STERLITE INDUSTRIES (INDIA) LTD. ETC. ETC.
v.
UNION OF INDIA & ORS. ETC. ETC.
(Civil Appeal Nos. 2776-2783 of 2013)

APRIL 2, 2013

[A.K. PATNAIK AND H. L. GOKHALE, JJ.]

Environment (Protection) Act, 1986 – s.3(2)(v) – Environment (Protection) Rules, 1986 – r.5 – Environmental clearance granted to appellant-company for setting up copper smelter plant – Interference with, by the High Court on ground of procedural impropriety – Justification – Held: On facts, not justified – There was no breach of any mandatory requirement in the procedure – Environmental clearance was granted in accordance with the procedure laid down in the Environment Impact Assessment (EIA) notification dated 27.01.1994 well before issuance of the notification dated 10.04.1997 providing for mandatory public hearing – Consequently, the High Court could not have allowed the writ petitions challenging the environmental clearances on the ground that no public hearing was conducted before grant of the environmental clearances – So long as the statutory process is followed and the EIA made by the authorities concerned is not found to be irrational so as to frustrate the very purpose of EIA, the Court will not interfere with the decision of the authorities in exercise of its powers of judicial review.

Environment (Protection) Act, 1986 – s.3(2)(v) – Environment (Protection) Rules, 1986 – r.5 – Environmental clearance granted to appellant-company for setting up copper smelter plant – Consent order granted by the State Pollution Control Board (TNPCB) under the Water Act – High Court directed closure of the plant of appellants on the ground that it was located within 25 kms. of an ecologically sensitive area

and thus the appellants violated the consent order – Justification – Held: Not justified – While appellant-company was given consent to establish its plant in the SIPCOT Industrial Complex in Tuticorin, a condition was stipulated that the appellants have to ensure that the location of the unit is 25 kms. away from ecological sensitive area – However, while granting consent, the TNPCB apparently failed to note that the said complex was within 25 kms. of four islands in the Gulf of Munnar Marine National Park (an ecologically sensitive area) – Since, the consent order was granted to appellant-company to establish its plant in the SIPCOT Industrial Complex and the plant was in fact established therein, the High Court could not have come to the conclusion that the appellant-company had violated the Consent Order – However, the plant of appellants can be directed to be shifted in future, in case it becomes necessary for preservation of ecology of the said four islands which form part of the Gulf of Munnar – As and when the Central Government issues order u/r.5 of the Environment (Protection) Rules, prohibiting or restricting the location of industries within and around the Gulf of Munnar, then appropriate steps may have to be taken by all concerned for shifting the industry of the appellants from the SIPCOT Industrial Complex depending upon the content of the order or notification issued by the Central Government under r.5 of the Environment (Protection) Rules, subject to legal challenge by the industries – Water (Prevention and Control of Pollution) Act, 1974 – s.25.

Environment (Protection) Act, 1986 – s.3(2)(v) – Environment (Protection) Rules, 1986 – r.5 – Environmental clearance granted to appellant-company for setting up copper smelter plant – Consent order granted by the State Pollution Control Board (TNPCB) under the Air Act – Condition imposed by TNPCB in regard to development of green belt around the battery limit of industry – High Court directed closure of the plant of appellant-company on the ground that though originally the TNPCB stipulated o

Objection Certificate' that the appellant-company has to develop a green belt of 250 meters width around the battery limit of the plant, later the TNPCB reduced the minimum width of the green belt required to be developed by the appellants to 25 meters – Held: If TNPCB after considering the representation of the appellants reduced the width of the green belt from a minimum of 250 meters to a minimum of 25 meters around the battery limit of the industry of the appellants and it is not shown that exercise of this power was vitiated by procedural breach or irrationality, the High Court in exercise of its powers of judicial review could not have interfered with the exercise of such power by the State Pollution Control Board – It was for the TNPCB to take the decision in that behalf and considering that the appellant's plant was within a pre-existing industrial estate, the appellant could not have been singled out to require a huge green belt – Air (Prevention and Control of Pollution) Act, 1981 – s.21.

Environment (Protection) Act, 1986 – s.3(2)(v) – Environment (Protection) Rules, 1986 – r.5 – Setting up of industrial plant – Liability to pay compensation for damage caused by the plant to the environment – Held: It is for the administrative and statutory authorities to consider and grant environmental clearance and the consents for setting up the plant – Such decisions cannot be interfered with, by the Court on ground that had the authorities made a proper environmental assessment of the plant, the adverse environmental effects of the industry could have been prevented – If, however, the industry continues to pollute the environment so as to effect the fundamental right to life under Article 21 of the Constitution, direction can be given for closure of the industry if there are no other remedial measures to ensure that the industry maintains the standards of emission and effluent – In the instant case, the plant of appellant-company did not maintain the standards of emission and effluent as laid down by the TNPCB – But

deficiencies in the plant of the appellants which affected the environment now removed – Thus, impugned order of the High Court directing closure of the plant of the appellants liable to be set aside, particularly on considerations of public interest, inasmuch as the plant of appellants contributes substantially to the copper production in India and provides employment to large number of people – However, appellant-company liable to pay compensation for causing damages to environment from 1997 to 2012 and for operating its plant without valid renewal for fairly long period – Considering the magnitude, capacity and prosperity of appellant-company, it is held liable to pay compensation of Rs. 100 crores – Any less amount, would not have the desired deterrent effect on appellant-company – Air (Prevention and Control of Pollution) Act, 1981 – s.21 – Water (Prevention and Control of Pollution) Act, 1974 – s.25 – Constitution of India, 1950 – Article 21.

The appellant-company applied and obtained 'No Objection Certificate' on 01.08.1994 from the State Pollution Control Board ('TNPCB') for setting up a copper smelter plant in Tuticorin. On 16.01.1995, the Ministry of Environment and Forests, Government of India, granted environmental clearance to the setting up of the plant and on 17.05.1995, the Government of Tamil Nadu too granted clearance. On 22.05.1995, the TNPCB granted its consent under Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 and under Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 to the appellants to establish the plant.

Writ petitions challenging a) the environmental clearance granted by the Ministry of Environment and Forests, Government of India, and the Government of Tamil Nadu, Department of Environment; and b) the consent orders granted under the Air Act and the Water Act by the TNPCB were filed before the High Court. While the writ petitions were pending, the

plant and commenced production on 01.01.1997. Two other writ petitions were then filed – one praying for *inter alia* a direction to the appellants to stop forthwith the operation of the plant; and the other for directions to the State of Tamil Nadu, TNPCB and the Union of India to take action against the appellant-company for its failure to take safety measures due to which there were pollution and industrial accidents in the plant.

Allowing the writ petitions, the High Court directed closure of the plant of the appellants on grounds:- 1) that prior to grant of environmental clearance, no public hearing, as mandatorily required was conducted; 2) that contrary to the stipulation made by TNPCB in its Consent Order, the plant of appellant-company was located within 25 kms. of an ecologically sensitive area; 3) that the TNPCB stipulated a condition in the NOC that the appellants will develop a green belt of 250 meters width around the battery limit of the industry as contemplated under the Environmental Management Plan but subsequently the TNPCB relaxed this condition and stipulated that appellant-company will develop a green belt of minimum width of 25 meters; and 4) that the plant of the appellants had caused severe pollution in the area. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1.1. The environmental clearance for setting up the plant was granted to the appellants under the Environment (Protection) Act, 1986. In exercise of powers under Section 3(2)(v) of the Environment (Protection) Act, 1986 and Rule 5(3) of the Environment (Protection) Rules, 1986, the Central Government issued notification dated 27.01.1994. Para 2 of the notification dated 27.01.1994 lays down the requirements and procedure for seeking environmental clearance of projects, and clause (c) of Para 2 provides that the Impact Assessment Agency

could solicit comments of the public within thirty days of receipt of proposal, in public hearings. The language of this notification did not lay down that the public hearing was a must. The notification dated 27.01.1994, however, was amended by notification dated 10.04.1997 and it was provided in clause (c) of Para 2 of the notification that the Impact Assessment Agency shall conduct a public hearing and the procedure for public hearing was detailed in Schedule IV to the notification by the amendment notification dated 10.04.1997. Admittedly, in this case, the environmental clearance was granted by the Ministry of Environment, Government of India, on 16.01.1995 in accordance with the procedure laid down by notification dated 27.01.1994 well before the notification dated 10.04.1997 providing for mandatory public hearing in accordance with the procedure laid down in Schedule IV to the notification. Consequently, the High Court could not have allowed the writ petitions challenging the environmental clearances on the ground that no public hearing was conducted before grant of the environmental clearances. [Paras 23, 24] [601-D, H; 602-B-H; 603-A]

1.2. The High Court further erred in allowing the writ petitions on the ground that environmental clearance was issued to the appellant-company on the basis of inadequate Rapid Environmental Impact Assessment (EIA), particularly when the Union of India in its affidavit had clearly averred that the environmental clearance was granted after detailed examination of Rapid EIA/EMP, filled in Questionnaire for industrial projects, NOC from State Pollution Control Board and Risk Analysis in accordance with the procedure laid down in EIA notification dated 27.01.1994 (as amended on 04.05.1994). [Para 25] [603-F-G; 604-A]

1.3. The High Court failed to e

decision of the Central Government to grant environmental clearance to the plant of the appellants could only be tested on the anvil of well recognized principles of judicial review. Where the challenge to the environmental clearance is on the ground of procedural impropriety, the High Court could quash the environmental clearance only if it is satisfied that the breach was of a mandatory requirement in the procedure. In absence of a mandatory requirement in the procedure laid down under the scheme under the Environment (Protection) Act, 1986 at the relevant time requiring a mandatory public hearing and a mandatory comprehensive EIA report, the High Court could not have interfered with the decision of the Central Government granting environmental clearance on the ground of procedural impropriety. Further, no material was placed to show that the decision of the Ministry of Environment and Forests to accord environmental clearance to the plant of the appellants at Tuticorin was wholly irrational and frustrated the very purpose of EIA. [Paras 26, 27 & 28] [604-B-C, H; 603-A, E-H; 604-C]

1.4. It is for the authorities under the Environment (Protection) Act, 1986, the Environment (Protection) Rules, 1986 and the notifications issued thereunder to determine the scope of the project, the extent of the screening and the assessment of the cumulative effects and so long as the statutory process is followed and the EIA made by the authorities is not found to be irrational so as to frustrate the very purpose of EIA, the Court will not interfere with the decision of the authorities in exercise of its powers of judicial review. [Para 29] [606-G-H; 607-A-B]

Lafarge Umiam Mining (P) Ltd. v. Union of India & Others **(2011) 7 SCC 338: 2011 (7) SCR 954 – referred to.**

Hari Narain v. Badri Das **AIR 1963 SC 1558: 1964 SCR**

203; *G. Narayanaswamy Reddy (dead) by LRs. & Anr. v. Government of Karnataka & Anr.* **(1991) 3 SCC 261: 1991 (2) SCR 563;** *Dalip Singh v. State of Uttar Pradesh & Ors.* **(2010) 2 SCC 114: 2009 (16) SCR 111;** *Abhyudya Sanstha v. Union of India* **(2011) 6 SCC 145: 2011 (7) SCR 611;** *Vellore Citizens Welfare Forum v. Union of India & Ors.* **(1996) 5 SCC 647: 1996 (5) Suppl. SCR 241;** *Tirupur Dyeing Factory Owners' Association v. Noyyal River Ayacutdars Protection Association* **(2009) 9 SCC 737: 2009 (14) SCR 1051;** *M.C. Mehta v. Union of India Ors.* **(2009) 6 SCC 142 and** *East Coast Railway & Anr. v. Mahadev Appa Rao & Ors.* **(2010) 7 SCC 678: 2010 (7) SCR 908 – cited.**

Belize Alliance of Conservation Non-governmental Organizations v. The Department of the Environment and Belize Electric Company Limited **(2004) 64 WIR 68 and** *Bow Valley Naturalists Society v. Minister of Canadian Heritage* **(2001) 2 FC 461 – referred to.**

The Northern Jamaica Conservation Association v. The Natural Resources Conservation Authority **[Claim No. HCV 3022 of 2005 decided by Supreme Court of Judicature of Jamaica] – cited.**

Environmental Law edited by David Woolley QC, John Pugh-Smith, Richard Langham and William Upton, Oxford University Press **– referred to.**

2.1. The Consent Order dated 22.05.1995 issued by the TNPCB under Section 25 of the Water Act makes it clear that while on the one hand, the appellant-company was given consent to establish its plant in the SIPCOT Industrial Complex in Tuticorin, which as per the NEERI report is within 25 kms. of four of the twenty one islands in the Gulf of Munnar (an ecologically sensitive area), on the other hand, a condition was stipulated in the consent order that the appellants have to ensure that the location of the unit is 25 kms. away from ecol a.

It thus appears that the TNPCB while granting the consent under the Water Act for establishment of the plant of the appellants in the SIPCOT Industrial Complex added the above requirement without noting that the SIPCOT Industrial Complex was within 25 kms. from ecological sensitive area. Since, however, the Consent Order was granted to the appellant-company to establish its plant in the SIPCOT Industrial Complex and the plant has in fact been established in the SIPCOT Industrial Complex, the High Court could not have come to the conclusion that the appellant-company had violated the Consent Order and directed closure of the plant on this ground. [Para 31 and 32] [607-F; 608-F-H; 609-A-B]

2.2. This is not to say that in case it becomes necessary for preservation of ecology of the aforesaid four islands which form part of the Gulf of Munnar, the plant of the appellants cannot be directed to be shifted in future. The Gulf of Munnar is an ecological sensitive area and the Central Government may in exercise of its powers under clause (v) of sub-section (1) of Rule 5 of the Environment (Protection) Rules, 1986 prohibit or restrict the location of industries and carrying on processes and operations to preserve the biological diversity of the Gulf of Munnar. As and when the Central Government issues an order under Rule 5 of the Environment (Protection) Rules, 1986 prohibiting or restricting the location of industries within and around the Gulf of Munnar Marine National Park, then appropriate steps may have to be taken by all concerned for shifting the industry of the appellants from the SIPCOT Industrial Complex depending upon the content of the order or notification issued by the Central Government under the aforesaid Rule 5 of the Environment (Protection) Rules, 1986, subject to the legal challenge by the industries. [Para 33] [609-C-E, F-H]

3. From a reading of the No Objection Certificate

issued by the TNPCB, it is clear that various conditions have been imposed on the industry of the appellants to ensure that air pollution control measures are installed for the control of emission generated from the plant and that the emission from the plant satisfies the ambient area quality standards prescribed by the TNPCB. Development of green belt contemplated under the environmental management plan around the battery limit of the industry of the appellants was an additional condition that was imposed by the TNPCB in the No Objection Certificate. If the TNPCB after considering the representation of the appellants has reduced the width of the green belt from a minimum of 250 meters to a minimum of 25 meters around the battery limit of the industry of the appellants and it is not shown that this power which has been exercised was vitiated by procedural breach or irrationality, the High Court in exercise of its powers of judicial review could not have interfered with the exercise of such power by the State Pollution Control Board. The High Court in the impugned judgment has not recorded any finding that there has been any breach of the mandatory provisions of the Air Act or the Rules thereunder by the TNPCB by reducing the green belt to 25 meters. Nor has the High Court recorded any finding that by reducing the width of the green belt around the battery limit of the industry of the appellants from 250 meters to 25 meters, it will not be possible to mitigate the effects of fugitive emissions from the plant. It was for the TNPCB to take the decision in that behalf and considering that the appellant's plant was within a pre-existing industrial estate, the appellant could not have been singled out to require such a huge green belt. [Para 34] [610-C-H; 611-B]

4.1. It is for the administrative and statutory authorities empowered under the law to consider and grant environmental clearance and e

appellants for setting up the plant and where no ground for interference with the decisions of the authorities on well recognized principles of judicial review is made out, the High Court could not interfere with the decisions of the authorities to grant the environmental clearance or the consents on the ground that had the authorities made a proper environmental assessment of the plant, the adverse environmental effects of the industry could have been prevented. If, however, after the environmental clearance under the Environment (Protection) Act, 1986, and the Rules and the notifications issued thereunder and after the consents granted under the Air Act and the Water Act, the industry continues to pollute the environment so as to effect the fundamental right to life under Article 21 of the Constitution, the High Court could still direct the closure of the industry by virtue of its powers under Article 21 of the Constitution if it came to the conclusion that there were no other remedial measures to ensure that the industry maintains the standards of emission and effluent. [Para 35] [611-D-H; 612-A]

4.2. In the instant case, the National Engineering and Research Institute (NEERI) report of 2005 did show that the emission and effluent discharge affected the environment but the report read as whole does not warrant a conclusion that the plant of the appellants could not possibly take remedial steps to improve the environment and that the only remedy to protect the environment was to direct closure of the plant of the appellants. [Para 36] [616-E-F]

4.3. From the joint inspection carried out by Central Pollution Control Board (CPCB) and TNPCB pursuant to orders passed by this Court, it is clear that out of the 30 directions issued by the TNPCB, the appellant-company has complied with 29 directions and only one more direction under the Air Act was to be complied with. As

the deficiencies in the plant of the appellants which affected the environment as pointed out by NEERI have now been removed, the impugned order of the High Court directing closure of the plant of the appellants is liable to be set aside. [Para 37] [616-G; 617-G-H; 618-A]

4.4. Further, the plant of the appellants contributes substantially to the copper production in India and copper is used in defence, electricity, automobile, construction and infrastructure etc. The plant of the appellants has about 1300 employees and it also provides employment to large number of people through contractors. A number of ancillary industries are also dependent on the plant. Through its various transactions, the plant generates a huge revenue to Central and State Governments in terms of excise, custom duties, income tax and VAT. It also contributes to 10% of the total cargo volume of Tuticorin port. For these considerations of public interest, it will not be a proper exercise of discretion under Article 136 of the Constitution to refuse relief to the appellants. [Para 40] [621-B-D]

4.5. However, the NEERI reports of 1998, 1999, 2003 and 2005 show that the plant of the appellant did pollute the environment through emissions which did not conform to the standards laid down by the TNPCB under the Air Act and through discharge of effluent which did not conform to the standards laid down by the TNPCB under the Water Act. On account of some of these deficiencies, TNPCB also did not renew the consent to operate for some periods and yet the appellants continued to operate its plant without such renewal. This is evident from the extracts from the NEERI report of 2011. For such damages caused to the environment from 1997 to 2012 and for operating the plant without a valid renewal for a fairly long period, the appellant-company is liable to compensate by paying da

the magnitude, capacity and prosperity of the appellant-company, it should be held liable for a compensation of Rs. 100 crores for having polluted the environment in the vicinity of its plant and for having operated the plant without a renewal of the consents by the TNPCB for a fairly long period. Any less amount, would not have the desired deterrent effect on the appellant-company. [Para 39] [618-B-D; 619-E; 620-D-E]

M.C. Mehta v. Union of India and others **(1987) 4 SCC 463: 1988 (1) SCR 279;** *M.C. Mehta and Another vs. Union of India and Others* **(1987) 1 SCC 395: 1987 (1) SCR 819 and** *Indian Council for Enviro-Legal Action and Others v. Union of India and Others* **(1996) 3 SCC 211 – referred to.**

5. However, it is made clear that by this judgment, this Court has only set aside the directions of the High Court in the impugned common judgment, and this judgment will not stand in the way of the TNPCB issuing directions to the appellant-company, including a direction for closure of the plant, for the protection of environment in accordance with law. It is also made clear that the award of damages of Rs.100 Crores by this judgment against the appellant-Company for the period from 1997 to 2012 will not stand in the way of any claim for damages for the aforesaid period or any other period in a civil court or any other forum in accordance with law. [Paras 42, 43] [622-D-F]

Case Law Reference:

1964 SCR 203	**cited**	**Para 13**
1991 (2) SCR 563	**cited**	**Para 13**
2009 (16) SCR 111	**cited**	**Para 13**
2011 (7) SCR 611	**cited**	**Para 13**
1996 (5) Suppl. SCR 241	**cited**	**Para 14**

2009 (14) SCR 1051	**cited**	**Para 14**
(2009) 6 SCC 142	**cited**	**Para 14**
2010 (7) SCR 908	**cited**	**Para 17**
(2004) 64 WIR 68	**referred to**	**Para 17, 29**
2011 (7) SCR 954	**referred to**	**Para 26**
(2001) 2 FC 461	**referred to**	**Para 29**
1988 (1) SCR 279	**referred to**	**Para 35**
1987 (1) SCR 819	**referred to**	**Para 40**
(1996) 3 SCC 211	**referred to**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2776-2783 of 2013.

From the Judgment & Order dated 28.09.2010 of the High Court of Judicature at Madras in WP No. 15501/1996, WP No. 15502/1996, WP No. 5769/1997, WP No. 16861/1998, WMP No. 8044/1999, WMP No. 8045/1999, WMP No. 8046/1999, WP No. 15503/2006.

P.P. Malhotra, ASG., C.A. Sundaram, C.U. Singh, Raj Panjwani, V. Prakash, S. Guru Krishna Kumar, AAG., Rohini Musa, Zafar Inayat, Yogsh V. Kotemath, S. Raghunathan, Mahesh Agarwal, Rishi Agarwal, E.C. Agrawala, Radhika Gautam, Abhinav Agrawal, Rashmi Nandakumar, Rahul Chowdhury, Anitha Shenoy, Vimla Sinha, Yasser Rauf, B. Krishna Prasad, Subramonium Prasad, Manju Jana, Shivaji M. Jahdhav, Vijay Panjwani G. Devadoss, M.S.M. Asaithambi, G. Ananthaselvam, M. Yogesh Kanna, R. Veeramani, A. Prasanna Venkat, S. Beno Bencigar, P. Somasundaram, Abhay Kumar, V.N. Subramaniam, V. Senthila Kumar, K. Krishna Kumar, M.A. Chinnasamy for the appearing parties, Vaiko @ V. Gopalswamy respondent-in-person.

The Judgment of the Court was de

A.K. PATNAIK, J. 1. Leave granted.

FACTS:

2. The relevant facts very briefly are that the appellant-company applied and obtained 'No Objection Certificate' on 01.08.1994 from the Tamil Nadu Pollution Control Board (for short 'the TNPCB') for setting up a copper smelter plant (for short 'the plant') in Melavittan village, Tuticorin. On 16.01.1995, the Ministry of Environment and Forests, Government of India, granted environmental clearance to the setting up of the plant of the appellants at Tuticorin subject to certain conditions including those laid down by the TNPCB and the Government of Tamil Nadu. On 17.05.1995, the Government of Tamil Nadu granted clearance subject to certain conditions and requested the TNPCB to issue consent to the proposed plant of the appellants. Accordingly, on 22.05.1995, the TNPCB granted its consent under Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 (for short 'the Air Act') and under Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 (for short 'the Water Act') to the appellants to establish the plant in the SIPCOT Industrial Complex, Melavittan village, Tuticorin Taluk.

3. The environmental clearance granted by the Ministry of Environment and Forests, Government of India, and the consent orders under the Air Act and the Water Act granted by the TNPCB were challenged before the Madras High Court in W.P. Nos.15501, 15502 and 15503 of 1996 by the National Trust for Clean Environment. While these writ petitions were pending, the appellants set up the plant and commenced production on 01.01.1997. Writ Petition No.5769 of 1997 was then filed by V. Gopalsamy, General Secretary, MDMK Political Party, Thayagam, praying for *inter alia* a direction to the appellants to stop forthwith the operation of the plant. Writ Petition No. 16861 of 1991 was also filed by Shri K. Kanagaraj, Secretary, CITU District Committee, District Thoothukudi, for directions to the State of Tamil Nadu, TNPCB and the Union of India to take

suitable action against the appellant-company for its failure to take safety measures due to which there were pollution and industrial accidents in the plant. A Division Bench of the High Court heard Writ Petition Nos. 15501 to 15503 of 1996, Writ Petition No.5769 of 1997 and Writ Petition No.16861 of 1998 and by the common judgment dated 28.09.2010, allowed and disposed of the writ petitions with the direction to the appellant-company to close down its plant at Tuticorin. By the common judgment, the High Court also declared that the employees of the appellant-company would be entitled to compensation under Section 25FFF of the Industrial Disputes Act, 1947 and directed the District Collector, Tuticorin, to take all necessary and immediate steps for the re-employment of the workforce of the appellant-company in some other companies/factories/ organizations so as to protect their livelihood and to the extent possible take into consideration their educational and technical qualifications and also the experience in the field. Aggrieved, the appellant has filed these appeals against the common judgment dated 28.09.2010 of the Division Bench of Madras High Court and on 01.10.2010, this Court passed an interim order staying the impugned judgment of the High Court.

CONTENTIONS ON BEHALF OF THE APPELLANTS:

4. Mr. C.A. Sundaram, learned senior counsel appearing for the appellants, submitted that one of the grounds stated in the impugned judgment of the High Court for directing closure of the plant of the appellants was that the TNPCB had stipulated in the Consent Order dated 22.05.1995 that the appellant-company has to ensure that the location of the unit should be 25 kms. away from the ecologically sensitive area and as per the report of NEERI (National Environmental Engineering and Research Institute) of 1998 submitted to the High Court, the plant is situated within 25 kms. from four of the twenty one islands in the Gulf of Munnar, namely, Vanthivu, Kasuwar, Karaichalli and Villanguchalli, which are at distances of 6 k.m., 7 k.m. and 15 k.m. respectively from Tuticorin where the plant is located. He submitted that there is no

the Central Government under Rule 5(1) of the Environment (Protection) Act, 1986 prohibiting or restricting the location of an industry in Tuticorin area. He submitted that the Government of Tamil Nadu, however, had issued a notification dated 10.09.1986 notifying its intention under Section 35(1) of the Wildlife (Protection) Act, 1972 to declare the twenty one islands of the Gulf of Munnar as a Marine National Park, but no notification has yet been issued by the Government of Tamil Nadu under Section 35(4) of the aforesaid Act declaring the twenty one islands of the Gulf of Munnar as a National Park. He explained that prior to the Environment (Protection) Act, 1986 and the Environment (Protection) Rules, 1986, some environmental guidelines had been issued by the Ministry of Environment and Forests, Department of Environment, Government of India, in August, 1985 and one of the guidelines therein was that industries must be located at least 25 kms. away from the ecologically sensitive areas and it is on account of these guidelines that the TNPCB in its Consent Order dated 22.05.1995 under the Water Act had stipulated that the plant of the appellants should be situated 25 kms. away from ecologically sensitive areas. He submitted that this stipulation was made in the Consent Order under the Water Act because the plant was likely to discharge effluent which could directly or indirectly affect the ecological sensitive areas within 25 kms. of the industry, but in the Consent Order issued on 14.10.1996 to operate the industry, this stipulation was removed and instead it was stipulated in clause (20) that the unit shall re-use the entire quantity of treated effluent in the process and ensure that no treated effluent is discharged into inland surface water or on land or sewer or sea as proposed by the unit. He submitted that in any case the consent for establishment issued under the Water Act by the TNPCB would show that the appellant-company was given the consent to establish its copper smelter project in SIPCOT Industrial Complex irrespective of the distance at which the SIPCOT Industrial Complex was located from any ecological sensitive area and in the SIPCOT Industrial Complex, many other chemical

industries are located and the High Court appears to have lost sight of this aspect of the consent given by the TNPCB to establish the plant.

5. Mr. Sundaram submitted that the second ground given by the High Court for directing closure of the plant of the appellants was that this being a project exceeding Rs.50/- crores, environmental clearance was required to be obtained from the Ministry of Environment and Forests, Government of India, after a public hearing which was a mandatory requirement but no materials were produced before the High Court to show that there was any such public hearing conducted before the commencement of the plant of the appellant-company. He submitted that when the environmental clearance was granted to the appellant-company the Environmental Impact Assessment (for short 'EIA') notification dated 27.01.1994 was in force and this notification did not make public hearing mandatory and only stated that comments of the public may be solicited if so recommended by the Impact Assessment Agency within 30 days of the receipt of the proposal. He submitted that the High Court, therefore, was not correct in taking a view that a public hearing was mandatory during EIA before environmental clearance was given by the Ministry of Environment and Forests, Government of India. He clarified that by a subsequent notification dated 10.04.1997, a public hearing was made compulsory but by the time this notification came into force environmental clearance had already been granted to the plant of the appellants on 16.01.1995.

6. Mr. Sundaram submitted that the High Court also took the view in the impugned judgment on the basis of the report of the NEERI of 1998 that there was undue haste on the part of the governmental authorities in granting permissions and consents to the appellant-company. He submitted that in an Explanatory Note to the EIA notification dated 27.01.1994 the Central Government has clarified that Rapid EIA could also be conducted for obtaining environment c

project/activity and therefore the State Government while granting No Objection Certificate by its letter dated 01.08.1994 asked the appellants to conduct Rapid EIA based on one season data and the appellants carried out Rapid EIA study based on the data collected by the M/s. Tata Consultancy Service (TCS). He relied on the affidavit dated 01.12.1998 filed on behalf of the Ministry of Environment and Forests, Government of India to submit that Rapid EIA before granting clearance to the plant of the appellant was conducted in accordance with the guidelines.

7. Mr. Sundaram submitted that the third ground on which the High Court directed closure of the plant of the appellants was that the TNPCB stipulated a condition in clause No.20 of the No Objection Certificate that the appellants will develop a green belt of 250 meters width around the battery limit of the industry as contemplated under the Environmental Management Plan but subsequently the appellant-company submitted a representation to TNPCB requesting TNPCB to reduce the requirement of green belt from 250 meters to the width of 10-15 meters as development of the green belt of 250 meters width requires a land of around 150 acres and TNPCB in its meeting held on 18.08.1994 relaxed this condition and stipulated that the appellant-company will develop a green belt of minimum width of 25 meters. He submitted that the land allocated by SIPCOT to the appellants was not sufficient to provide a green belt of 250 meters width around the plant and hence this was an impossible condition laid down in the No Objection Certificate and for this reason the appellants approached the TNPCB to modify this condition and the TNPCB reduced the width of the green belt to 25 meters. He further submitted that generally, the TNPCB and the Ministry of Environment and Forests, Government of India, have been insisting on a green belt of 25% of the plant area and the appellants could not be asked to provide a green belt of more than 25% of the plant area.

8. Mr. Sundaram submitted that the last ground, on which the High Court directed closure of the plant of the appellants is that the plant of the appellants has caused severe pollution in the area as has been recorded by NEERI in its report of 2005 submitted to the High Court and the groundwater samples taken from the area indicate that the copper, chrome, lead cadmium and arsenic and the chloride and fluoride content is too high when compared to Indian drinking water standards. He referred to the reports of NEERI of 1998, 1999, 2003 and 2005 submitted to the High Court and the report of NEERI of 2011 and also the joint inspection report of TNPCB and CPCB of September 2012 submitted to this Court, to show that the finding of the High Court that the plant of the appellants had caused severe pollution in the area was not correct. He vehemently submitted that though there were no deficiencies in the plant of the appellants, the TNPCB in its affidavit has referred to its recommendations as if there were deficiencies. He submitted that the recommendations made by the TNPCB were only to provide the best of checks in the plant against environmental pollution with a view to ensure that the plant of the appellants becomes a model plant from the point of view of the environment, but that does not mean that the plant of the appellants had deficiencies which need to be corrected. He submitted that the reports of NEERI of 2005 and 2011 referred to accumulation of gypsum and phospho gypsum, which come out from the plant of the appellants as part of the slag but the opinion of CPCB in its letter dated 17.11.2003 to the TNPCB is that such slag is non-hazardous and can be used in cement industries, for filling up lower level area and as building/road construction material, etc. and has no adverse environmental effects.

9. Mr. Sundaram finally submitted that since none of the grounds given by the High Court in the impugned judgment for directing closure of the plant of the appellants are well-founded, it is a fit case in which this Court should set aside the impugned judgment of the High Court and allow the

that the plant of the appellants produces 2,02,000 metric tones of copper which constitute 39% of the total of 5,14,000 metric tones of copper produced in India and that 50% of the copper produced by the plant of the appellants is consumed in the domestic market and the balance 50% is exported abroad. He also submitted that the plant provides direct and indirect employment to about 3000 people and yields a huge revenue to both the Central and State Governments. He submitted that closure of the plant of the appellants, therefore, would also not be in the public interest.

CONTENTIONS ON BEHALF OF THE WRIT PETITIONERS-RESPONDENTS:

10. Mr. V. Gopalsamy, who was the writ petitioner in Writ Petition No.5769 of 1997 before the High Court, appeared in-person and supported the impugned judgment of the High Court. He submitted that the TNPCB in its No Objection Certificate dated 01.08.1994 as well as in its Consent Order dated 22.05.1995 under the Water Act clearly stipulated that the appellant-company shall ensure that the location of its unit should be 25 kms. away from ecological sensitive area and the Government of Tamil Nadu in their affidavit dated 27.10.2012 have stated that all the 21 islands including the four near Tuticorin in the Gulf of Munnar Marine National Park are ecologically sensitive areas. He submitted that NEERI in its report of 1998 has observed that four out of twenty one islands, namely, Vanthivu, Kasuwar, Karaichalli and Villanguchalli, are at distances of 6 kms., 7 kms. and 15 kms. respectively from Tuticorin. He further submitted that merely because a condition has been subsequently imposed on the appellant-company by TNPCB not to discharge any effluent to the sea, the restriction of minimum 25 kms. distance from ecological sensitive area from location of the unit of the appellants cannot be lifted particularly when the Government of Tamil Nadu as well as the Central Government are treating the Gulf of Munnar as a Marine National Park and extending financial assistance for the development of its ecology. He submitted that the proposal for

issuance of a declaration under Section 35(4) of the Wildlife (Protection) Act, 1972 is pending for concurrence of the Central Government and, therefore, the ecological balance in the area of Gulf of Munnar would be disturbed if the plant of the appellants continues at Tuticorin and the High Court was right in directing closure of the plant of the appellants located at Tuticorin.

11. Mr. V. Gopalsamy submitted that the High Court was similarly right in directing closure of the plant of the appellants on the ground that the appellants did not develop a green belt of 250 metres width around their plant as stipulated in the No Objection Certificate dated 01.08.1994 of the TNPCB and instead represented to the TNPCB and got the green belt reduced to only 25 metres width. He submitted that considering the grave adverse impact on the environment by the plant of the appellants, a 250 metres width of green belt was absolutely a must but the TNPCB very casually reduced the green belt from 250 metres width to 25 metres. He submitted that it will be seen from the joint report of TNPCB and CPCB filed pursuant to the order dated 27.08.2012 of this Court that as a condition of the renewal of the consent order, the appellant-company has been asked to develop a green belt to an extent of 25% of the total area of 172.17 hectares which works out to 43.04 hectares and yet the TNPCB has found development of green belt of 26 hectares as sufficient compliance. He submitted that the appellants would, therefore, be required to develop a green belt of 17.04 hectares more for compliance of the condition for renewal of consent stipulated by the TNPCB.

12. Mr. V. Gopalsamy submitted that for their plant, the appellants have been importing copper concentrate from Australian mines which are highly radioactive and contaminated and contain high levels of arsenic, uranium, bismuth, fluorine and experts of environment like Mark Chernaik have given a report on the adverse impacts of the plant of the appellants at Tuticorin on the environment. In this co

that an American company, namely, the Asarco producing copper had to be closed down on account of such adverse environmental effects. He submitted that the claim of the appellants that their plant has no deficiencies and that it does not have any impact on the environment is not correct and different reports of the NEERI would show that the plant of the appellants is continuing to pollute the air and has also affected the ground water of the area by discharging effluent and the High Court, therefore, rightly directed the closure of the plant. He submitted that the appellants had initially proposed to establish the plant in Gujarat but this was opposed vehemently and the appellants decided to shift the establishment of the plant to Goa but because of opposition the plant could not be established in Goa. He submitted that the appellants thereafter intended to set up the plant at Ratnagiri in Maharashtra and invested Rs.200 crores in construction activities after obtaining environmental clearance but because of the opposition of the farmers of Ratnagiri, the Maharashtra Government had to revoke the licence granted to the appellants. He submitted that the appellants have been able to set up the plant at Tuticorin in Tamil Nadu by somehow obtaining environmental clearance from the Ministry of Environment and Forests, Government of India, without a public hearing and the consents under the Water Act and the Air Act from the TNPCB and the High Court rightly allowed the writ petitions and directed closure of the plant of the appellants.

13. Mr. V. Prakash, learned senior counsel appearing for the writ petitioner, National Trust For Clean Environment, in Writ Petition Nos. 15501 to 15503 of 1996 before the High Court, submitted that the appellants had made a false statement in the synopsis at page (B) of the Special Leave Petition that it has been consistently operating for more than a decade with all necessary consents and approvals from all the statutory authorities without any complaint. He submitted that similarly in ground no. IV at page 45 of the Special Leave Petitions the appellants have falsely stated that the High Court has erred in

not appreciating that the appellants had got all the statutory approvals/consent orders from the authorities concerned as also the Central Government and the State Government. He submitted that the report of NEERI of 2011 would show that the appellants did not have valid consent during various periods including the period when it filed the Special Leave Petitions. He submitted that the appellants did not also inform this Court that when they moved this Court on 01.10.2010 to stay the operation of the impugned order of the High Court, the plant of the appellants had already stopped operation. He vehemently argued that due to misrepresentation of the material facts by the appellants in the Special Leave Petitions as well as suppression of the material facts, this Court was persuaded to pass the stay order dated 01.10.2010. He argued that on this ground alone this Court should refuse to grant relief to the appellants in exercise of its discretion under Article 136 of the Constitution. He relied on the decisions of this Court in *Hari Narain v. Badri Das* [AIR 1963 SC 1558], *G. Narayanaswamy Reddy (dead) by LRs. & Anr. v. Government of Karnataka & Anr*. [(1991) 3 SCC 261] and *Dalip Singh v. State of Uttar Pradesh & Ors*. [(2010) 2 SCC 114] and *Abhyudya Sanstha v. Union of India* [(2011) 6 SCC 145] for the proposition that this Court can refuse relief under Article 136 of the Constitution where the appellants have not approached this Court with clean hands and have made patently false statements in the special leave petition.

14. Mr. Prakash next submitted that the main ground that was taken in the writ petitions before the High Court by National Trust For Clean Environment was that the Ministry of Environment and Forests, Government of India, and the TNPCB had not applied their mind to the nature of the industry as well as the pollution fall out of the industry of the appellants and the capacity of the unit of the appellants to handle the waste without causing adverse impact on the environment as well as on the people living in the vicinity of the plant. He submitted that this Court has already held that a right to cle rt

of the right to life guaranteed under Article 21 of the Constitution and has explained the precautionary principle and the principle of sustainable development in *Vellore Citizens Welfare Forum v. Union of India & Ors*. [(1996) 5 SCC 647], *Tirupur Dyeing Factory Owners' Association v. Noyyal River Ayacutdars Protection Association* [(2009) 9 SCC 737] and *M.C. Mehta v. Union of India Ors*. [(2009) 6 SCC 142]. He submitted that these principles, therefore, have to be borne in mind by the authorities while granting environmental clearance and consent under the Water Act or the Air Act, but unfortunately both the Ministry of Environment and Forests, Government of India, and the TNPCB have ignored these principles and have gone ahead and hastily granted environmental clearance and the consent under the two Acts. He submitted that, in the present case, the appellants have relied on the Rapid EIA done by Tata Consultancy Service, but this Rapid EIA was based on the data which is less than the month's particulars and is inadequate for making a proper EIA which must address the issue of the nature of the manufacturing process, the capacity of the manufacturing facility and the quantum of production, the quantum and nature of pollutants, air, liquid and solid and handling of the waste.

15. Mr. Prakash referred to the report of NEERI of 1998 submitted to the High Court to show that the inspection team of NEERI collected waste water samples from the plant of the appellants and an analysis of the waste water samples indicate that the treatment plant of the appellants was operating inefficiently as the levels of arsenic, selenium and lead in the treated effluent as also the effluent stored in the surge ponds were higher than the standards stipulated by the TNPCB. He also referred to the report of NEERI of February 1999 in which NEERI has stated that the treated effluent quality did not conform to the standards stipulated by the TNPCB.

16. Mr. Prakash further submitted that the counter affidavit of the Union of India filed on 01.12.1998 before the High Court also does not disclose whether, apart from the Rapid EIA of Tata Consultancy Services, there was any independent

evaluation of the Rapid EIA by the environmental impact assessment authority, namely, the Ministry of Environment and Forests. He submitted that the TNPCB in its No Objection Certificate dated 01.08.1994 has stipulated in Clause 18 that the appellants have to carry out Rapid EIA (for one season other than monsoon) as per the EIA notification dated 27.01.1994 issued by the Ministry of Environment and Forests, Government of India, and furnish a copy to the TNPCB and this clause itself would show that TNPCB had not applied its mind as to whether there was a sufficient rational analysis of the nature of the industry, nature of pollutants, quantum of fall out and the plan or method for handling the waste. He submitted that since there was no application of mind by either the Ministry of Environment and Forests, Government of India, before granting the environmental clearance or by the TNPCB before granting the consents under the Water Act and the Air Act, the environmental clearance and the consent orders are liable to be quashed.

17. In support of his submissions, Mr. Prakash cited *East Coast Railway & Anr. v. Mahadev Appa Rao & Ors*. [(2010) 7 SCC 678], for the proposition that for a valid order there has to be application of mind by the authority, and in the absence of such application of mind by the authority, the order is arbitrary and is liable to be quashed. He cited the decision of the Lords of the Judicial Committee of Privy Council in *Belize Alliance of Conservation Non-governmental Organizations v. The Department of the Environment and Belize Electric Company Limited* [(2004) 64 WIR 68 para 69] in which it has been observed that EIA is expected to be comprehensive in treatment of the subject, objective in its approach and must meet the requirement that it alerts the decision maker to the effect of the activity on the environment and the consequences to the community. He also relied on the judgment of the Supreme Court of Judicature of Jamaica in *The Northern Jamaica Conservation Association v. The Natural Resources Conservation Authority* [Claim No. HCV 3022 of 2005] to argue that a public hearing was of

environmental clearance and submitted that as there was no public hearing in this case and there was inadequate EIA before the grant of the environmental clearance for the plant of the appellants, the High Court has rightly directed closure of the plant of the appellants.

18. Finally, Mr. Prakash submitted that the finding of the High Court that the plant of the appellants continues to pollute the environment has been substantiated by the inspection report which has been filed in this Court by the NEERI as well as the TNPCB from time to time. In particular, he referred to the joint inspection report of the TNPCB and CPCB to show that the directions issued by the TNPCB to improve solid waste disposal has not been complied with. He submitted that one of the conditions of the consent order of the TNPCB was that no slag was to be stored in the premises of the plant but huge quantity of slag has been stored in the premises of the plant and the direction to dispose at least 50% more than the monthly generation quantities of both slag and gypsum has not been complied with. He vehemently argued that unless the plant is shut down, the appellants will not be able to clear the huge quantity of slag and gypsum lying in the plant premises. He submitted that it is not correct as has been submitted on behalf of the appellants that the slag is not a hazardous waste containing arsenic and will certainly jeopardize the environment. He argued that there was therefore no other option for the High Court but to direct closure of the plant of the appellants to ensure clean environment in the area.

CONTENTIONS ON BEHALF OF THE AUTHORITIES:

19. Mr. S. Guru Krishna Kumar, learned counsel appearing for the TNPCB as well as the State of Tamil Nadu, relying on the affidavit filed on behalf of the State of Tamil Nadu on 29.10.2012 submitted that the Gulf of Munnar consisting of 21 islands in 4 groups was notified under Section 35(1) of the Wildlife (Protection) Act, 1972 on 10th September 1986 as this group of islands consisted of territorial waters between them

and the proposal to declare Gulf of Munnar as a Marine National Park under Section 35(4) of the said Act was sent by the Chief Wild Life Warden to the State Government for approval on 30.04.2003 but the declaration under Section 35(4) of the said Act has not been finally made. He further submitted that all the 21 islands including the 4 islands in the Gulf of Munnar are therefore ecological sensitive areas. He submitted that notwithstanding the fact that four of the islands were near Tuticorin, the TNPCB gave the consent under the Water Act to the appellants to set up the plant at Tuticorin because the plant has a zero effluent discharge. He also referred to the compliance affidavit of the TNPCB filed on 08.10.2012 to show that the TNPCB is monitoring the emissions from the plant of the appellants to ensure that the National Ambient Air Quality Standards are maintained.

20. Mr. Vijay Panjwani, learned counsel appearing for CPCB, made a reference to Sections 3, 16 and 18 of the Water Act which relate to the CPCB and submitted that it was not for the CPCB but for the TNPCB to issue No Objection Certificate and consent in respect of the plant set up in the State of Tamil Nadu. He submitted that under Rule 19 of the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989, however, improvement notices can be issued by the CPCB to any person to remedy the contravention of the Rules.

CONTENTIONS ON BEHALF OF THE INTERVENER:

21. Mr. Raj Panjwani, learned counsel for the intervener, submitted that a marine biosphere is an ecological sensitive area and if in the consent order a condition was stipulated that the plant of the appellants has to be situated beyond 25 kms. from ecological sensitive area, this condition has to be complied with. He further submitted that in any case the appellants are liable to compensate for having damaged the environment.

FINDINGS OF THE COURT:

22. Writ Petition No.15501 of 1996, Writ Petition No.15503 of 1996 and Writ Petition No.5769 of 1997 had been filed for quashing the environmental clearances dated 16.01.1995 and 17.05.1995 granted by the Ministry of Environment and Forests, Government of India, to the appellants for setting up the plant at Tuticorin and by the impugned judgment, the High Court has not quashed the environmental clearance but has allowed the three writ petitions. Hence, the first question which we will have to decide is whether the High Court could have interfered with the environmental clearances granted by the Ministry of Environment and Forests, Government of India, and the Government of Tamil Nadu, Department of Environment.

23. The environmental clearance for setting up the plant was granted to the appellants under the Environment (Protection) Act, 1986. Sub-section (1) of Section 3 of the Environment (Protection) Act, 1986 provides that subject to the provisions of the Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. Sub-section (2) of Section 3 further provides that in particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the matters specified therein. One such matter specified in clause (v) of sub-section (2) is restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Rule 5(3) of the Environment (Protection) Rules, 1986 accordingly empowers the Central Government to impose prohibitions or restrictions on the location of an industry or the carrying on processes and operations in an area, by notification in the Official Gazette. In exercise of these powers under Section 3(2)(v) of the Environment (Protection) Act, 1986 and Rule 5(3) of the Environment (Protection) Rules, 1986, the

Central Government has issued a notification dated 27.01.1994 imposing restrictions and prohibitions on the expansion and modernization of any activity or new projects being undertaken in any part of India unless environmental clearance has been accorded by the Central Government or the State Government in accordance with the procedure specified in the said notification.

24. Para 2 of the notification dated 27.01.1994 lays down the requirements and procedure for seeking environmental clearance of projects, and clause (c) of Para 2 provides that the Impact Assessment Agency could solicit comments of the public within thirty days of receipt of proposal, in public hearings, arranged for the purpose, after giving thirty days notice of such hearings in at least two newspapers, and after completion of public hearing, where required, convey its decision. The language of this notification did not lay down that the public hearing was a must. The Impact Assessment was done by Tata Consultancy Services as per the requirements then existing and the Government of India has granted the Environmental Clearance on 16.01.1995. The notification dated 27.01.1994, however, was amended by notification dated 10.04.1997 and it was provided in clause (c) of Para 2 of the notification that the Impact Assessment Agency shall conduct a public hearing and the procedure for public hearing was detailed in Schedule IV to the notification by the amendment notification dated 10.04.1997. Admittedly, in this case, the environmental clearance was granted by the Ministry of Environment, Government of India, on 16.01.1995 in accordance with the procedure laid down by notification dated 27.01.1994 well before the notification dated 10.04.1997 providing for mandatory public hearing in accordance with the procedure laid down in Schedule IV. As there was no mandatory requirement in the procedure laid down under the Environment (Protection) Act, 1986 and the Environment (Protection) Rules, 1986 and the notifications dated 27.01.1994 as amended by notification dated 04.05.1994 that a public hearing has to be conducted before grant of environmental clearance

not have allowed the writ petitions challenging the environmental clearances on the ground that no public hearing was conducted before grant of the environmental clearances.

25. An Explanatory Note regarding the EIA notification dated 27.01.1994 was also issued by the Central Government and Para 5 of the Explanatory Note clarified that project proponents could furnish Rapid EIA report to the Impact Assessment Agency based on one season data, for examination of the project and Comprehensive EIA report may be submitted later, if so asked for by the Impact Assessment Agency and this was permitted where Comprehensive EIA report would take at least one year for its preparation. In Para 5 of the affidavit filed by the Union of India before the High Court in Writ Petition Nos.15501 to 15503 of 1996, the allegation of the writ petitioner that the Ministry of Environment and Forests have accorded environmental clearance without applying its mind and without making any analysis of the adverse impacts on the marine ecological system has been denied and it has been further stated that after detailed examination of Rapid EIA/ EMP, filled in Questionnaire for industrial projects, NOC from State Pollution Control Board and Risk Analysis, the project was examined as per the procedure laid down in the EIA notification dated 27.01.1994 (as amended on 04.05.1994) and the project was accorded approval on 16.01.1995 subject to specific conditions. As the procedure laid down under the Environment (Protection) Act, 1986 and the Environment (Protection) Rules, 1986 and the notifications dated 27.01.1994 as amended by notification dated 04.05.1994 and as explained by the Explanatory Note issued by the Government of India permitted Rapid EIA in certain circumstances, the High Court could not have allowed the writ petitions on the ground that environmental clearance was issued to the appellant-company on the basis of inadequate Rapid EIA, particularly when the Union of India in its affidavit had clearly averred that the environmental clearance was granted after detailed examination of Rapid EIA/ EMP, filled in Questionnaire for industrial projects, NOC from

State Pollution Control Board and Risk Analysis in accordance with the procedure laid down in EIA notification dated 27.01.1994 (as amended on 04.05.1994).

26. The High Court has noticed some decisions of this Court on Sustainable Development, Precautionary and Polluter Pays Principles and Public Trust Doctrine, but has failed to appreciate that the decision of the Central Government to grant environmental clearance to the plant of the appellants could only be tested on the anvil of well recognized principles of judicial review as has been held by a three Judge Bench of this Court in *Lafarge Umiam Mining (P) Ltd. v. Union of India & Others* [(2011) 7 SCC 338 at 380]. To quote Environmental Law edited by David Woolley QC, John Pugh-Smith, Richard Langham and William Upton, Oxford University Press:

> "The specific grounds upon which a public authority can be challenged by way of judicial review are the same for environmental law as for any other branch of judicial review, namely on the grounds of illegality, irrationality, and procedural impropriety."

Thus, if the environmental clearance granted by the competent authority is clearly outside the powers given to it by the Environment (Protection) Act, 1986, the Environment (Protection) Rules, 1986 or the notifications issued thereunder, the High Court could quash the environmental clearance on the ground of illegality. If the environmental clearance is based on a conclusion so unreasonable that no reasonable authority could ever have come to the decision, the environmental clearance would suffer from *Wednesbury* unreasonableness and the High Court could interfere on the ground of irrationality. And, if the environmental clearance is granted in breach of proper procedure, the High Court could review the decision of the authority on the ground of procedural impropriety.

27. Where, however, the challenge to the environmental clearance is on the ground of procedura[illegible]h

Court could quash the environmental clearance only if it is satisfied that the breach was of a mandatory requirement in the procedure. As stated in Environmental Law edited by David Woolley QC, John Pugh-Smith, Richard Langham and William Upton, Oxford University Press:

> "It will often not be enough to show that there has been a procedural breach. Most of the procedural requirements are found in the regulations made under primary legislation. There has been much debate in the courts about whether a breach of regulations is mandatory or directory, but in the end the crucial point which has to be considered in any given case is what the particular provision was designed to achieve."

As we have noticed, when the plant of the appellant-company was granted environmental clearance, the notification dated 27.01.1994 did not provide for mandatory public hearing. The Explanatory Note issued by the Central Government on the notification dated 27.01.1994 also made it clear that the project proponents may furnish rapid EIA report to the IAA based on one season data (other than monsoon), for examination of the project Comprehensive EIA report was not a must. In the absence of a mandatory requirement in the procedure laid down under the scheme under the Environment (Protection) Act, 1986 at the relevant time requiring a mandatory public hearing and a mandatory comprehensive EIA report, the High Court could not have interfered with the decision of the Central Government granting environmental clearance on the ground of procedural impropriety.

28. Coming now to the ground of irrationality argued so vehemently by Mr. V. Prakash, we find that no materials have been produced before us to take a view that the decision of the Central Government to grant the environmental clearance to the plant of the appellants was so unreasonable that no reasonable authority could ever have taken the decision. As we have already noticed, in Para 5 of the affidavit filed by the Union

of India before the High Court in Writ Petition Nos.15501 to 15503 of 1996, it has been stated that the Ministry of Environment and Forests have accorded environmental clearance after detailed examination of rapid EIA/EMP, filled in Questionnaire for industrial projects, NOC from State Pollution Control Board and Risk Analysis, and that the project was examined as per the procedure laid down in the EIA notification dated 27.01.1994 (as amended on 04.05.1994) and only thereafter the project was accorded approval on 16.01.1995. No material has been placed before us to show that the decision of the Ministry of Environment and Forests to accord environmental clearance to the plant of the appellants at Tuticorin was wholly irrational and frustrated the very purpose of EIA.

29. In *Belize Alliance of Conservation Non-governmental Organizations v. The Department of the Environment and Belize Electric Company Limited* (supra) cited by Mr. Prakash, the Lords of the Judicial Committee of the Privy Council have quoted with approval the following words of Linden JA with reference to the Canadian legislation in *Bow Valley Naturalists Society v. Minister of Canadian Heritage* [2001] 2 FC 461 at 494:

> "The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized but, as long as they follow the statutory process, it is for the responsible authorities."

The aforesaid passage will make it clear that it is for the authorities under the Environment (Protection) Act, 1986, the Environment (Protection) Rules, 1986 and the notifications issued thereunder to determine the scope of the project, the extent of the screening and the assess[illegible]e

effects and so long as the statutory process is followed and the EIA made by the authorities is not found to be irrational so as to frustrate the very purpose of EIA, the Court will not interfere with the decision of the authorities in exercise of its powers of judicial review.

30. The next question that we have to decide is whether the High Court was right in directing closure of the plant of the appellants on the ground that the plant of the appellants is located at Tuticorin within 25 kms. of four of the twenty one islands in the Gulf of Munnar, namely, Vanthivu, Kasuwar, Karaichalli and Villanguchalli. The reason given by the High Court in coming to this conclusion is that the TNPCB had stipulated in the Consent Order dated 22.05.1995 that the appellant-company has to ensure that the location of the unit should be 25 kms. away from ecologically sensitive area and as per the report of NEERI, the plant of the appellants was situated at a distance of 6 kms. of Vanthivu, 7 kms. of Kasuwar and 15 kms. of Karaichalli and Villanguchalli and these four villages are part of the twenty one islands in the Gulf of Munnar. Hence, the High Court directed closure of the plant because the appellant-company has violated the condition of the Consent Order dated 22.05.1995 issued by the TNPCB under the Water Act.

31. The Consent Order dated 22.05.1995 issued by the TNPCB under Section 25 of the Water Act states as follows:

> "Consent to establish or take steps to establish is hereby granted under Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 as amended in 1988) (hereinafter referred to as 'The Act') and the rules and orders made thereunder to
>
> The Chief Project Manager,
> M/s Sterlite Industries (India) Limited (Copper Smelter Project)

> SIPCOT Industrial Complex,
> Meelavittam Village, Tuticorin Taluk,
> V.O. Chidambaraner District
>
> (hereinafter referred to as 'The applicant') authorizing him/her/them to establish or take steps to establish the industry in the site mentioned below:
>
> SIPCOT Industrial Complex,
> Meelavittam Village, Tuticorin Taluk,
> V.O. Chidambaraner District."

The aforesaid extract from the Consent Order dated 22.05.1995 of the TNPCB issued under the Water Act makes it clear that the appellant-company was given consent to establish its plant in the SIPCOT Industrial Complex, Melavittan Village, Tuticorin Taluk. Along with the Consent Order under the Water Act, special conditions were annexed and clause 20 of the special conditions reads as follows:

> "20. (i) 1 km away from the water resources specified in G.O.Ms. No.213 E&P Dept Dt. 30.3.89
>
> (i) 25 km away from ecological/sensitive areas.
>
> (i) 500 metres away from high tide line."

32. On the one hand, therefore, the appellants were given consent to establish their plant in the SIPCOT Industrial Complex, which as per the NEERI report is within 25 kms. of four of the twenty one islands in the Gulf of Munnar. On the other hand, a condition was stipulated in the consent order that the appellants have to ensure that the location of the unit is 25 kms. away from ecological sensitive area. It thus appears that the TNPCB while granting the consent under the Water Act for establishment of the plant of the appellants in the SIPCOT

Industrial Complex added the above requirement without noting that the SIPCOT Industrial Complex was within 25 kms. from ecological sensitive area. Since, however, the Consent Order was granted to the appellant-company to establish its plant in the SIPCOT Industrial Complex and the plant has in fact been established in the SIPCOT Industrial Complex, the High Court could not have come to the conclusion that the appellant-company had violated the Consent Order and directed closure of the plant on this ground.

33. This is not to say that in case it becomes necessary for preservation of ecology of the aforesaid four islands which form part of the Gulf of Munnar, the plant of the appellants cannot be directed to be shifted in future. We find from the affidavit filed on behalf of the State of Tamil Nadu on 29.10.2012 that the Gulf of Munnar consisting of 21 islands including the aforesaid four islands have been notified under Section 35(1) of the Wildlife (Protection) Act, 1972 on 10th September 1986 and a declaration may also be made under Section 35(4) of the said Act declaring the Gulf of Munnar as a Marine National Park. We have, therefore, no doubt that the Gulf of Munnar is an ecological sensitive area and the Central Government may in exercise of its powers under clause (v) of sub-section (1) of Rule 5 of the Environment (Protection) Rules, 1986 prohibit or restrict the location of industries and carrying on processes and operations to preserve the biological diversity of the Gulf of Munnar. As and when the Central Government issues an order under Rule 5 of the Environment (Protection) Rules, 1986 prohibiting or restricting the location of industries within and around the Gulf of Munnar Marine National Park, then appropriate steps may have to be taken by all concerned for shifting the industry of the appellants from the SIPCOT Industrial Complex depending upon the content of the order or notification issued by the Central Government under the aforesaid Rule 5 of the Environment (Protection) Rules, 1986, subject to the legal challenge by the industries.

34. The next question with which we have to deal is whether the High Court could have directed the closure of the plant of the appellants on the ground that though originally the TNPCB stipulated a condition in the 'No Objection Certificate' that the appellant-company has to develop a green belt of 250 meters width around the battery limit of the plant, the appellants made representation to the TNPCB for reducing the width of the green belt and the TNPCB in its meeting held on 18.08.1994 relaxed this condition and required the appellants to develop the green belt with a minimum width of 25 meters. We find on a reading of the No Objection Certificate issued by the TNPCB that various conditions have been imposed on the industry of the appellants to ensure that air pollution control measures are installed for the control of emission generated from the plant and that the emission from the plant satisfies the ambient area quality standards prescribed by the TNPCB and development of green belt contemplated under the environmental management plan around the battery limit of the industry of the appellants was an additional condition that was imposed by the TNPCB in the No Objection Certificate. If the TNPCB after considering the representation of the appellants has reduced the width of the green belt from a minimum of 250 meters to a minimum of 25 meters around the battery limit of the industry of the appellants and it is not shown that this power which has been exercised was vitiated by procedural breach or irrationality, the High Court in exercise of its powers of judicial review could not have interfered with the exercise of such power by the State Pollution Control Board. The High Court in the impugned judgment has not recorded any finding that there has been any breach of the mandatory provisions of the Air Act or the Rules thereunder by the TNPCB by reducing the green belt to 25 meters. Nor has the High Court recorded any finding that by reducing the width of the green belt around the battery limit of the industry of the appellants from 250 meters to 25 meters, it will not be possible to mitigate the effects of fugitive emissions from the plant. The High Court has merely held that the TNPCB should not have taken such a

should not have in a casual way dealt with the issue permitting the appellant-company to reduce the green belt particularly when there have been ugly repercussions in the area on account of the incidents which took place on 05.07.1997 onwards. It was for the TNPCB to take the decision in that behalf and considering that the appellant's plant was within a pre-existing industrial estate, the appellant could not have been singled out to require such a huge green belt.

35. This takes us to the argument of Mr. Prakash that had the Ministry of Environment and Forests, Government of India, applied its mind fully before granting the environment clearance and had the TNPCB applied its mind fully to the consents under the Air Act and the Water Act and considered all possible environmental repercussions that the plant proposed to be set up by the appellants would have, the environmental problems now created by the plant of the appellants would have been prevented. As we have already held, it is for the administrative and statutory authorities empowered under the law to consider and grant environmental clearance and the consents to the appellants for setting up the plant and where no ground for interference with the decisions of the authorities on well recognized principles of judicial review is made out, the High Court could not interfere with the decisions of the authorities to grant the environmental clearance or the consents on the ground that had the authorities made a proper environmental assessment of the plant, the adverse environmental effects of the industry could have been prevented. If, however, after the environmental clearance under the Environment (Protection) Act, 1986, and the Rules and the notifications issued thereunder and after the consents granted under the Air Act and the Water Act, the industry continues to pollute the environment so as to effect the fundamental right to life under Article 21 of the Constitution, the High Court could still direct the closure of the industry by virtue of its powers under Article 21 of the Constitution if it came to the conclusion that there were no other remedial measures to ensure that the industry maintains the standards of emission

and effluent as laid down by law for safe environment (see *M.C. Mehta v. Union of India and others* [(1987) 4 SCC 463] in which this Court directed closure of tanneries polluting the waters of Ganga river).

36. We have, therefore, to examine whether there were materials before the High Court to show that the plant of the appellants did not maintain the standards of emission and effluent as laid down by the TNPCB and whether there were no remedial measures other than the closure of the industry of the appellants to protect the environment. We find on a reading of the impugned judgment of the High Court that it has relied on the report of NEERI of 2005 to hold that the plant site itself is severely polluted and the ground samples level of arsenic justified classifying the whole site of the plant of the appellant as hazardous waste. We extract hereinbelow the relevant observations of NEERI in its report of 2005 relating to air, water and soil environment in the Executive Summary:

"**Air Environment:**

- The emission factors of SO2 from sulphuric acid plant – I (SAP-I) and sulphuric acid plant – II (SAP-II) were 0.55 kg/MT of H2SO4 manufactured which is well within the TNPCB stipulated limit of 2kg/MT of H2SO4 manufactured.
- The acid mist concentration of SAP-I was 85 mg/Nm3, which exceeds the TNPCB limit of 50 mg/Nm3. The acid mist concentration from SAP-II was 42 mg/Nm3, which is well within the TNPCB limit. In view of the exceedance of TNPCB limit for acid mist, it is recommended that the performance of acid mist eliminators may be intermittently checked. It is further recommended to install a tail gas treatment plant to take care of occasional upsets.
- Out of the seven D.G. sets

monitored for particulate matter (PM) emissions. The level of PM was 115 mg/Nm3 (0.84 gm/kWh) which is within the TNPCB stipulated limit of 150 mg/Nm3 for thermal power plants of 200 MW and higher capacity (165 mg/Nm3) but higher than that stipulated for diesel engines / Gen sets up to 800 KW capacity (0.3 gm/kWh). Therefore TNPCB may decide whether the present PM emissions from the DG sets of 6.3 MW capacity is within the limit or otherwise.

- The fugitive emissions were monitored at four sites to assess the status of air quality with respect of SO2, NO2 and SPM. The results of analysis at all fugitive emission monitoring sites indicate that the levels of gaseous pollutants SO2 and NO2, were below the respective NIOSH/OSHA standards for work place environment. The levels of SPM were also within the stipulated TNPCB standards for industrial areas.

- Impact of stack and fugitive emissions on surrounding air quality was also assessed by monitoring SO2, NO2 and SPM levels at five monitoring locations. The levels of SPM, SO2 and NO2 at all the five sites were far below the TNPCB standards of 120 ìg/Nm3 for SO2 as well as NO2 and 500 ìg/Nm3 for SPM for industrial zone.

- Water Environment

- Surface water samples were collected and analyzed for physico-chemical, nutrient demand parameters. The physico-chemical characteristics and nutrient demand parameters, i.e. with special reference to pH (7.9-8.0), TDS (120-160 mg/L), COD (11-18 mg/L) and levels of heavy metals viz. Cd, Cr, Cu, Pb, Fe, Mn, Zn and As in surface water,

were found within the prescribed limits of drinking water standards (IS: 10500-1995).

- Total eight groundwater samples were collected (seven from hand pumps and one from dug well) to assess the groundwater quality in the study area. The analysis on physico-chemical characteristics of groundwater samples collected from various locations showed high mineral contents in terms of dissolved solids (395-3020mg/L), alkalinity (63-210 mg/L), total hardness (225-2434 mg/L), chloride (109-950 mg/L), sulphate (29-1124 mg/L) and sodium (57-677 mg/L) as compared to the drinking water standards (IS:10500-1995). Thus, it could be concluded that water in some of the wells investigated is unfit for drinking. The concentrations of nutrient demand parameters revealed that phosphate was in the range 0.1-0.3 mg/L while nitrate was in the range 1-7.5 mg/L at all sampling locations which is within the limits stipulated under drinking water standards (IS:10500-1995). Levels of Chromium, Copper and lead were found to be higher in comparison to the parameters stipulated under drinking water standards (IS:10500-1995), other heady metal concentrations, viz. iron, manganese, zinc and arsenic were found in the range 0.01-0.05 mg/L, ND-0.01 mg/L and ND-0.08 mg/L respectively which are within the drinking water standards (IS:10500-1995).

- To assess the impact on groundwater quality due to secured and fill sites and other waste disposal facilities, five samples were collected from monitoring wells (shallow bore wells located around the waste disposal sites). The Physico-Chemical characteristics of well water around secured land fill site and gypsum pond sh[illegible]s

higher then the levels stipulated in IS: 10500-1995 in terms of dissolved solids (400-3245 mg/L), alkalinity (57-137 mg/L), hardness (290-1280 mg/L), chloride (46-1390 mg/L), sulphate (177-649 mg/L) and sodium (9-271 mg/L). The results of nutrient demand parameters showed phosphate in the range 0.1-0.5 mg/L while nitrate was in the range 0.8-11.7 mg/L at all sampling locations, which are within the levels stipulated in IS:10500-1995, whereas level of arsenic was found in the range of ND-0.08 mg/L as against the stipulated limit of 0.05 mg/L under drinking water standards (IS:10500-1995). Levels of cadmium, chromium, copper and lead were also found to exceed the drinking water standards in some of the wells.

- The hourly composite wastewater samples were collected at six locations. During the sample collection, flow monitoring was also carried out at the inlet and final outlet of the effluent treatment plant (ETP). The concentrations of total dissolved solid (TDS) and sulphate exceed the limit stipulated by the TNPCB for treated effluent. All the other parameters are within the consent conditions prescribed by TNPCB. The treated effluent is being recycled back in the process to achieve zero discharge.

- Soil Environment

- Soil samples were also analyzed for level of heavy metals. The soil samples at the plant site showed presence of As (132.5 to 163.0 mg/kg), Cu (8.6 to 163.5 mg/kg), Mn (283 to 521.0 mg/kg) and Fe (929.6 to 1764.6 mg/kg). Though there is no prescribed limit for heavy metal contents in soil, the occurrence of these heavy metals in the soil may be attributed to fugitive emission, solid waste dumps, etc."

It will be clear from the extracts from the Executive Summary of NEERI in its report of 2005, that while some of the emissions from the plant of the appellants were within the limits stipulated by the TNPCB, some of the emissions did not conform to the standards stipulated by TNPCB. It will also be clear from the extracts from the Executive Summary relating to water environment that the surface water samples were found to be within the prescribed limits of drinking water (IS:10500-1995) whereas ground water samples showed high mineral contents in terms of dissolved solids as compared to the drinking water standards, but concentrations of nutrient demand parameters revealed that the phosphate and nitrate contents were within the limits stipulated under drinking water standards and levels of chromium, copper and lead were found to be higher in comparison to the parameters stipulated under drinking water standards, whereas the heavy metal concentrations, namely, iron, manganese, zinc and arsenic were within the drinking water standards. Soil samples also revealed heavy metals. Regarding the solid waste out of slag in the plant site, the CPCB has taken a view in its communication dated 17.11.2003 to TNPCB that the slag is non-hazardous. Thus, the NEERI report of 2005 did show that the emission and effluent discharge affected the environment but the report read as whole does not warrant a conclusion that the plant of the appellants could not possibly take remedial steps to improve the environment and that the only remedy to protect the environment was to direct closure of the plant of the appellants.

37. In fact, this Court passed orders on 25.02.2011 directing a joint inspection by NEERI (National Engineering and Research Institute) with the officials of the Central Pollution Control Board (for short 'the CPCB') as well as the TNPCB. Accordingly, an inspection was carried out during 6th April to 8th April, 2011 and 19th April to 22nd April, 2011 and a report was submitted by NEERI to this Cour[illegible]s

Court directed the Tamil Nadu Government and the TNPCB to submit their comments with reference to the NEERI report. On 25.08.2011, this Court directed TNPCB to file a synopsis specifying the deficiencies with reference to the NEERI report and suggest control measures that should be taken by the appellants so that this Court can consider the direction to be issued for remedial measures which can be monitored by the TNPCB. Accordingly, the TNPCB filed an affidavit dated 30.08.2011 along with the chart of deficiencies and measures to be implemented by the appellants and on 11.10.2011, this Court directed the TNPCB to issue directions, in exercise of its powers under the Air Act and the Water Act to the appellants to carry out the measures and remove the deficiencies indicated in the chart. Pursuant to the order dated 11.10.2011, the TNPCB issued directions to the appellants and on 17.01.2012, the appellants claimed before the Court that they have removed the deficiencies pointed out by the TNPCB and on 27.08.2012, this Court directed that a joint inspection be carried out by TNPCB and CPCB and completed by 14th September, 2012 and a joint report be submitted to this Court.

38. The conclusion in the joint inspection report of CPCB and TNPCB is extracted hereinbelow:

> "Out of the 30 Directions issued by the Tamil Nadu Pollution Control Board, the industry has complied with 29 Directions. The remaining Direction No.1(3) under the Air Act on installation of bag filter to converter is at the final stage of erection, which will require further 15 working days to fully comply as per the industry's revised schedule."

From the aforesaid conclusion of the joint inspection report, it is clear that out of the 30 directions issued by the TNPCB, the appellant-company has complied with 29 directions and only one more direction under the Air Act was to be complied with. As the deficiencies in the plant of the appellants which affected the environment as pointed out by NEERI have now been removed, the impugned order of the High Court directing

closure of the plant of the appellants is liable to be set aside.

39. We may now consider the contention on behalf of the interveners that the appellants were liable to pay compensation for the damage caused by the plant to the environment. The NEERI reports of 1998, 1999, 2003 and 2005 show that the plant of the appellant did pollute the environment through emissions which did not conform to the standards laid down by the TNPCB under the Air Act and through discharge of effluent which did not conform to the standards laid down by the TNPCB under the Water Act. As pointed out by Mr. V. Gopalsamy and Mr. Prakash, on account of some of these deficiencies, TNPCB also did not renew the consent to operate for some periods and yet the appellants continued to operate its plant without such renewal. This is evident from the following extracts from the NEERI report of 2011:

> "Further, renewal of the Consent to Operate was issued vide the following Proceedings Nos. and validity period:

TNPCB Proceeding	**Validity Upto**
No.T7/TNPCB/F.22276/RL/TTN/W/2007 dated 07.05.2007	
No.T7/TNPCB/F.22276/RL/TTN/A/2006 dated 07.05.2007	30-09-2007
No.T7/TNPCB/F.22276/URL/TTN/W/2008 dated 19.01.2009	
No.T7/TNPCB/F.22276/URL/TTN/A/2008 dated 19.01.2009	31-03-2009
No.T7/TNPCB/F.22276/URL/TTN/W/2009 dated 14.08.2009	
No.T7/TNPCB/F.22276/URL/TTN/A/2009 dated 14.08.2009.	31-12-2009

Thereafter, the TNPCB did not renew the Consents due to non-compliance of the following conditions:

Under Water Act, 1974

i. The unit shall take expedite action to achieve the time bound target for disposal of slag, submitted to the Board, including BIS clearance before arriving at disposal to cement industries, marine impact study before arriving at disposal for landfill in abandoned quarries.

ii. The unit shall take expedite action to dispose the entire stock of the solid waste of gypsum.

Under Air Act, 1981

i. The unit shall improve the fugitive control measure to ensure that no secondary fugitive emission is discharged at any stage, including at the points of material handing and vehicle movement area."

For such damages caused to the environment from 1997 to 2012 and for operating the plant without a valid renewal for a fairly long period, the appellant-company obviously is liable to compensate by paying damages. In *M.C. Mehta and Another vs. Union of India and Others* [(1987) 1 SCC 395], a Constitution Bench of this Court held:

> "The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."

The Constitution Bench in the aforesaid case further observed that the quantum of compensation must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect and the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it. In the Annual Report 2011 of the appellant-company, at pages 20 and 21, the performance of its copper project is given. We extract hereinbelow the paragraph titled Financial Performance:

> "PBDIT for the financial year 2010-11 was Rs.1,043 Crore, 40% higher than the PBDIT of Rs.744 Crore for the financial year 2009-10. This was primarily due to higher LME prices and lower unit costs at Copper India and with the improved by-product realization."

Considering the magnitude, capacity and prosperity of the appellant-company, we are of the view that the appellant-company should be held liable for a compensation of Rs. 100 crores for having polluted the environment in the vicinity of its plant and for having operated the plant without a renewal of the consents by the TNPCB for a fairly long period and according to us, any less amount, would not have the desired deterrent effect on the appellant-company. The aforesaid amount will be deposited with the Collector of Thoothukudi District, who will invest it in a Fixed Deposit with a Nationalized Bank for a period of five years. The interest therefrom will be spent for improving the environment, including water and soil, of the vicinity of the plant after consultation with TNPCB and approval of the Secretary, Environment, Government of Tamil Nadu.

40. We now come to the submission of Mr. Prakash that we should not grant relief to the appellants because of misrepresentation and suppression of material facts made in the special leave petition that the appellants have always been running their plant with statutory consents and approvals and misrepresentation and suppression of material facts made in the special leave petition that the plant

the special leave petition was moved and a stay order was obtained from this Court on 01.10.2010. There is no doubt that there has been misrepresentation and suppression of material facts made in the special leave petition but to decline relief to the appellants in this case would mean closure of the plant of the appellants. The plant of the appellants contributes substantially to the copper production in India and copper is used in defence, electricity, automobile, construction and infrastructure etc. The plant of the appellants has about 1300 employees and it also provides employment to large number of people through contractors. A number of ancillary industries are also dependent on the plant. Through its various transactions, the plant generates a huge revenue to Central and State Governments in terms of excise, custom duties, income tax and VAT. It also contributes to 10% of the total cargo volume of Tuticorin port. For these considerations of public interest, we do not think it will be a proper exercise of our discretion under Article 136 of the Constitution to refuse relief on the grounds of misrepresentation and suppression of material facts in the special leave petition.

41. Before we part with this case, we would like to put on record our appreciation for the writ petitioners before the High Court and the intervener before this Court for having taken up the cause of the environment both before the High Court and this Court and for having assisted this Court on all dates of hearing with utmost sincerity and hard work. In *Indian Council for Enviro-Legal Action and Others vs. Union of India and Others* [(1996) 3 SCC 211], this Court observed that voluntary bodies deserve encouragement wherever their actions are found to be in furtherance of public interest. Very few would venture to litigate for the cause of environment, particularly against the mighty and the resourceful, but the writ petitioners before the High Court and the intervener before this Court not only ventured but also put in their best for the cause of the general public.

42. In the result, the appeals are allowed and the impugned common judgment of the High Court is set aside. The appellants, however, are directed to deposit within three months from today a compensation of Rs.100 crores with the Collector of Thoothukudi District, which will be kept in a fixed deposit in a Nationalized Bank for a minimum of five years, renewable as and when it expires, and the interest therefrom will be spent on suitable measures for improvement of the environment, including water and soil, of the vicinity of the plant of the appellants after consultation with TNPCB and approval of the Secretary, Environment, Government of Tamil Nadu. In case the Collector of Thoothukudi District, after consultation with TNPCB, finds the interest amount inadequate, he may also utilize the principal amount or part thereof for the aforesaid purpose after approval from the Secretary, Environment, Government of Tamil Nadu. By this judgment, we have only set aside the directions of the High Court in the impugned common judgment and we make it clear that this judgment will not stand in the way of the TNPCB issuing directions to the appellant-company, including a direction for closure of the plant, for the protection of environment in accordance with law.

43. We also make it clear that the award of damages of Rs. 100 Crores by this judgment against the appellant-Company for the period from 1997 to 2012 will not stand in the way of any claim for damages for the aforesaid period or any other period in a civil court or any other forum in accordance with law.

B.B.B. Appeals allowed.

AMITBHAI ANILCHANDRA SHAH
v.
THE CENTRAL BUREAU OF INVESTIGATION & ANR.
(Writ Petition (Criminal) No. 149 of 2012)

APRIL 8, 2013

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Code of Criminal Procedure, 1973 – ss.154, 155, 156, 157, 162, 169, 170 and 173(8) – Second FIR – Registration of – Permissibility – Held: – There can be no second FIR and consequently, there can be no fresh investigation on receipt of every subsequent information in respect of same cognizable offence or the same occurrence, giving rise to one or more cognizable offences – Sub-s. (8) of s.173 empowers the police to make further investigation, in such cases – In the facts and circumstances of the present case, second FIR and fresh charge-sheet is unwarranted and violative of fundamental right u/Arts. 14, 20 and 21 of the Constitution – Hence, the same is quashed and charge-sheet filed in pursuance of the second FIR, directed to be regarded as a supplementary charge-sheet in the first FIR – Constitution of India, 1950 – Arts. 14, 20 and 21.

Administration of Criminal Justice – Court needs to strike balance between fundamental rights of accused and power of police to investigate a cognizable offence – Sweeping power of investigation does not warrant subjecting a citizen each time, to fresh investigation in respect of the same incident, giving rise to one or more cognizable offences – Code of Criminal Procedure, 1973 – s.154 – Constitution of India, 1950 – Fundamental Rights.

In the writ petition [*Rubabuddin sheikh vs. State of Gujarat and Ors.* (2010) 2 SCC 200], Supreme Court entrusted the investigation regarding fake encounter of

'S' and abduction of 'K' (wife of 'S') by the Gujarat police authorities (including the petitioners in the present case) to CBI from State police. The Court also expressed a suspicion that the killing of 'TP' (a close associate of 'S') could be the part of the conspiracy of killing of 'S' and abduction of 'K'. CBI, pursuant thereto lodged first FIR against the present writ petitioners.

In another writ petition by mother of 'TP' (*Narmada Bai vs. State of Gujarat and Ors.* (2011) 5 SCC 79), Supreme Court rejected the investigation conducted by the State Police and entrusted the investigation regarding disappearance and death of 'TP' to CBI. CBI lodged second FIR in respect of death of 'TP' against the writ petitioners in the present case.

The accused Nos.1 and 3 in the second FIR, filed the present writ petitions on the ground that the second FIR was violative of their fundamental rights under Articles 14, 20 and 21 of the Constitution and contrary to the directions given in *Narmada Bai's case* and prayed for quashing the second FIR and to treat the charge-sheet in respect of the second FIR as supplementary charge-sheet in the first FIR.

Allowing the petitions, the Court

HELD: 1.1. The various provisions of the Cr.P.C. clearly show that an officer-in-charge of a police station has to commence investigation as provided in Section 156 or 157 Cr.P.C. on the basis of entry of the First Information Report, on coming to know of the commission of cognizable offence. On completion of investigation and on the basis of evidence collected, Investigating Officer has to form an opinion under Section 169 or 170 Cr.P.C. and forward his report to the concerned Magistrate under Section 173(2) Cr.P.C.. Even after filing of such a report, if he co n

of further information or material, there is no need to register a fresh FIR, he is empowered to make further investigation normally with the leave of the Court and where during further investigation, he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports which is evident from sub-section (8) of s.173 Cr.P.C.. Under the scheme of the provisions of ss.154, 155, 156, 157, 162, 169, 170 and 173 Cr.P.C., only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of s.154 Cr.P.C.. Thus, there can be no second FIR and, consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. [Paras 52(b) and (c)] [671-E-H; 672-A-C]

1.2. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering FIR in the Station House Diary, the officer-in-charge of the police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in s. 173 Cr.P.C.. Sub-s. (8) of s.173 Cr.P.C. empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report (s) to the Magistrate. A case of fresh investigation based on the second or successive FIRs not being a counter case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is underway or final report u/s. 173(2) has been forwarded to the Magistrate, is liable to

be interfered with by the High Court by exercise of power u/s.482 Cr.P.C. or u/Arts. 226/227 of the Constitution. [Para 52(d)] [672-C-G]

1.3. First Information Report is a report which gives first information with regard to any offence. There cannot be second FIR in respect of the same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the first FIR. [Para 52(e)] [672-G-H; 673-A]

Upkar Singh vs. Ved Prakash **(2004) 13 SCC 292;** *Babubhai vs. State of Gujarat and Ors.* **(2010) 12 SCC 254: 2010 (10) SCR 651;** *Chirra Shivraj vs. State of A.P.* **AIR 2011 SC 604: 2010 (15) SCR 673;** *C. Muniappan vs. State of Tamil Nadu* **(2010) 9 SCC 567: 2010 (10) SCR 262;** *Babulal vs. Emperor* **AIR 1938 PC 130;** *S. Swamirathnam vs. State of Madras* **AIR 1957 SC 340;** *State of A.P. vs. Kandimalla Subbaiah* and *Anr.* **AIR 1961 SC 1241;** *State of A.P. vs. Cheemalapati Ganeswara Rao and Anr.* **AIR 1963 SC 1850: 1964 SCR 297 – relied on.**

Anju Chaudhary vs. State of U.P. and Anr. **2012(12) Scale 619;***Babubhai vs. State of Gujarat* **(2010) 12 SCC 254: 2010 (10) SCR 651;** *Surender Kaushik and Ors. vs. State of U.P. and Ors.* **JT 2013 (3) SC 472;** *Nirmal Singh Kahlon vs. State of Punjab* **(2009) 1 SCC 441: 2008 (14) SCR 1049;** *Ram Lal Narang vs. State (Delhi Admn.)* **(1979) 2 SCC 322;** *Upkar Singh vs. Ved Prakash and Ors.* **(2004) 13 SCC 292;** *Kari Choudhary vs. Mst. Sita Devi and Ors.* **(2002) 1 SCC 714: 2001 (5) Suppl. SCR 588 – distinguished.**

2.1. In the present case according to the CBI itself, it is the case where the larger conspiracy allegedly commenced in November, 2005 and culminated into the murder of 'TP' in December, 2006 in a fake encounter; the alleged fake encounter of 'TP' was a consequence of earlier false encounter of 'S' and 'K' s

witness to the abduction and consequent murders of 'S' and 'K'; and 'TP' was allegedly kept under the control of accused police officers, as a part of the same conspiracy, till the time he was allegedly killed in a fake encounter. [Para 33] [662-G-H; 663-A-B]

2.2. The charge-sheet dated 23.07.2010 filed by the CBI in the first FIR clearly show that CBI was very categorical that killing of 'TP' was also a part of the very same conspiracy as alleged in the first FIR. Apart from the above specific stand, CBI filed supplementary charge-sheet dated 22.10.2010 in the first FIR which clearly show that killing of 'TP' was a fake encounter and was part of the same series of acts so connected together that they form part of the same conspiracy as alleged in the first FIR. In view of the same, there cannot be a second FIR dated 29.04.2011 and fresh charge-sheet dated 04.09.2012 for killing of 'TP'. [Paras 21-22] [641-D-E; 642-H; 643-A, D]

2.3. During pendency of Writ Petition (*Narmada Bai* case), the CBI, in its affidavit prayed for "further investigation" in the first FIR. Thus, it leaves no room for doubt that the CBI itself prayed for "further investigation" so as to enable it to "complete the investigation in first FIR" filed by the CBI, i.e., FIR dated 01.02.2010 by investigating encounter of 'TP'. [Paras 23 and 24] [643-E; 644-E-F]

2.4. Petitioner No. 1 was arrested in the first FIR and charge-sheet dated 23.07.2010, and was further interrogated even on the question of alleged killing of 'TP'. When petitioner No.1 filed regular bail application, the CBI had opposed the same contending that the alleged killing of 'TP' as a part of the same series of acts, viz., killing of 'S' and 'K'. [Para 27] [651-F-G]

2.5. The findings rendered in *Narmada Bai* case clearly show the acceptance of the contentions raised by the CBI that killing of two individuals and killing of third

person, viz., 'TP' were part of the very same conspiracy and in the same series of acts so connected together that they will have to be tried in one trial u/s. 220 Cr.P.C.. After the investigation of the second FIR, the CBI filed charge-sheet dated 04.09.2012 wherein, among others, the petitioner was also arrayed as one of the accused. The details mentioned in the charge-sheet dated 04.09.2012 clearly show that what the CBI has conducted is mere 'further investigation' and the alleged killing of 'TP' was in continuance of and an inseparable part of the conspiracy which commenced in November, 2005 by abduction of 'S', 'K' and 'TP' and which culminated into the final stage of alleged killing of 'TP' who was kept under the control of accused police officers since he was a material eye-witness like 'K'. Thus, the charge-sheet dated 04.09.2012 itself is conclusive to show that the said charge-sheet, in law and on facts, deserves to be treated as 'supplementary charge-sheet in the first FIR'. [Paras 28 and 30] [655-F-H; 658-G-H; 659-A-B]

2.6. In view of the factual situation as projected by the CBI itself, merely because two separate complaints had been lodged, did not mean that they could not be clubbed together and one charge-sheet could not be filed. In view of the consistent stand taken by the CBI, at this juncture, CBI may not be permitted to adopt a contradictory stand. [Paras 33 and 34] [663-C-D]

T.T. Anthony vs. State of Kerala **(2001) 6 SCC 181: 2001 (3) SCR 942;** *C. Muniappan and Ors. vs. State of Tamil Nadu* **(2010) 9 SCC: 2010 (10) SCR 262 – relied on.**

2.7. The factual details show that right from the inception of entrustment of investigation to the CBI by order dated 12.01.2010 till filing of the charge-sheet dated 04.09.2012, this Court has also treated the alleged fake encounter of 'TP' to be an outcome of one single conspiracy alleged to have been ha

2005 which ultimately culminated in 2006. In such circumstances, the filing of the second FIR and a fresh charge-sheet for the same is contrary to the provisions of Cr.P.C. suggesting that the petitioner was not being investigated, prosecuted and tried 'in accordance with law' . [Para 31] [659-C-E]

2.8. The observations, findings and directions in *Rubabbuddin Sheikh* case clearly show that the alleged killing of 'TP' was thus perceived even by this Court to be an act forming part of the very same transaction and same conspiracy in which the offence of killing of 'S' and 'K' took place. The CBI also, upon investigation held that "strong suspicion expressed by this Court in the above judgment was true and filed charge sheet/s". [Para 19] [641-A-B]

2.9. This Court accepting the plea of the CBI in *Narmada Bai* case that killing of 'TP' was part of the same series of cognizable offence forming part of the first FIR directed the CBI to "take over" the investigation and did not grant the relief prayed for i.e., registration of a fresh FIR. Accordingly, filing of a fresh FIR by the CBI is contrary to various decisions of this Court. [Para 52(a)] [671-D]

2.10. A second FIR in respect of an offence or different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. Thus, in the light of the specific stand taken by the CBI before this Court in the earlier proceedings by way of assertion in the form of counter affidavit, status reports, etc., filing of the second FIR and fresh charge-sheet is violative of fundamental rights under Article 14, 20 and 21 of the Constitution since the same relate to alleged offence in respect of which an FIR had already been filed and the court has taken cognizance. [Paras 32 and 53] [659-F; 674-E-F]

T.T. Anthony vs. State of Kerala **(2001) 6 SCC 181: 2001 (3) SCR 942 – relied on.**

2.11. Thus, the second FIR dated 29.04.2011 filed by the CBI is contrary to the directions issued in judgment and order dated 08.04.2011 by this Court in Writ Petition (*Narmada Bai* case) and accordingly the same is quashed. As a consequence, the charge-sheet filed on 04.09.2012, in pursuance of the second FIR, be treated as a supplementary charge sheet in the first FIR. [Para 54] [675-A-B]

Narmada Bai vs. State of Gujarat and Ors. **(2011) 5 SCC 79: 2011 (5) SCR 729;** *Rubabbuddin Sheikh vs. State of Gujarat and Ors.* **(2010) 2 SCC 200: 2010 (1) SCR 991 – referred to.**

3. Administering criminal justice is a two-end process, where guarding the ensured rights of the accused under Constitution is as imperative as ensuring justice to the victim. Thus, a just balance between the fundamental rights of the accused guaranteed under the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. Accordingly, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences. As a consequence, this is a fit case for quashing the second FIR to meet the ends of justice. [Para 52(i)] [673-H; 674-A-C]

Case Law Reference

2011 (5) SCR 729	**referred to**	**Para 1**
2010 (10) SCR 262	**relied on**	**Para 7**
2010 (1) SCR 991	**referr**	

2001 (3) SCR 942	**relied on**	**Para 32**
(2004) 13 SCC 292	**relied on**	**Para 33**
2010 (10) SCR 651	**relied on**	**Para 33**
2010 (15) SCR 673	**relied on**	**Para 33**
2010 (10) SCR 262	**relied on**	**Para 33**
AIR 1938 PC 130	**relied on**	**Para 36**
AIR 1957 SC 340	**relied on**	**Para 37**
AIR 1961 SC 1241	**relied on**	**Para 38**
1964 SCR 297	**relied on**	**Para 39**
2012(12) Scale 619	**distinguished**	**Para 41**
2010 (10) SCR 651	**distinguished**	**Para 42**
JT 2013 (3) SC 472	**distinguished**	**Para 43**
2008 (14) SCR 1049	**distinguished**	**Para 44**
(1979) 2 SCC 322	**distinguished**	**Para 45**
(2004) 13 SCC 292	**distinguished**	**Para 48**
2001 (5) Suppl. SCR 588	**distinguished**	**Para 49**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 149 of 2012.

Under Article 32 of the Constitution of India.

WITH

W.P.(Crl.) No. 5 of 2013

H.P. Raval, ASG, Mahesh Jethmalani, K.V. Viswanathan, Mukul Gupta, Adish C Aggarwala, Tushar Mehta, AAG, Pranav Badheka, Devang Vyas, Shally Bhasin Maheshwari, S.S. Shamshery, Shubhashis R. Soren, V.M. Vishnu, Bharat Sood, Ruchi Kohli, Ritin Rai, Siddhartha Dave, Anando Mukherjee,

Maheen N. Pradhan, B.V. Balram Das, Subramonium Prasad, Ejaz Khan, Hemantika Wahi, S.S. Nehra, Sandeep Garg, Sudhir Aggrawal, Nirnimesh Dube for the Appearing Parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Amitbhai Anilchandra Shah has filed the present Writ Petition being No. 149 of 2012 under Article 32 of the Constitution of India owing to the filing of fresh FIR being No. RC-3(S)/2011/Mumbai dated 29.04.2011 by the Central Bureau of Investigation (CBI) and charge sheet dated 04.09.2012 arraying him as an accused in view of the directions given by this Court to the Police Authorities of the Gujarat State to handover the case relating to the death of Tulsiram Prajapati - a material witness to the killings of Sohrabuddin and his wife Kausarbi to the CBI in *Narmada Bai vs. State of Gujarat & Ors.,* (2011) 5 SCC 79.

2. In *Narmada Bai* (supra), this Court, taking note of the fact that the charge sheet has been filed by the State of Gujarat after a gap of 3½ years and also considering the nature and gravity of the crime, rejected the investigation conducted/ concluded by the State Police and directed the State police authorities to handover the case to the CBI. After investigation, the CBI filed a fresh FIR dated 29.04.2011 against various police officials of the States of Gujarat and Rajasthan and others for acting in furtherance of a criminal conspiracy to screen themselves from legal consequences of their crime by causing the disappearance of human witness, i.e., Tulsiram Prajapati, by murdering him on 28.12.2006 and showing it off as a fake encounter. Though the said FIR did not specifically name any person, in the charge sheet dated 04.09.2012 filed in the said FIR before the Court of Judicial Magistrate First Class, Danta District, Banaskantha, Gujarat, the petitioner herein was arrayed as A-1. Further, due to lack of jurisdiction, the charge sheet was presented before the 2nd Additional Chief Judicial Magistrate, (First Class), (CBI Court No. 1), Ahmedabad, Gujarat.

3. Being aggrieved by the fresh FIR dated 29.04.2011 and charge sheet dated 04.09.2012, the petitioner herein has filed the above said writ petition on the ground of it being violative of his fundamental rights under Articles 14, 20 and 21 of the Constitution and contrary to the directions given in *Narmada Bai* (supra).

Writ Petition (Criminal) No. 5 of 2013:

4. Sangiah Pandiyan Rajkumar IPS-who was arrayed as A-3 in the charge sheet dated 04.09.2012 has filed the above said writ petition praying for similar relief as sought for in Writ Petition (Crl.) No. 149 of 2012. Since the grievance of the above-said petitioner is similar to that of the petitioner in W.P. (Crl.) No. 149 of 2012, there is no need to traverse those details once again.

5. Heard Mr. Mahesh Jethmalani, learned senior counsel for the petitioner in W.P. (Crl.) No. 149 of 2012, Mr. K.V. Viswanathan, learned senior counsel for the petitioner in W.P. (Crl.) No. 5 of 2013, Mr. H.P. Rawal, learned Additional Solicitor General for the CBI and Mr. Tushar Mehta, learned Additional Advocate General for the State of Gujarat.

Discussion:

6. A perusal of the prayer in the writ petition clearly shows that the petitioner is not seeking quashing of investigation, however, praying for quashing of second FIR being No. RC-3(S)/2011/Mumbai dated 29.04.2011 and also praying that the charge sheet dated 04.09.2012 in respect of the said FIR be treated as supplementary chargesheet in first FIR being No. RC No. 4S of 2010 so that his fundamental right under Article 21 is not infringed.

7. Mr. Mahesh Jethmalani, learned senior counsel for the petitioner pointed out that the reliefs sought for are in consonance with the law laid down by this Court in *C. Muniappan & Ors. vs. State of Tamil Nadu* (2010) 9 SCC 567.

He very much relied on para 37 of the said judgment which holds as under:

> "…..Merely because two separate complaints had been lodged, did not mean that they could not be clubbed together and one charge sheet could not be filed"

8. It is also pointed out by learned senior counsel for the petitioner-Amit Shah that the above said prayer is based upon CBI's own finding that the offence covered by the Second FIR is part of the same conspiracy and culminated into the same series of acts forming part of the same transaction in which the offence alleged in the first FIR was committed. It is also pointed out that it is the case of the CBI itself before this Court that even the charges will have to be framed jointly and one trial will have to be held as contemplated under Section 220 of the Code of Criminal Procedure, 1973 (in short 'the Code'). It is further pointed out that as per the CBI, the alleged criminal conspiracy commenced when Sohrabuddin and Kausarbi (whose deaths were in question in the first FIR) and Tulsiram Prajapati (whose death was in question in the second FIR) were abducted from Hyderabad after which Sohrabuddin was allegedly killed on 25/26.11.2005 and Kausarbi and Tulsiram Prajapati were killed thereafter since they were, as per CBI, the eye-witnesses. Finally, it is highlighted that the competent jurisdictional court has already taken cognizance of all the three alleged killings in the chargesheet/challan filed by the CBI in the first FIR itself.

9. Before going into the factual matrix as projected by learned senior counsel for the petitioner, it is desirable to refer to the stand taken by the CBI.

10. It is the definite case of the CBI that the abduction of Sohrabuddin and Kausarbi and their subsequent murders as well as the murder of Tulsiram Prajapati are distinct offences arising out of separate conspiracies though inter-connected with each other as the motive behind the murder of Tulsiram Prajapati was to destroy the evider e

abduction of Sohrabuddin and Kausarbi, as he was a prime witness to the said incident. It is not in dispute that as per the scheme prescribed in the Code, once a complaint is received with respect to a cognizable offence, the investigating authority is duty bound to register an FIR and, thereafter, initiate investigation.

11. Mr. Rawal, learned Additional Solicitor General appearing for the CBI, by drawing our attention to Section 218 of the Code submitted that a distinct charge is to be framed for a distinct offence, i.e., there has to be a separate charge for separate offence and each distinct charge has to be tried separately. He further pointed out that the concept of joint trial, which is an exception and not the rule cannot be made applicable to the stage either of investigation or the filing of charge sheet of a report under Section 173(2) of the Code. He also highlighted that in the Code, there is no concept of joint investigation. The only exception is under Sections 219 and 220 of the Code that a person can be tried at one trial for more offences than one committed within a period of one year. He also pointed out that there is no bar in law to file separate FIR/ complaint in respect of two distinct offences and similarly there is no bar to file two separate charge-sheets for seeking prosecution of accused in two distinct offences. He further highlighted that in *T.T. Anthony vs. State of Kerala* (2001) 6 SCC 181, the principle that was laid down with regard to the bar of filing of the second FIR was only in respect of the same incident or occurrence. According to him, whether the offences are distinct or same would necessarily have to be examined in the facts and circumstances of each case. He also submitted that the facts urged in the affidavit were on the basis of mere suspicion, hence, CBI cannot be held to be bound by its initial response in the status report or the affidavit since on a complete investigation, it is revealed that not only both the offences are distinct and separate but both the conspiracies were also hatched at different points of time. It is also pointed out by the CBI that the abduction and subsequent murder of

Sohrabuddin and the murder of Tulsiram Prajapati after a period of more than one year are separate and distinct offences. According to him, the material available with the CBI would show distinct and separate conspiracy to eliminate Sohrabuddin and, thereafter, another conspiracy was hatched in order to eliminate Tulsiram Prajapati as soon as the accused persons apprehended that Tulsiram Prajapati would spill the beans with respect to elimination of Sohrabuddin in a fake encounter.

12. It is the definite case of the CBI that the investigation has revealed that subsequent to the murder of Hamid Lala, Sohrabuddin and Tulsiram Prajapati continued their criminal activities in the States of Maharashtra, Rajasthan and Gujarat. However, Sohrabuddin remained elusive and beyond the reach of the Gujarat Police. It was, therefore, that the accused Amit Shah (petitioner herein), D.G. Vanzara, S. Pandiyan Rajkumar, Dinesh Man and others entered into a conspiracy to abduct and murder Sohrabuddin. Accordingly, D.G. Vanzara, with the aid of Abhay Chudasma, S.P. Valsad had Tulsiram Prajapati, an associate of Sohrabuddin, in order to trace Sohrabuddin. Whilst giving such directions, D.G. Vanzara also assured Tulsiram Prajapati that he would ensure safe passage for him as he would be implicated in some petty cases. It was after this assurance from D.G. Vanzara and Abhay Chudasma that Tulsiram Prajapati agreed to help them in tracing and locating Sohrabuddin. Accordingly, Tulsiram Prajapati, in accordance with his clandestine agreement with the Gujarat Police, informed them in advance about the plan of Sohrabuddin to travel to Sangli from Hyderabad and, thereafter, Sohrabuddin was abducted and murdered. By pointing out the above factual details, it is the stand of the CBI that the first conspiracy took place to eliminate Sohrabuddin with the help of Tulsiram Prajapati who agreed to trace and locate him after the assurances given by the Gujarat Police. Thus, in the aforesaid conspiracy, Tulsiram Prajapati can be said to be a part of the said conspiracy though not knowing the

13. It is further pointed out that in pursuance of the aforesaid criminal conspiracy, Sohrabuddin, Kausarbi and Tulsiram Prajapati were brought to Valsad, Gujarat in vehicles by Gujarat Police. From Valsad, Tulsiram Prajapati was allowed to return to Bhilwara, Rajasthan by the police party. Subsequently, Sohrabuddin was murdered and shown as if he was a Lashkar-e-Taiba terrorist killed in an encounter with a police party on 26.11.2005 at Ahmedabad while his wife Kausarbi was murdered on 29/30.11.2005 and her body was disposed off. Tulsiram Prajapati was shown to be arrested on 29.11.2005. Since then, he had been lodged in Udaipur Jail till he met his fate.

14. The most vital evidence that seems to have triggered Tulsiram Prajapati's death is a letter of Shri V.L. Solanki dated 18.12.2006 seeking permission to interrogate Tulsiram Prajapati and Sylvester lodged in Udaipur Jail. On the very same letter, Ms. Geetha Johri, head of the SIT is alleged to have recorded that even she may be given permission to accompany the IO for interrogation. Thereafter, the said letter is alleged to have been endorsed by Ms. Geetha Johri to Shri G.C. Raiger, Additional DGP, CID. It is further pointed out that the said letter of Shri V.L. Solanki containing the note of Ms. Geetha Johri was not found in the official file. In its place, a fabricated note dated 05.01.2007 along with a noting of Shri G.C. Raiger dated 06/08.01.2007 was found in the file in which it was recorded as under:-

> "13(d) To go to Udaipur to interrogate accused Sylvester and Tulsi Prajapati (both being allegedly primary witnesses in the case) of whom Tulsi was recently encountered at BK by border range."

15. It is also pointed out by the CBI that at the time of the murder of Sohrabuddin, there was no conspiracy to murder Tulsiram Prajapati and it is only subsequent to his murder when the accused persons feared of Tulsiram Prajapati being a threat to them and would spill the beans as he was a material witness

in the first conspiracy inasmuch as tracing and locating of Sohrabuddin on the assurances of the accused, another conspiracy was hatched to murder a potential witness to the murder of Sohrabuddin. By highlighting these factual details, it is pointed out by the CBI that there were two distinct and separate conspiracies.

16. With these factual aspects, as projected by the CBI, let us analyze further details highlighted by learned senior counsel for the petitioner as well as the specific stand of the CBI in the earlier proceedings asserted before this Court in the form of affidavit/counter affidavit and status reports.

Entrustment of investigation to the CBI in respect of Ist FIR:

17. Initially, Gujarat police conducted investigation into the killing of two individuals and filed charge sheet in the FIR being Crime Register No. 5/2006. This Court, in the writ petition filed in *Rubabbuddin Sheikh vs. State of Gujarat and Others* (2010) 2 SCC 200 did not accept the investigation of the Gujarat Police and consequently directed the CBI to conduct investigation. This order was passed by this Court on 12.01.2010. In the said decision, this Court expressed a suspicion that the alleged killing of Tulsiram Prajapati could be the part of the same conspiracy. It is useful to refer the relevant excerpts from the above decision which are as under:

> "(i) The writ petitioner also seeks the registration of an offence and investigation by CBI into the alleged encounter of one Tulsiram, a close associate of Sohrabuddin, who was allegedly used to locate and abduct Sohrabuddin and his wife Kausarbi, and was thus a material witness against the police personnel.
>
> (ii) The report expressly states that no link of Tulsiram Prajapati had been established in this case. The third person who was abducted was not to be the said Tulsiram Prajapati.

(iii) On 02.08.2007, the seventh action taken report was filed, which stated that the third person who was picked up was one Kalimuddin, who was suspected to be an informer of the Police.

(iv) From the charge-sheet, it also appears that the third person was "sent somewhere". However, it appears that the literal translation of the charge-sheet in Gujarati would mean that he was "anyhow made to disappear".

(v) It also appears from the charge-sheet that it identifies the third person who was taken to Disha farm as Kalimuddin. But it does not contain the details of what happened to him once he was abducted. The possibility of the third person being Tulsiram Prajapati cannot be ruled out, although the police authorities or the State had made all possible efforts to show that it was not Tulsiram.

(vi) Similarly, it was submitted that non-identification of the third person who was abducted along with Sohrabuddin and Kausarbi would also not affect the prosecution case."

18. After expressing and arriving at such a conclusion, this Court concluded that "the possibility of the third person being Tulsiram Prajapati cannot be ruled out and that his killing could be an attempt to destroy a human witness" and after saying so, transferred the investigation to the CBI. Ultimately, this Court directed the CBI "to unearth the larger conspiracy". The following categorical observations and directions in paras 65, 66 and 82 are relevant which are noted hereunder:-

"65. It also appears from the charge-sheet that it identifies the third person who was taken to Disha farm as Kalimuddin. But it does not contain the details of what happened to him once he was abducted. The possibility of the third person being Tulsiram Prajapati cannot be ruled out, although the police authorities or the State had made all possible efforts to show that it was not Tulsiram.

In our view, the facts surrounding his death evokes strong suspicion that a deliberate attempt was made to destroy a human witness.

66. So far as the call records are concerned, it would be evident from the same that they had not been analysed properly, particularly the call data relating to three senior police officers either in relation to Sohrabuddin's case or in Prajapati's case. It also appears from the charge-sheet as well as from the eight action taken reports that the motive, which is very important in the investigation reports was not properly investigated into as to the reasons of their killing. The motive of conspiracy cannot be merely fame and name. No justification can be found for the Investigating Officer Ms Johri walking out of the investigation with respect to Tulsiram Prajapati's death without even informing this Court.

82. Accordingly, in the facts and circumstances even at this stage the police authorities of the State are directed to hand over the records of the present case to the CBI Authorities within a fortnight from this date and thereafter the CBI Authorities shall take up the investigation and complete the same within six months from the date of taking over the investigation from the State police authorities. The CBI Authorities shall investigate all aspects of the case relating to the killing of Sohrabuddin and his wife Kausarbi including the alleged possibility of a larger conspiracy. The report of the CBI Authorities shall be filed in this Court when this Court will pass further necessary orders in accordance with the said report, if necessary. We expect that the Police Authorities of Gujarat, Andhra Pradesh and Rajasthan shall cooperate with the CBI Authorities in conducting the investigation properly and in an appropriate manner."

19. The observations, findings and directions in *Rubabbuddin Sheikh* (supra) clearly s d

killing of Tulsiram Prajapati was thus perceived even by this Court to be an act forming part of the very same transaction and same conspiracy in which the offence of killing of Sohrabuddin and Kausarbi took place. The CBI also, upon investigation held that "strong suspicion expressed by this Court in the above judgment was true and filed charge sheet/s".

20. Pursuant to the decision in *Rubabbuddin Sheikh* (supra) dated 12.01.2010, the CBI filed a fresh FIR, viz., first FIR. It is also clear that during the investigation, the CBI came to the conclusion that this first FIR was a part of the series of acts concerning with the alleged offence of abduction and killing of two individuals, viz., Sohrabuddin on 25/26.11.2005 and Kausarbi on 29.11.2005 culminating with the killing of one more person, viz., Tulsiram Prajapati as part of the very same conspiracy.

21. Now, let us discuss the charge sheet dated 23.07.2010 filed by the CBI in the first FIR. As rightly pointed out by Mr. Mahesh Jethmalani, learned senior counsel for the petitioner-Amit Shah, in this chargesheet itself, the CBI categorically mentioned that the killing of Tulsiram Prajapati is also a part of the very same conspiracy which is mentioned in the first FIR above. Though, before us, a different stand was taken by the CBI, the following excerpts of the charge sheet clearly show that CBI was very categorical that killing of Tulsiram Prajapati is also a part of the very same conspiracy, which are as under:-

"11……Shri Naymuddin, brother of Shri Sohrabuddin had gone to see off Shri Sohrabuddin, sister-in-law Smt. Kausarbi and Tulsiram Prajapati at Indore Bus Stand.

19. Investigation further revealed that the Police Party also followed the luxury bus. About 15 to 20 kilometers from the hotel, on the instructions of Shri Rajkumar Pandiyan (A-2) their vehicles overtook the luxury bus and stopped the bus. Two police persons entered into the bus and asked the driver to switch on the light. While the third police person

was having torch in his hand remained near the door of the bus. The police persons told there is police checking. All the three police personnel were in civil dress. They picked up Tulsiram Prajapati who was sitting in the bus. After sometime, they again came into bus and picked up Sohrabuddin. When Sohrabuddin was made to get down from the bus, Kausarbi also got down…..

20. Investigation further disclosed that Shri Sohrabuddin and Tulsiram Prajapati abducted by police party were made to sit in the Qualis while Kausarbi was made to sit in one of the Tata Sumo vehicles along with Santram Sharma (A-11).….All of them reached Valsad where at one big hotel, both the Tata Sumo Vehicles were stopped and they took lunch. Tulsiram Prajapati was shifted to another vehicle which was brought by Rajasthan Police personnel. They took him straight to Udaipur where he was kept in illegal custody for five days. Thereafter, he was shown arrested by a team lead by Shri Bhanwar Singh Hada, Inspector/SHO P.S. Hathipole, Udaipur Rajasthan from Bhilwara.

32. Investigation further disclosed that in the early part of November, 2005, Shri Tulsiram Prajapati was contacted by accused Abhay Chudasama (A-15) and brought to Ahmedabad where he was produced before accused D.G. Vanzara (A-1). They asked him to make Sohrabuddin available before them as there was lot of political pressure. Tulsiram Prajapati was assured that Sohrabuddin would get a safe passage and at the most Sohrabuddin would be put in jail so as to keep him away from glare for 3-4 months. No physical harm would be done to Sohrabuddin. Having got the assurance from accused D.G. Vanzara (A-1), Tulsiram Prajapati helped accused Abhay Chudasama (A-15) in tracking down Sohrabuddin."

22. Apart from the above specific stand, it is also relevant

to point out that the CBI filed supplementary chargesheet dated 22.10.2010 in the first FIR which made the following charges:-

> "Investigation has also revealed that after the Gujarat Police Officers had eliminated Shri Tulsiram Prajapati on 28.12.2006 in a fake encounter, Smt. Geeta Johri, the then IGP prepared a note sheet on 05.01.2006 mentioning therein inter alia the permission to go to Udaipur to interrogate the aforesaid two associates of Sohrabuddin viz., Sylvester and Tulsiram Prajapati, of whom, she mentioned that Tulsriram Prajapati was encountered by the Police…."

The above extracts culled out from the chargesheet and supplementary chargesheet filed in the first FIR by the CBI would clearly show that killing of Tulsiram Prajapati was a fake encounter and was part of the same series of acts so connected together that they form part of the same conspiracy as alleged in the first FIR. In view of the same, there cannot be a second FIR dated 29.04.2011 and fresh chargesheet dated 04.09.2012 for killing of Tulsiram Prajapati.

23. It is also relevant to point out that when Writ Petition (Crl.) No. 115 of 2007 was pending, the CBI, by way of an affidavit dated 19.08.2010, furnished the following information:-

> (i) Tulsiram Prajapati's killing is a part of the same series of acts in which killing of Sohrabuddin and Kausarbi took place.
>
> (ii) All the three killings are part of the same conspiracy.
>
> (iii) Trial of all the three offences shall have to be one trial under Section 220 of the Code.
>
> (iv) CBI be given formal permission to investigate Tulsiram Prajapati killing as "further investigation" in the first FIR filed by CBI which investigation was going on.

> (v) If CBI is not formally given investigation of Tulsiram Prajapati, prosecution would face questions of "issue estoppel" & "Res-judicata".

In the said affidavit, the CBI even prayed for "further investigation" in the first FIR which becomes evident from the prayer made by the CBI in the last paragraph of the affidavit which reads as under:-

> "12. That on 12.08.2010, the Hon'ble Supreme Court (Mr. Justice Aftab Alam and Mr. Justice R.M. Lodha) has granted three more months to complete the investigation. Hence, it is prayed that orders for transferring Tulsiram Prajapati case to the CBI may be issued for expeditious completion of investigation."

24. As rightly pointed out by Mr. Mahesh Jethmalani, the above prayer of the CBI makes it clear that the CBI had also prayed for entrustment of Tulsiram Prajapati's encounter "to complete the investigation" for which three months time was granted in W.P. (Crl.) No. 6 of 2007 to complete the investigation in the first FIR. On reading the abovesaid affidavit as a whole and the paragraphs quoted above in particular, it leaves no room for doubt that the CBI itself prayed for "further investigation" so as to enable it to "complete the investigation in first FIR" filed by the CBI, i.e., FIR dated 01.02.2010 by investigating Tulsiram Prajapati encounter. In this regard, the order of this Court dated 12.08.2010 relied upon by the CBI is relevant and the same is quoted hereunder:-

"**Order**

> "In pursuance of the order passed by this Court on January 12, 2010, the CBI has submitted a status report. In the status report, it is stated that they have been carrying on investigations as directed by this Court, but on certain aspects of the matter the investigation remain incomplete. A prayer is, therefore, made to g s

further time to complete the investigation. It is further prayed that three other cases that were registered in connection with the alleged escape of Tulsiram Prajapati from police escort and his death in a police encounter may also be transferred for investigation to the CBI because the death of Tulsiram Prajapati in the alleged encounter formed an inseparable part of the investigation which is entrusted to the CBI by this Court.

Today, Mr. Jethmalani, senior advocate, appeared on behalf of one of the accused-Amit Shah. Mr. Jethmalani strongly criticized the manner of investigation by the CBI and alluded to some larger political conspiracy. He submitted that he proposed to take steps of recall/ modification of the order dated January 12, 2010 passed by this Court by which the investigation of the case was taken away from the Gujarat Police and was handed over to the CBI.

Today, we can proceed only on the basis of the previous order passed on January 12, 2010 by which the CBI was directed to investigate all aspects of the case, relating to the killing of Sohrabuddin and his wife Kausarbi including the alleged possibility of a larger conspiracy. By that order, the CBI was asked to complete the investigation within six months from the date it took over the case from the State police and to file its report to this Court when this Court would pass further necessary orders in accordance with the said report, if necessary.

As on date, the investigation ordered to be made remains incomplete. In continuation of the previous order, therefore, the time allowed to the CBI to complete the investigation is extended by three months from today, at the end of which they would file a status report before this Court.

Put up on receipt of the status report."

25. It is clear that in both the status report(s) as well as in the affidavit filed in W.P. (Crl.) No. 115/2007, the CBI prayed for entrusting the investigation relating to Tulsiram Prajapati on the ground that his encounter was a part of the very same offence in the first FIR which CBI was investigating. It is not in dispute that this Court, after entrusting the investigation to the CBI by order dated 12.01.2010 was monitoring the said investigation in W.P. (Crl.) No. 6 of 2007. Even in the said writ petition, the CBI filed status report(s) contending that Tulsiram Prajapati's killing was a part of the very same conspiracy and series of the very same transactions in which Sohrabuddin and Kausarbi were abducted and killed. The following averments in the affidavit dated 19.08.2010 in W.P. (Crl.) No. 115 of 2007 made by the CBI are relevant which are as under:-

> "47. During the investigation of Sohrabuddin and Kausarbi matter it has emerged that there are clear circumstances indicating that the encounter of Tulsiram Prajapati on 28.12.2006 was done in order to eliminate him as he was the key witness in the criminal conspiracy of the abduction and killing of Sohrabuddin and Kausarbi by the powerful and influential accused persons. The CBI investigation has been conducted into this aspect in view of the following observations of the Hon'ble Supreme Court in its order dated 12.01.2010.
>
> 48. The investigation has disclosed that Tulsiram Prajapati @ Praful @ Sameer @ Babloo s/o Gangaram Prajapati, r/o Shantinagar PS Neel Ganga District Ujjain, M.P. was a close associate of Sohrabuddin. Both hailed from same Ujjain district of MP and knew each other since the days Sohrabuddin was lodged in Sabarmati Jail in the Arms recovery case. Tulsiram was working with him as his sharp shooter….
>
> 51. The investigation has further revealed that Tulsiram was picked up by the Police of Gujarat and Rajasthan to trace Sohrabuddin about 20 days [illegible]er

of Sohrabuddin. Both Sohrabuddin and his wife Kausarbi were abducted on the information of Tulsiram. He was promised by accused Shri D.G. Vanzara (A-1) and accused Shri Abhay Chudasama (A-15) that no physical harm would be caused to Sohrabuddin because Sohrabuddin was their old associate. Further, Tulsiram was shown to have been arrested on 29.11.2005 at Bhilwada (Rajasthan) by the Rajasthan police i.e., after the fake encounter of Sohrabuddin on 26.11.2005.

52. The investigation has further revealed that after the fake encounter of Sohrabuddin and murder of Kausarbi said deceased Tulsiram Prajapati knew that his death was imminent at the hands of the Gujarat Police in connivance with the Rajasthan Police as he was the only surviving prime witness to the abduction and killing of Kausarbi and Sohrabuddin. The grave apprehensions of Tulsiram Prajapati were expressed by him in his applications filed in the court of ACJM City (North) No. 1, Udaipur, on 27.01.2006 and 02.02.2006 and his letters addressed to the National Human Rights Commission (NHRC) dated 18.05.2006 and to the Collector, Udaipur dated 11.05.2006. In addition, he made verbal/oral prayer before the Hon'ble Principal Judge, Ahmedabad on 28.11.2006. Out of sheer desperation, he made the fervent appeal before the Hon'ble Judge that he would be alleged to have shown as escaped from the police escort party custody and subsequently killed in a fake encounter. True to his apprehension, the premonition came true as the events such as his alleged escape from the escape custody on 26.12.2006 registered with Ahmedabad Railway PS vide CR No. 294/2006 on 27.12.2006 and alleged fake encounter on 28.12.2006 registered with Ambaji Police Station vide CR No. 115/2006 dated 28.12.2006.

54. Shri V.K. Goda, who had demitted the office of IG of Police, Udaipur on 31.10.2005 on superannuation has

stated during his examination by the CBI that he had received a letter in the month of November 2005 addressed to him in his named cover by the family members of Tulsiram Prajapati which was duly forwarded by the then MLA. The letter could not be made available to the CBI. As per the statement of Shri Godila, the contents of the letter revealed that the family members of Tulsiram Prajapati apprehended that Shri Tulsiram Prajapati was illegally detained by Police and was in their illegal custody. The letter also revealed that the state of despair of family members of Shri Tulsiram Prajapati as they apprehended death for which they immediately wanted action by the then IG of Police, Udaipur through the people representative. This is an additional corroboration that Tulsiram Prajapati was in the Police Custody just prior to the encounter of Sohrabuddin. This seen in conjunction with other evidence indicates that Tulsiram Prajapati was the person who revealed the location of Sohrabuddin to the accused police officers of Rajasthan and Gujarat.

55. The investigation has further disclosed that while lodged in Udaipur Jail, in addition to the above mentioned prayers made by Tulsiram to the Human Rights Commission, different courts, he explained the true fact behind the fake encounter of Sohrabuddin to his jail inmate friends. The police kept the telephone number being used by some of the criminals inside the jail and outside the jail under interception and allegedly had received the information that Tulsiram was trying to run away from the custody. Both accused Shri. Dinesh MN (A-3) and IG, Udaipur Shri Rajeev Dasot sent letters for permission to intercept the telephone numbers alleged having such information. Thereafter, when Tulsiram Prajapati was brought to Ahmedabad on 28.11.2006 along with co-accused Mohd. Azam in connection with Case No. 1124/2004 (Popular Builders Firing Case) in JM Court No. 13, Ahmedabad, around 50 police

detailed for the escort party. On both these occasions, the mother, wife and daughter of Azam Khan accompanied them from Udaipur to Ahmedabad and back. Later on the police decided to kill Tulsiram and whereas on subsequent hearing fixed for 26.12.2006, Shri Tulsiram Prajapati was deliberately sent alone on 25.12.2006. His usual companion/co-accused Azam Khan was detained in a scooter theft case. Interestingly, the above scooter theft case registered in Ambamata PS of Udaipur (Rajasthan) vide Case No. 95/2004 was already detected, vehicle recovered and handed over to the complainant in 2004 itself. Thus, foisting a case against Mohd. Azam and sending Tulsiram Prajapati alone were to facilitate the murder of Tulsiram Prajapati. It has also come into evidence that this time before leaving Udaipur Jail on 25.12.2006, Tulsiram had expressed apprehension of his being killed in an encounter. Contrary to the earlier two occasions, this time only four police personnel were sent from the jail as his escort. On the way back from Ahmednagar to Udaipur, he was shown having run away from the custody on the night intervening 26/27.12.2006. Next day, he was killed in an alleged encounter.

56. The investigation disclosed that the Udaipur Police had sent letter No. 1120 dated 27.12.2006 to SP Banaskantha, alleging that the call details of Tulsiram show that he is hiding somewhere in Banaskantha. As per the documents received by the CBI from the office of IG, Udaipur, this letter was sent through fax at around 2332 hours on 27.12.2006. As per the telephone call details available, the phone was not used after the evening of 26.12.2006 so there was no reason for Udaipur Police to have information that Tulsiram was hiding somewhere in Banaskantha. This letter was nothing but an attempt to provide the Banaskantha police an opportunity to stage-manage the encounter of Tulsiram Prajapati in their district. Further, the available call details show that on

27.12.2006 accused Shri Dinesh M.N. (A-3) was constantly in touch with other accused Rajkumar over telephone till confirmation of this fax.

57. In the investigation conducted by the CBI, it has clearly emerged that killing of Tulsiram Prajapati was an integral part of the criminal conspiracy hatched by the accused arising out the same transaction. After the abduction and fake encounter of Sohrabuddin and Kausarbi, the Supreme Court was seized of the matter, which had directed the State of Gujarat to investigate in detail the above episode. During such inquiry ordered by Gujarat Government in obedience to the Hon'ble Supreme Court, it emerged that police officials of ATS, Ahmedabad were involved in the abduction and killing of Sohrabuddin and Kausarbi…..

59. When it became clear and evident that…..

(i) That Tulsiram Prajapati was the sole surviving witness to the abduction of Sohrabuddin and his wife Kausarbi.

(ii) That the Mobile Call Detail Records pertaining to the case contained important piece of evidence not only against accused Shri Amit Shah (A-16), Minister of State (MoS), Government of Gujarat, but other police officers of Gujarat and Rajasthan, who worked at his behest to cover up the fake encounter that killed Tulsiram Prajapati on 28.12.2006.

60. The analysis of Mobile Call Details for the week in which the planning and execution of Tulsiram Prajapati's encounter took place, reflects furry of call exchanged by accused Shri Amit Shah (A-16), MoS, accused Shri D.G. Vanzara (A-1), DIG Border Range, accused Shri Rajkumar Pandian (A-2), SP, ATS, Shri Vipul Agarwal, SP, Banaskantha and accused Shri Dinesh MN (A-3), SP, Udaipur, Rajasthan, suggesting a s[illegible]e

the sole witness in the state-executed Sohrabuddin encounter.

67. Thus, in view of the aforesaid provision, it is eminently required in the interest of justice that the Tulsiram Prajapati fake encounter case be investigated and tried along with Sohrabuddin fake encounter case as the evidence procured so far shows that Tulsiram Prajapati's encounter took place as he was the prime witness to the Sohrabuddin's abduction. As such both these cold blooded murders are inter-connected, they ought not to be tried separately as it may give rise to conflicting findings, raise issues of issue estoppels and/or res judicata and end up derailing or frustrating the interest of justice."

26. As rightly pointed out, this was the stand of the CBI prior to passing of the order in the decision dated 08.04.2011 in W.P. (Crl.) No. 115 of 2007. As a matter of fact, based on the above assertion of the CBI, this Court, in the above matter, entrusted the investigation of Tulsiram Prajapati's killing also to the CBI. It is also not in dispute that the above extracted status reports were part of record of proceedings in W.P. (Crl.) No. 115 of 2007.

27. Mr. Mahesh Jethamalani, learned senior counsel for the petitioner-Amit Shah also brought to our notice that he was arrested in the first FIR and chargesheet dated 23.07.2010 and was further interrogated even on the question of alleged killing of Tulsiram Prajapati. It is also brought to our notice that when the petitioner-Amit Shah filed regular bail application, the CBI opposed the same contending that the alleged killing of Tulsiram Prajapati as a part of the same series of acts, viz., killing of Sohrabuddin and Kausarbi. The following objections were taken by the CBI while considering the bail application which are as under:-

"The applicant took several steps by systematically eliminating evidence of the murder of Sohrabuddin. One

witness after the other were killed either surreptitiously (Kausarbi) or another stage managed encounter (Tulsiram Prajapati)

38. Learned senior counsel Mr. Tulsi submitted that the case of the prosecution is that the applicant is part and parcel of the larger conspiracy in the killing of Sohrabuddin, his wife and Tulsiram Prajapati and also the conspiracy with regard to extortion of money."

All the above assertions by the CBI support the stand of the petitioner. It is also relevant to note the stand taken by the CBI and reliance placed on the same by this Court in the order dated 08.04.2011 in W.P. (Crl.) No. 115 of 2007, i.e., *Narmada Bai* (supra). The relevant excerpts are quoted verbatim hereunder:-

"2(g) It is the further case of the petitioner that the deceased being a key eye witness to the murder of Sohrabuddin and his wife Kausarbi, the team of Mr. D.G. Vanzara and others planned to do away with him to avoid his interrogation by Ms. Geeta Johri, Inspector General of Police. Hence, the petitioner has preferred this petition before this Court praying for direction to CBI to register an FIR and investigate the case.

(5) Stand of the CBI – respondent No.21:

(a) The investigation conducted in R.C. No. 4(S)/2010, Special Crime Branch, Mumbai, as per the directions of this Court in its order dated 12.01.2010, vide Writ Petition (Crl.) No. 6 of 2007 revealed that the alleged fake encounter of Tulsiram Prajapati on 28.12.2006 was done in order to eliminate him as he was the key witness in the criminal conspiracy of the abduction and killing of Sohrabuddin and Kausarbi by the powerful and the influential accused persons.....

(c) The murder of Tulsiram Pra n

28.12.2006, case was registered on 28.12.2006 and Gujarat CID commenced investigation on 22.03.2007. However, even after a lapse of 3 years, no action was taken against any of the accused. As directed by this Court, only on the investigation of Tulsiram Prajapati's case, the "larger conspiracy" would be established and the mandate and tasks assigned by this Court to the CBI would be accomplished both in letter and spirit towards the goal of a fair trial, upholding the rule of law. If Tulsiram Prajapati's fake encounter case is not transferred to the CBI for investigation, it may lead to issue-estoppel or res judicata against prosecution.

13. As pointed out by the learned counsel for the petitioner and the CBI, the said judgment records that there is strong suspicion that the 'third person' picked up with Sohrabuddin was Tulsiram Prajapati.

14. Pursuant to the said direction, the CBI investigated the cause of death of Sohrabuddin and his wife Kausarbi. The CBI, in their counter affidavit, has specifically stated that as per their investigation Tulsiram Prajapati was a key witness in the murder of Sohrabuddin and he was the 'third person' who accompanied Sohrabuddin from Hyderabad and killing of Tulsiram Prajapati was a part of the same conspiracy. It was further stated that all the records qua Tulsiram Prajapati's case were crucial to unearth the "larger conspiracy" regarding the Sohrabuddin's case which despite being sought were not given by the State of Gujarat.

15 vi) The CBI submitted two reports- Status Report No.1 on 30.07.2010 and a week thereafter, they filed the charge-sheet. In pursuance of the charge-sheet, accused No.16-Amit Shah was arrested on 25.07.2010 and released on bail by the High Court of Gujarat on 29.10.2010. The order releasing him on bail is subject matter of challenge in SLP (Crl.) No. 9003 of 2010. The

Status Report No.1, filed by the CBI before the Bench on 30.07.2010 informed the Court that Tulsiram Prajapati was abducted along with Sohrabuddin and Kausarbi and he was handed over to the Rajasthan Police.

17. Inasmuch as the present writ petition is having a bearing on the decision of the writ petiton filed by Rubabbuddin Sheikh and also the claim of the petitioner, the observations made therein, particularly, strong suspicion about the 'third person' accompanied Sohrabuddin, it is but proper to advert factual details, discussion and ultimate conclusion of this Court in Rubabbuddin Sheikh's case.

In Writ Petition No. 6 of 2007, Rubabbuddin Sheikh prayed for direction for investigation by the CBI into the alleged abduction and fake encounter of his brother Sohrabuddin by the Gujarat Police Authorities and also prayed for registration of an offence and investigation by the CBI into the alleged encounter of one Tulsiram Prajapati, a close associate of Sohrabuddin, who was allegedly used to locate and abduct Sohrabuddin and his wife Kasurbi, and was thus a material witness against the police personnel.

19. It is clear that the above judgment records that there was a strong suspicion that the 'third person' picked up with Sohrabuddin was Tulsiram Prajapati. It was also observed that the call records of Tulsiram were not properly analyzed and there was no justification for the then Investigation Officer – Ms. Geeta Johri to have walked out of the investigation pertaining to Tulsiram Prajapati. The Court had also directed the CBI to unearth "larger conspiracy" regarding the Sohrabuddin's murder. In such circumstances, we are of the view that those observations and directions cannot lightly be taken note of and it is the duty of the CBI to go into all the details as directed by the Court.

23. If we analyze the allegations of the State and other respondents with reference to the materials placed with the stand taken by the CBI, it would be difficult to accept it in its entirety. It is the definite case of the CBI that the abduction of Sohrabuddin and Kausarbi and their subsequent murders as well as the murder of Tulsiram Prajapati are one series of acts, so connected together as to form the same transaction under Section 220 of the Cr.P.C. As rightly pointed out by the CBI, if two parts of the same transaction are investigated and prosecuted by different agencies, it may cause failure of justice not only in one case but in other trial as well. It is further seen that there is substantial material already on record which makes it probable that the prime motive of elimination of Tulsiram Prajapati was that he was a witness to abduction of Sohrabuddin and Kausarbi.

37).....In view of various circumstances highlighted and in the light of the involvement of police officials of the State of Gujarat and police officers of two other States, i.e. Andhra Pradesh and Rajasthan, it would not be desirable to allow the Gujarat State Police to continue with the investigation, accordingly, to meet the ends of justice and in the public interest, we feel that the CBI should be directed to take the investigation.

28. The findings rendered by us in *Narmada Bai* (supra) clearly show the acceptance of the contentions raised by the CBI that killing of two individuals and killing of third person, viz., Tulsiram Prajapati were part of the very same conspiracy and in the same series of acts so connected together that they will have to be tried in one trial under Section 220 of the Code.

29. After the investigation of the second FIR, the CBI filed chargesheet dated 04.09.2012 wherein, among others, petitioner-Amit Shah was also arrayed as one of the accused. By pointing out various averments/assertions in the chargesheet dated 04.09.2012, learned senior counsel for the

petitioner pointed out that the CBI has merely conducted further investigation and it should be considered "supplementary chargesheet in the first FIR." The following stand of the CBI in the chargesheet dated 04.09.2012 are also relevant which are as under:-

"2.…The investigation established that it was in furtherance of a criminal conspiracy by the principal accused persons that Sohrabuddin was abducted and then murdered by showing it off as an encounter and further for the purpose of screening themselves from the legal consequences of their crime, the accused caused the disappearance of material witnesses to the pivotal fact of abduction of Sohrabuddin by murdering them, first his wife, Kauserbi and then Tulsiram Prajapati who was accompanying Sohrabuddin and his wife Kausarbi at the time they were abducted, and, who had in fact facilitated his abduction at the behest of accused D.G. Vanzara (A-2).....

4. Investigation of RC 4(S)/2010/SCB/Mumbai disclosed that the third person who was abducted along with Sohrabuddin and Kausarbi was Tulsiram Prajapati. The investigation further disclosed that he was a material witness/eye-witness to the abduction of Sohrabuddin and his wife and the same was within the knowledge of accused Amit Shah (A-1), D.G. Vanzara (A-2), S. Pandian Rajkumar (A-3) and Dinesh M.N. (A-4) and others.

6.4….In the meantime, in accordance with his clandestine agreement with Gujarat Police, Tulsiram Prajapati informed them in advance about the plan of Sohrabuddin to travel to Sangli from Hyderabad.

6.8 In pursuance of the criminal conspiracy to screen themselves from the legal consequences of the crime, the accused acted in concert with each other to keep Tulsiram Prajapati, a significant material eye witness to the abduction of Sohrabuddin and Ka d

policemen of Gujarat police under their continuing control and beyond the reach of others. Accordingly, Dinesh M.N. (A-4), the then SP Udaipur, who had also participated in the murder of Sohrabuddin on 26.11.2005, ensured by directing Rajasthan Police to detain Tulsiram Prajapati on the very same day i.e., 26.11.2005 for achieving the common object of keeping Tulsiram Prajapati under their control.

6.13 On 08.02.2006, Tulsiram Prajapati was brought from Central Jail, Udaipur to Ujjain, Madhya Pradesh. When he met Narmada Bai and Pawan Kumar Prajapati, he told them that he was under severe stress because he apprehended that the Gujarat and Rajasthan Police would kill him in a false encounter. He also confessed to them that Gujarat Police had used him for tracing and abducting Sohrabuddin and his wife. He had also expressed his apprehension that the police would kill him because he was a witness to the abduction of Sohrabuddin and his wife Kausarbi.

6.26…..With the object of shielding themselves from the grave implications of abduction and murder of Sohrabuddin and his wife Kausarbi, the accused expedited the pace of their criminal conspiracy as aforesaid to abduct and murder Tulsiram Prajapati as soon as possible.

6.34…..during the relevant period to show that they were acting in concert with each other in furtherance of the criminal conspiracy as aforesaid to murder Tulsiram Prajapati who was no longer under their control and further with the efforts being made by Inspector V.L. Solanki to examine him and record his statement with regard to the abduction of Sohrabuddin were anxious to expedite the criminal conspiracy towards its culmination point."

6.51….This establishes the fact that the country made

weapon was planted to cover up the murder of Tulsiram Prajapati in pursuance of a criminal conspiracy spanning more than a year and to show it as the result of a shootout/ an encounter.

6.54…..for participating in the criminal conspiracy as aforesaid and taking it towards its culmination point by murdering Tulsiram Prajapati…..

6.62…..by so doing had intentionally provided the requisite time needed by the co-accused to take the necessary efforts to cause disappearance of human witness Tulsiram Prajapati to their crime of abduction of Sohrabuddin and his wife precedent to their murders by murdering him as well and thereby had facilitated the criminal conspiracy towards its culmination point…..

6.69…..Besides this, accused Geetha Johri (A-18), in furtherance of a criminal conspiracy as aforesaid made all attempts to delink Tulsiram Prajapati case from the Sohrabuddin fake encounter case to establish that the third person who traveled with Sohrabuddin and Kausarbi in the bus in the night of 22/23.11.2005 and was abducted was somebody else and not Tulsiram Prajapati himself. She projected that the third person who was abducted along with Sohrabuddin and his wife Kauserbi was one Kalimuddin of Hyderabad in spite of the fact that she had knowledge that the third person was Tulsiram Prajapati as made know to her by her Investigating Officer V.L. Solanki….."

30. The above details mentioned in the chargesheet dated 04.09.2012 clearly show that what the CBI has conducted is mere 'further investigation' and the alleged killing of Tulsiram Prajapati was in continuance of and an inseparable part of the conspiracy which commenced in November, 2005 by abduction of Sohrabuddin, Kausarbi and Tulsiram Prajapati and which culminated into the final stage of alleg n

Prajapati who was kept under the control of accused police officers since he was a material eye-witness like Kausarbi. To put it straight, apart from the consistent stand of the CBI, the chargesheet dated 04.09.2012 itself is conclusive to show that the said chargesheet, in law and on facts, deserves to be treated as 'supplementary chargesheet in the first FIR'.

Legal aspects as to permissibility/impermissibility of second FIR :

31. Now, let us consider the legal aspects raised by the petitioner-Amit Shah as well as the CBI. The factual details which we have discussed in the earlier paragraphs show that right from the inception of entrustment of investigation to the CBI by order dated 12.01.2010 till filing of the charge sheet dated 04.09.2012, this Court has also treated the alleged fake encounter of Tulsiram Prajapati to be an outcome of one single conspiracy alleged to have been hatched in November, 2005 which ultimately culminated in 2006. In such circumstances, the filing of the second FIR and a fresh charge sheet for the same is contrary to the provisions of the Code suggesting that the petitioner was not being investigated, prosecuted and tried 'in accordance with law' .

32. This Court has consistently laid down the law on the issue interpreting the Code, that a second FIR in respect of an offence or different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. In *T.T. Anthony* (supra), this Court has categorically held that registration of second FIR (which is not a cross case) is violative of Article 21 of the Constitution. The following conclusion in paragraph Nos. 19, 20 and 27 of that judgment are relevant which read as under:

> "19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.
>
> 20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC.
>
> 27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be stru[illegible]e

cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narang case it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution."

The above referred declaration of law by this Court has never been diluted in any subsequent judicial pronouncements even while carving out exceptions.

33. Mr. Rawal, learned ASG, by referring *T.T. Anthony* (supra) submitted that the said principles are not applicable and relevant to the facts and circumstances of this case as the said judgment laid down the ratio that there cannot be two FIRs relating to the same offence or occurrence. Learned ASG further pointed out that in the present case, there are two distinct incidents/occurrences, inasmuch as one being the conspiracy relating to the murder of Sohrabuddin with the help of Tulsiram

Prajapati and the other being the conspiracy to murder Tulsiram Prajapati - a potential witness to the earlier conspiracy to murder Sohrabuddin. We are unable to accept the claim of the learned ASG. As a matter of fact, the aforesaid proposition of law making registration of fresh FIR impermissible and violative of Article 21 of the Constitution is reiterated, re-affirmed in the following subsequent decisions of this Court:

1. *Upkar Singh vs. Ved Prakash* (2004) 13 SCC 292
2. *Babubhai vs. State of Gujarat & Ors.* (2010) 12 SCC 254
3. *Chirra Shivraj vs. State of A.P.* AIR 2011 SC 604
4. *C. Muniappan vs. State of Tamil Nadu* (2010) 9 SCC 567.

In *C. Muniappan* (supra), this Court explained "consequence test", i.e., if an offence forming part of the second FIR arises as a consequence of the offence alleged in the first FIR then offences covered by both the FIRs are the same and, accordingly, the second FIR will be impermissible in law. In other words, the offences covered in both the FIRs shall have to be treated as a part of the first FIR. In the case on hand, in view of the principles laid down in the above referred decisions, in particular, *C. Muniappan* (supra) as well as in *Chirra Shivraj* (supra), apply with full force since according to the CBI itself it is the case where:-

(i) The larger conspiracy allegedly commenced in November, 2005 and culminated into the murder of Tulsiram Prajapati in December, 2006 in a fake encounter;

(ii) The alleged fake encounter of Tulsiram Prajapati was a consequence of earlier false encounter of Sohrabuddin and Kausarbi since Tulsiram

Prajapati was an eye witness to the abduction and consequent murders of Sohrabuddin and Kausarbi; and

(iii) Tulsiram Prajapati was allegedly kept under the control of accused police officers, as a part of the same conspiracy, till the time he was allegedly killed in a fake encounter.

In view of the factual situation as projected by the CBI itself, the ratio laid down by this Court in *C. Muniappan* (supra), viz., merely because two separate complaints had been lodged did not mean that they could not be clubbed together and one chargesheet could not be filed [See T.T. Anthony (supra)].

34. In view of the consistent stand taken by the CBI, at this juncture, CBI may not be permitted to adopt a contradictory stand.

35. Learned counsel for the petitioner has placed reliance on the following decisions of this Court which explained "same transaction":

(i) *Babulal vs. Emperor,* AIR 1938 PC 130

(ii) *S. Swamirathnam vs. State of Madras,* AIR 1957 SC 340

(iii) *State of A.P. vs. Kandimalla Subbaiah & Anr.,* AIR 1961 SC 1241

(iv) *State of A.P. vs. Cheemalapati Ganeswara Rao & Anr.,* AIR 1963 SC 1850

36. In *Babulal* (supra), the Privy Council has held that if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators), these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The

common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it.

37. In *Swamirathnam* (supra), the following conclusion in para 7 is relevant:

"7. On behalf of the appellant Abu Bucker it was contended that there has been misjoinder of charges on the ground that several conspiracies, distinct from each other, had been lumped together and tried at one trial. The Advocate for Swamirathnam, however, did not put forward this submission. We have examined the charge carefully and find no ground for accepting the contention raised. The charge as framed, discloses one single conspiracy, although spread over several years. There was only one object of the conspiracy and that was to cheat members of the public. The fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy did not change the conspiracy and did not split up a single conspiracy into several conspiracies. It was suggested that although the modus operandi may have been the same, the several instances of cheating were not part of the same transaction. Reliance was placed on the cast of Sharpurji Sorabji v. Emperor, AIR 1936 Bom 154 (A) and on the cast of Choragudi Venkatadari, In re. ILR 33 Mad 502 (B). These cases are not in point. In the Bombay case, no charge of conspiracy had been framed and the decision in the Madras case was given before Section 120-B was introduced into the Indian Penal Code. In the present case, the instances of cheating were in pursuance of the conspiracy and were therefore parts of the same transaction."

38. In *Kandimalla Subbaiah* (supra), this Court held where the alleged offence have been committed in the course of the same transaction, the limitation placed by Section 234(1) cannot operate.

39. In *Cheemalapati Ganeswara Rao* (supra), while considering the scope of Section 239 of the old Code (Section 220 in the new Code), this Court held:

"28. The decision of the Allahabad High Court in T.B. Mukherji case directly in point and is clearly to the effect that the different clauses of Section 239 are mutually exclusive in the sense that it is not possible to combine the provisions of two or more clauses in any one case and to try jointly several persons partly by applying the provisions of one clause and partly by applying those of another or other clauses. A large number of decisions of the different High Courts and one of the Privy Council have been considered in this case. No doubt, as has been rightly pointed out in this case, separate trial is the normal rule and joint trial is an exception. But while this principle is easy to appreciate and follow where one person alone is the accused and the interaction or intervention of the acts of more persons than one does not come in, it would where the same act is committed by several persons, be not only inconvenient but injudicious to try all the several parsons separately. This would lead to unnecessary multiplicity of trials involving avoidable inconvenience to the witnesses and avoidable expenditure of public time and money. No corresponding advantage can be gained by the accused persons by following the procedure of separte trials. Where, however, several offences are alleged to have been committed by several accused persons it may be more reasonable to follow the normal rule of separate trials. But here, again, if those offences are alleged not to be wholly unconnected but as forming part of the same transaction the only consideration that will justify separate trials would be the embarrassment or difficulty caused to the accused persons in defending themselves. We entirely agree with the High Court that joint trial should be founded on some "principle". ....

40. Learned ASG placed reliance on the following decisions:

(i) *Anju Chaudhary vs. State of U.P. & Anr.,* 2012(12) Scale 619

(ii) *Babubhai vs. State of Gujarat* (2010) 12 SCC 254

(iii) *Surender Kaushik & Ors. vs. State of U.P. & Ors.,* JT 2013 (3) SC 472

(iv) *Nirmal Singh Kahlon vs. State of Punjab* (2009) 1 SCC 441

(v) *Ram Lal Narang vs. State (Delhi Admn.),* (1979) 2 SCC 322

(vi) *Upkar Singh vs. Ved Prakash & Ors.* (2004) 13 SCC 292

(vii) *Kari Choudhary vs. Mst. Sita Devi & Ors.* (2002) 1 SCC 714.

41. In *Anju Chaudhary* (supra) this Court was concerned with a case in which the second FIR was not connected with the offence alleged in the first FIR. After carefully analyzing the same, we are of the view that it has no relevance to the facts of the present case.

42. In the case of *Babubhai* (supra), the very same Bench considered the permissibility of more than one FIR and the test of sameness. After explaining FIR under Section 154 of the Code, commencement of the investigation, formation of opinion under Sections 169 or 170 of the Code, police report under Section 173 of the Code and statements under Section 162 of the Code, this Court, has held that the Court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents having two or more parts of the same transaction. This Court further held that if the answer is in affirmative, the second FIR [illegible].

It was further held that in case the contrary is proved, where the version in the second FIR is different and is in respect of the two different incidents/crimes, the second FIR is permissible. This Court further explained that in case in respect of the same incident the accused in the first FIR comes forward with a different version or counterclaim, investigation on both the FIRs has to be conducted. It is clear from the decision that if two FIRs pertain to two different incidents/crimes, second FIR is permissible. In the light of the factual position in the case on hand, the ratio in that decision is not helpful to the case of the CBI.

43. The CBI has also placed reliance on a recent decision of this Court in *Surender Kaushik* (supra). A careful perusal of the facts which arose in the said case would disclose that three FIRs which formed the subject matter of the said case were registered by three different complainants. Two of the FIRs consisted of cross cases inasmuch as the complainant of the first FIR was accused in the other while the accused in the first FIR was the complainant in the second FIR. The third FIR was filed by a third person citing both the complainants of first two FIRs as accused persons. In view of the above peculiar facts situation arising in the said case that the second and third FIRs were not quashed by the High Court, which decision was upheld by this Court, we are satisfied that the said decision has no relevance to the facts of the present case.

44. In the case of *Nirmal Singh Kahlon* (supra), this Court has carved out an exception for filing a second FIR. As per the exception carved out in the said case, the second FIR lies in a case where the first FIR does not contain any allegations of criminal conspiracy. On the other hand, in the case on hand, the first FIR itself discloses an offence of alleged criminal conspiracy and it was this conspiracy which the CBI was directed to unearth in the judgment dated 12.01.2010 based on which the CBI filed its first FIR, hence, the CBI cannot place reliance on this judgment to justify the filing of the second FIR and a fresh charge sheet.

45. *Ram Lal Narang* (supra) was cited to be an authority carving out an exception to the general rule that there cannot be a second FIR in respect of the same offence. This Court, in the said decision, held that a second FIR would lie in an event when pursuant to the investigation in the first FIR, a larger conspiracy is disclosed, which was not part of the first FIR. In the case on hand, while entrusting the investigation of the case relating to the killing of Sohrabuddin and Kausarbi to the CBI, this Court, by order dated 12.01.2010, expressed a suspicion that Tulsiram Prajapati could have been killed because he was an eye witness to the killings of Sohrabuddin and Kausarbi.

46. The CBI also filed an FIR on 01.02.2010 based upon the aforesaid judgment dated 12.01.2010 and conducted the investigation reaching to a conclusion that conspiracy to kill Sohrabuddin and Kausarbi and conspiracy to kill Tulsiram Prajapati were part of the same transaction inasmuch as both these conspiracies were entered into from the very outset in November, 2005. Based upon its investigation, the CBI filed a status report (s) before this Court and an affidavit in Writ Petition (Crl.) No. 115 of 2007 bringing to the notice of this Court that killing of Tulsiram Prajapati was also a part of the same transaction and very same conspiracy in which killings of Sohrabuddin and Kausarbi took place and unless the CBI is entrusted with the investigation of Tulsiram case, it will not be able to unearth the larger conspiracy covered in the first FIR. The fact that even as per the CBI, the scope of conspiracy included alleged killing of Sohrabuddin and Kausarbi and alleged offence of killing of Tulsiram Prajapati and the same is unequivocally established by the order passed by this Court on 12.08.2010 in Writ Petition (Crl.) No. 6 of 2007 which is fortified by the status report dated 11.11.2011 filed by the CBI has already been extracted in paragraphs supra.

47. In the light of the factual details, since the entire larger conspiracy is covered in the first FIR dated 01.02.2010 and in the investigation of the said FIR, the CBI after investigating

Tulsiram Prajapati's encounter recorded a finding in supplementary charge sheet dated 22.10.2010 filed in the killings of Sohrabuddin and Kausarbi case that the said encounter was a fake one, we are satisfied that the decision in *Ramlal Narang* (supra) would not apply to the facts of the case on hand. Even otherwise, as pointed out by learned senior counsel for the petitioner, in *Ramlal Narang* (supra), the chargesheet filed pursuant to the first FIR was withdrawn which was a fact which weighed with this Court while delivering the judgment in the second case.

48. *Upkar Singh* (supra) also carves out a second exception to the rule prohibiting lodging of second FIR for the same offence or different offences committed in the course of the transaction disclosed in the first FIR. The only exception to the law declared in *T.T. Anthony* (supra), which is carved out in *Upkar Singh* (supra) is to the effect that when the second FIR consists of alleged offences which are in the nature of the cross case/cross complaint or a counter complaint, such cross complaint would not be permitted as second FIR. In the case on hand, it is not the case of the CBI that the FIR in Tulsiram Prajapati's case is a cross FIR or a counter complaint to the FIR filed in Sohrabuddin and Kausarbi's case being FIR dated 01.02.2010.

49. The ratio laid down in *Kari Choudhary's* case (supra) is heavily relied on by learned ASG appearing for the CBI. In that decision, it was held that when there are two rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency. While there is no quarrel as to the above proposition, after carefully considering the factual position, we are of the view that the said decision is not helpful to the case on hand.

Maintainability of writ petition under Article 32:

50. Regarding the maintainability, namely, filing a writ

petition under Article 32 of the Constitution of India, learned ASG submitted that it is only on complete examination and appreciation of facts, materials and evidence that it can be decided as to whether these distinct conspiracies form part of the same transaction in view of the law laid down by this Court. He further pointed out that the CBI which is the investigating agency, after a full fledged investigation, came to a conclusion that the conspiracy to eliminate Tulsiram Prajapati was a distinct and separate offence, accordingly, such disputed questions of fact are not and ought not to be decided in a writ petition under Article 32. He also pointed out that apart from the fact that there are sufficient remedies to raise such a plea under the Code before a court of competent jurisdiction, such disputed questions of fact can only be adjudicated after carefully examining and appreciating the evidence led in. It is also pointed out that there is no question of any prejudice suffered on account of prayer of the petitioner since if the offences are distinct and separate which is so emerging from the present case, there can neither be joint trial nor could the charge sheet filed in the present case be treated as supplementary charge sheet. As a concluding argument, Mr. Rawal, learned ASG submitted that this Court in exercise of its jurisdiction under Article 32 may not like to adjudicate such disputed questions of fact which require evidence to be led and its appreciation.

51. As against this, Mr. Mahesh Jethmalani, learned senior counsel for the petitioner submitted that the CBI is not faced with any prejudice which is to be caused to it, if the relief as prayed for by the petitioner is granted. Admittedly, the petitioner is not praying for quashing of the charge sheet dated 04.09.2012. During the course of argument, when this Court specifically put a question to learned ASG appearing for the CBI as to what prejudice would be caused to the CBI if instead of treating the charge sheet dated 04.09.2012 to be fresh and independent charge sheet, the same will be treated as a supplementary charge sheet in the first charge sheet, there was no definite answer as to what prejudice

CBI. For the sake of repetition, it is relevant to mention that in our order dated 08.04.2011 in *Narmada Bai* (supra), while disposing of the said writ petition, this Court directed the CBI to take up the investigation as prayed accepting their contention that killing of Tulsiram Prajapati is a part of the same series of acts in which Sohrabuddin and Kausarbi were killed and, therefore, Tulsiram Prajapati encounter should also be investigated by the CBI. Accepting the above assertion of the CBI, this Court directed to complete the investigation within six months.

Summary:

52. a) This Court accepting the plea of the CBI in *Narmada Bai* (supra) that killing of Tulsiram Prajapati is part of the same series of cognizable offence forming part of the first FIR directed the CBI to "take over" the investigation and did not grant the relief prayed for i.e., registration of a fresh FIR. Accordingly, filing of a fresh FIR by the CBI is contrary to various decisions of this Court.

(b) The various provisions of the Code of Criminal Procedure clearly show that an officer-in-charge of a police station has to commence investigation as provided in Section 156 or 157 of the Code on the basis of entry of the First Information Report, on coming to know of the commission of cognizable offence. On completion of investigation and on the basis of evidence collected, Investigating Officer has to form an opinion under Section 169 or 170 of the Code and forward his report to the concerned Magistrate under Section 173(2) of the Code.

(c) Even after filing of such a report, if he comes into possession of further information or material, there is no need to register a fresh FIR, he is empowered to make further investigation normally with the leave of the Court and where during further investigation, he collects further evidence, oral or documentary, he is obliged to forward the same with one or

more further reports which is evident from sub-section (8) of Section 173 of the Code. Under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of the Code, only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 of the Code. Thus, there can be no second FIR and, consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences.

(d) Further, on receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering FIR in the Station House Diary, the officer-in-charge of the police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Code. Sub-section (8) of Section 173 of the Code empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report (s) to the Magistrate. A case of fresh investigation based on the second or successive FIRs not being a counter case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is underway or final report under Section 173(2) has been forwarded to the Magistrate, is liable to be interfered with by the High Court by exercise of power under Section 482 of the Code or under Articles 226/227 of the Constitution.

(e) First Information Report is a report which gives first information with regard to any offence. There cannot be second FIR in respect of the same offence/event because whenever

any further information is received by the investigating agency, it is always in furtherance of the first FIR.

(f) In the case on hand, as explained in the earlier paras, in our opinion, the second FIR was nothing but a consequence of the event which had taken place on 25/26.11.2005. We have already concluded that this Court having reposed faith in the CBI accepted their contention that Tulsiram Prajapati encounter is a part of the same chain of events in which Sohrabuddin and Kausarbi were killed and directed the CBI to "take up" the investigation.

(g) For vivid understanding, let us consider a situation in which Mr. 'A' having killed 'B' with the aid of 'C', informs the police that unknown persons killed 'B'. During investigation, it revealed that 'A' was the real culprit and 'D' abetted 'A' to commit the murder. As a result, the police officer files the charge sheet under Section 173(2) of the Code with the Magistrate. Although, in due course, it was discovered through further investigation that the person who abetted Mr. 'A' was 'C' and not 'D' as mentioned in the charge sheet filed under Section 173 of the Code. In such a scenario, uncovering of the later fact that 'C' is the real abettor will not demand a second FIR rather a supplementary charge sheet under section 173(8) of the Code will serve the purpose.

(h) Likewise, in the case on hand, initially the CBI took a stand that the third person accompanying Sohrabbuddin and Kausarbi was Kalimuddin. However, with the aid of further investigation, it unveiled that the third person was Tulsiram Prajapati. Therefore, only as a result of further investigation, the CBI has gathered the information that the third person was Tulsiram Prajapati. Thus a second FIR in the given facts and circumstances is unwarranted; instead filing of a supplementary charge sheet in this regard will suffice the issue.

(i) Administering criminal justice is a two-end process, where guarding the ensured rights of the accused under

Constitution is as imperative as ensuring justice to the victim. It is definitely a daunting task but equally a compelling responsibility vested on the court of law to protect and shield the rights of both. Thus, a just balance between the fundamental rights of the accused guaranteed under the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. Accordingly, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences. As a consequence, in our view this is a fit case for quashing the second F.I.R to meet the ends of justice.

(j) The investigating officers are the kingpins in the criminal justice system. Their reliable investigation is the leading step towards affirming complete justice to the victims of the case. Hence they are bestowed with dual duties i.e. to investigate the matter exhaustively and subsequently collect reliable evidences to establish the same.

Conclusion:

53. In the light of the specific stand taken by the CBI before this Court in the earlier proceedings by way of assertion in the form of counter affidavit, status reports, etc. we are of the view that filing of the second FIR and fresh charge sheet is violative of fundamental rights under Article 14, 20 and 21 of the Constitution since the same relate to alleged offence in respect of which an FIR had already been filed and the court has taken cognizance. This Court categorically accepted the CBI's plea that killing of Tulsiram Prajapati is a part of the same series of cognizable offence forming part of the first FIR and in spite of the fact that this Court directed the CBI to "take over" the investigation and did not grant the relief as prayed, namely, registration of fresh FIR, the present action of CBI filing fresh FIR is contrary to various judicial pronouncements which is demonstrated in the earlier part of our judgment

54. In view of the above discussion and conclusion, the second FIR dated 29.04.2011 being RC No. 3(S)/2011/ Mumbai filed by the CBI is contrary to the directions issued in judgment and order dated 08.04.2011 by this Court in Writ Petition (Criminal) No. 115 of 2009 and accordingly the same is quashed. As a consequence, the charge sheet filed on 04.09.2012, in pursuance of the second FIR, be treated as a supplementary charge sheet in the first FIR. It is made clear that we have not gone into the merits of the claim of both the parties and it is for the trial Court to decide the same in accordance with law. Consequently, Writ Petition (Criminal) No. 149 of 2012 is allowed. Since the said relief is applicable to all the persons arrayed as accused in the second FIR, no further direction is required in Writ Petition (Criminal) No. 5 of 2013.

K.K.T. Writ Petition allowed.

DEVENDER PAL SINGH BHULLAR

v.

STATE OF N.C.T. OF DELHI

(Writ Petition (Criminal) D. No. 16039 of 2011)

APRIL 12, 2013

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Constitution of India, 1950:

Articles 72 and 161 – Petition under – For grant of pardon – Delay is disposal of – Whether sufficient ground for commuting the death sentence to life imprisonment by judicial forum – Held: The Court cannot exercise power of judicial review only on the ground of undue delay – the rule that long delay may be the ground for commutation of death sentence, cannot be invoked in the case where conviction is under TADA – In the present case, the petitioner having been convicted under TADA, the decision taken by the President not to grant pardon, cannot be quashed by taking resort to judicial review – Terrorist and Disruptive Activities (Prevention) Act, 1987.

Articles 72 and 161 – Power under – Nature of – Held: The power is neither a matter of grace nor a matter of privilege – It is an important constitutional responsibility to be discharged by the highest executive, keeping in consideration larger public interest and welfare of the people – The power has to be exercised by taking into cognizance, the relevant facts after taking aid and advice of the Council of Minister.

Articles 72 and 161 – Decision under – Judicial review of – Scope of – Held: The scope of judicial review of the decision passed u/Arts. 72/161 is very limited – The Court in such cases can neither sit in appeal nor exercise the power

of review – It can interfere only where it finds that the decision is taken without application of mind to the relevant factors, or the decision is founded on the extraneous or irrelevant considerations, or is vitiated due to malafides or patent arbitrariness – In the facts of the present case, there is no valid ground to interfere with the decision of the President not to grant pardon u/Art. 72 – Judicial Review.

Art. 72 – Petition under – Delay in disposal – About 18 petitions filed between the years 1999 and 2011 remained pending for a period ranging from 1 year to 13 years – Courts showed its concern with the hope that such petitions would be disposed of in future without undue delay.

The questions for consideration in the present petitions were:

(a) What is the nature of power vested in the President under Article 72 and the Governor under Article 161 of the Constitution?

(b) Whether delay in deciding a petition filed under Articles 72 or 161 of the Constitution is, by itself, sufficient for issue of a judicial fiat for commutation of the sentence of death into life imprisonment irrespective of the nature and magnitude of the crime committed by the convict and the fact that the delay may have been occasioned due to direct or indirect pressure brought upon the Government by the convict through individuals, groups of people and organizations from within or outside the country or failure of the concerned public authorities to perform their duty?

(c) Whether the parameters laid down by the Constitution Bench in Triveniben vs. State of Gujarat 1989 (1) SCR 509 for judging the issue of delay in the disposal of a petition filed under Articles 72 or 161 of the Constitution can be applied to the cases in which an accused has been found guilty of committing offences

under TADA and other similar statutes?

(d) What is the scope of the Court's power of judicial review of the decision taken by the President under Article 72 and the Governor under Article 161 of the Constitution, as the case may be?

Dismissing the petitions, the Court

HELD: 1. The power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is manifestation of prerogative of the State. It is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive, keeping in view the considerations of larger public interest and welfare of the people. While exercising power under Article 72, the President is required to act on the aid and advice of the Council of Ministers. In tendering its advice to the President, the Central Government is duty bound to objectively place the case of the convict with a clear indication about the nature and magnitude of the crime committed by him, its impact on the society and all incriminating and extenuating circumstances. The same is true about the State Government, which is required to give advice to the Governor to enable him to exercise power under Article 161 of the Constitution. On receipt of the advice of the Government, the President or the Governor, as the case may be, has to take a final decision in the matter. Although, he/she cannot overturn the final verdict of the Court, but in appropriate case, the President or the Governor, as the case may be, can after scanning the record of the case, form his/her independent opinion whether a case is made out for grant of pardon, reprieve, etc.. In any case, the President or the Governor, as the case may be, has to take cognizance of the relevant facts and then decide whether a case is made out for exercise

of power under Article 72 or 161 of the Constitution. [Para 22] [728-H; 729-A-F]

Maru Ram vs. Union of India **(1981) 1 SCC 107;** *Kehar Singh v. Union of India* **(1989) 1 SCC 204: 1988 Suppl 3 SCR 1102– followed.**

State (Govt. of NCT of Delhi) vs. Prem Raj **(2003) 7 SCC 121;** *EpuruSudhakar vs. Government of A.P.* **(2006) 8 SCC 161: 2006 (7) Suppl. SCR 81 – relied on.**

2.1. While imposing punishment for murder and similar type of offences, the Court is not only entitled, but is duty bound to take into consideration the nature of the crime, the motive for commission of the crime, the magnitude of the crime and its impact on the society, the nature of weapon used for commission of the crime, etc.. If the murder is committed in an extremely brutal or dastardly manner, which gives rise to intense and extreme indignation in the community, the Court may be fully justified in awarding the death penalty. If the murder is committed by burning the bride for the sake of money or satisfaction of other kinds of greed, there will be ample justification for awarding the death penalty. If the enormity of the crime is such that a large number of innocent people are killed without rhyme or reason, then too, award of extreme penalty of death will be justified. All these factors have to be taken into consideration by the President or the Governor, as the case may be, while deciding a petition filed under Article 72 or 161 of the Constitution and the exercise of power by the President or the Governor, as the case may be, not to entertain the prayer for mercy in such cases cannot be characterized as arbitrary or unreasonable and the Court cannot exercise power of judicial review only on the ground of undue delay. [Para 39] [749-C-G]

Machhi Singh vs. State of Punjab **(1983) 3 SCC 470:**

1983 (3) SCR 413; *Ediga Anamma vs. State of A.P.* **(1974) 4 SCC 443: 1974 (3) SCR 329;** *Sher Singh vs. State of Punjab* **(1983) 2 SCC 344;** *Triveniben vs. State of Gujarat* **(1989) 1 SCC 678: 1989 (1) SCR 509 – relied on.**

2.2. The rule that long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives. At times, their objective is to annihilate their rivals including the political opponents. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. While doing so, they do not show any respect for human lives. Before killing the victims, they do not think even for a second about the parents, wives, children and other near and dear ones of the victims. The families of those killed, suffer the agony for their entire life, apart from financial and other losses. It is paradoxical that the people who do not show any mercy or compassion for others, plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights. The present case is not a fit one for exercise of the power of judicial review for quashing the decision taken by the President not to commute the sentence of death imposed on the petitioner. [Paras 39 and 40] [749-B,

Madhu Mehta vs. Union of India **(1989) 3 SCR 775;** *Rajendra Prasad vs. State of U.P.* **(1979) 3 SCC 646: 1979 (3) SCR 78;** *Daya singh vs. Union of India* **(1991) 3 SCC 61: 1991 (2) SCR 462;** *Piare Dusadh vs. Emperor* **AIR 1944 FC 1;** *State of U.P. vs. Lalla Singh* **(1978) 1 SCC 142;** *Vivian Rodrick vs. State of Bengal* **(1971) 1 SCC 468: 1971 (3) SCR 546;** *Neiti Sreeramulu vs. State of Andhra Pradesh* **(1974) 3 SCC 314: 1973 (3) SCR 844;** *Bhagwan Bux Singh vs. State of U.P.* **(1978) 1 SCC 214;** *State of U.P. vs. Sahai* **(1982) 1 SCC 352;** *Sadhu Singh vs. State* **(1978) 4 SCC 428;** *Ediga Anamma vs. State of A.P.* **(1974) 4 SCC 443: 1974 (3) SCR 329;** *T.V. Vatheeswaran vs. State of Tamil Nadu* **(1983) 2 SCC 68: 1983 (2) SCR 348;** *K.P. Mohd. vs. Stateof Kerala* **1984 Supp. SCC 684;** *Sher Singh vs. State of Punjab* **(1983) 2 SCC 344 – referred to.**

Zimbabwe vs. Attorney General, Zimbabwe and Ors. **1993 (4) SA 239 (ZS);** *Riley vs. Attorney General of Jamaica* **(1983) 1 AC 719;** *Pratt vs. Attorney General of Jamaica* **(1994) 2 AC 1 – referred to.**

"The Death Penalty – A Worldwide Perspective" – The study conducted by Roger Hood and Carolyn Hoyle of the University of Oxford **– referred to.**

3.1. While examining challenge to the decision taken by the President under Article 72 or the Governor under Article 161 of the Constitution, as the case may be, the Court's power of judicial review of such decision is very limited. The Court can neither sit in appeal nor exercise the power of review, but can interfere if it is found that the decision has been taken without application of mind to the relevant factors or the same is founded on the extraneous or irrelevant considerations or is vitiated due to *malafides* or patent arbitrariness. [Para 41] [750-F-G]

Maru Ram vs. Union of India **(1981) 1 SCC 107;** *Kehar Singh vs. Union of India* **(1989) 1 SCC 204: 1988 (3) Suppl.**

SCR 1102; *Swaran Singh vs. State of U.P.* **(1998) 4 SCC 75: 1998 (2) SCR 206;** *Satpal vs. State of Haryana* **(2000) 5 SCC 170: 2000 (3) SCR 858;** *Bikas Chatterjee vs. Union of India* **(2004) 7 SCC 634;** *Narayan Dutt vs. State of Punjab* **(2011) 4 SCC 353: 2011 (4) SCR 983 – relied on.**

3.2. In the present case, the petitioner was convicted for killing 9 innocent persons and injuring 17 others. The designated Court found that the petitioner and other members of Khalistan Liberation Front were responsible for the blast. Their aim was to assassinate 'M.S.B', who escaped with minor injuries. The majority of this Court upheld the judgment of the designated Court. The finding recorded by the majority on the issue of the petitioner's guilt, is conclusive and, while deciding the issue whether the sentence of death awarded to the accused should be converted into life imprisonment, the Court cannot review such finding. [Paras 42 and 43] [751-B; 752-F]

3.3. It is true that there was considerable delay in disposal of the petition filed by the petitioner but, keeping in view the peculiar facts of the case, there is no valid ground to interfere with the ultimate decision taken by the President not to commute the sentence of death awarded to the petitioner into life imprisonment. The Court can take judicial notice of the fact that a substantial portion of the delay can well-nigh be attributed to the unending spate of the petitions on behalf of the petitioner by various persons to which reference has been made hereinabove. [Para 44] [752-G-H; 753-A]

3.4. The files produced before the Court show that the concerned Ministries had, after threadbare examination of the factors like the nature, magnitude and intensity of crime committed by the petitioner, the findings recorded by the designated Court and this Court as also the plea put forward by the petitioner and his supporters recommended that no e

shown to the person found guilty of killing 9 innocent persons and injuring 17 others by using 40 kgs. RDX. While making the recommendation, the Government had also considered the impact of such crimes on the public at large. Unfortunately, the petition filed by the petitioner remained pending with the President for almost 6 years, i.e., between May 2005 and May 2011. During this period, immense pressure was brought upon the Government in the form of representations made by various political and non-political functionaries, organizations and several individuals from other countries. This appears to be one of the reasons why the file remained pending in the President's Secretariat and no effort was made for deciding the petitioner's case. The figures made available through RTI inquiry reveal that during the particular period, a large number of mercy petitions remained pending with the President giving rise to unwarranted speculations. On its part, the Ministry of Home Affairs also failed to take appropriate steps for reminding the President's Secretariat about the dire necessity of the disposal of the pending petitions. What was done in April and May, 2011 could have been done in 2005 itself and that would have avoided unnecessary controversy. Thus, the delay in disposal of the petition filed by the petitioner under Article 72 does not justify review of the decision taken by the President in May 2011 not to entertain his plea for clemency. [Para 45] [753-B-H; 754-A]

3.5. Though the documents produced do give an indication that on account of prolonged detention in jail after his conviction and sentence to death, the petitioner has suffered physically and mentally, the same cannot be relied upon for recording a finding that the petitioner's mental health has deteriorated to such an extent that the sentence awarded to him cannot be executed. [Para 46] [754-B]

4. The statistics produced show that between 1950

and 2009, over 300 mercy petitions were filed of which 214 were accepted by the President and the sentence of death was commuted into life imprisonment. 69 petitions were rejected by the President. The result of one petition is obscure. However, about 18 petitions filed between 1999 and 2011 remained pending for a period ranging from 1 year to 13 years. This gives an impression that the Government and the President's Secretariat have not dealt with these petitions with requisite seriousness. The Court hopes and trusts that in future such petitions will be disposed of without unreasonable delay. [Para 47] [754-C-F]

Jagmohan Singh vs. State of U.P. **(1973) 1 SCC 20;** *Maneka Gandhi vs. Union of India* **(1978) 1 SCC 248: 1978 (2) SCR 621;** *Devender Pal Singh vs. State (NCT of Delhi),* **(2002) 5 SCC 234: 2002 (2) SCR 767;** *Kartar Singh vs. State of Punjab* **(1994) 3 SCC 569: 1994 (2) SCR 375;** *Javed Ahmed vs. State of Maharashtra* **(1985) 1 SCC 275: 1985 (2) SCR 8;** *State of U.P. vs. Suresh* **(1981) 3 SCC 653;** *Daya Singh vs. Union of India* **(1991) 3 SCC 61: 1991 (2) SCR 462;** *Shivaji Jaising Babar vs. State of Maharashtra* **(1991) 4 SCC 375;** *Jagdish vs. State of Madhya Pradesh* **(2009) 9 SCC 495: 2009 (14) SCR 727;** *State (Govt. of NCT of Delhi) vs. Prem Raj* **(2003) 7 SCC 121: 2003 (2) Suppl. SCR 235 – referred to.**

Furman vs. State of Georgia, **408 US 238;** *Henfield vs. Attorney General* **(1996) UKPK 36;** *Catholic Commission vs. Attorney General* **(2001) AHRLR (ZWSC 1993);** *Commonwealth vs. O'Neal* **(1975) 339 NE 2d 676;** *De Freitas vs. Benny* **(1976) AC 239;** *Biddle vs. Perovoch* **274 US 480;** *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General, Zimbabwe and Ors.* **(1993) 4 SA 239 (ZS) – referred to.**

Case Law Reference:

(1973) 1 SCC 20 **referr**

(1980) 2 SCC 684	**referred to**	**Para 5**
1978 (2) SCR 621	**referred to**	**Para 5**
1979 (3) SCR 78	**referred to**	**Para 5**
1983 (3) SCR 413	**referred to**	**Para 6**
1994 (2) SCR 375	**referred to**	**Para 8**
2002 (2) SCR 767	**referred to**	**Para 9.1**
1983 (2) SCR 348	**referred to**	**Para 10**
1984 Supp. SCC 684	**referred to**	**Para 10**
(1996) UKPK 36	**referred to**	**Para 10**
(2001) AHRLR (ZWSC 1993)	**referred to**	**Para 10**
(1975) 339 NE 2d 676	**referred to**	**Para 10**
(1976) AC 239	**referred to**	**Para 10**
1971 (3) SCR 546	**referred to**	**Para 10**
(1981) 3 SCC 653	**referred to**	**Para 10**
1973 (3) SCR 844	**referred to**	**Para 10**
(1978) 1 SCC 4	**referred to**	**Para 10**
(1978) 4 SCC 428	**referred to**	**Para 10**
1988 Suppl 3 SCR 1102	**followed**	**Para 11**
274 US 480	**referred to**	**Para 12**
(1983) 1 AC 719	**referred to**	**Para 12**
(1989) 3 SCR 775	**referred to**	**Para 13**
(1991) 4 SCC 375	**referred to**	**Para 13**
2009 (14) SCR 727	**referred to**	**Para 14**
1993 (4) SA 239 (ZS)	**referred to**	**Para 14**

(1981) 1 SCC 107	**followed**	**Para 18**
1988 (3) Suppl. SCR 1102	**followed**	**Para 19**
2003 (2) Suppl. SCR 235	**relied on**	**Para 20**
2006 (7) Suppl. SCR 81	**relied on**	**Para 21**
1974 (3) SCR 329	**referred to**	**Para 25**
AIR 1944 FC 1	**referred to**	**Para 25**
(1978) 1 SCC 142	**referred to**	**Para 25**
(1978) 1 SCC 214	**referred to**	**Para 25**
(1982) 1 SCC 352	**referred to**	**Para 25**
(1983) 2 SCC 344	**referred to**	**Para 29**
1985 (2) SCR 8	**referred to**	**Para 30**
1989 (1) SCR 509	**referred to**	**Para 31**
(1994) 2 AC 1	**referred to**	**Para 35**
1991 (2) SCR 462	**referred to**	**Para 36**
1991 (2) SCR 462	**referred to**	**Para 36**
(1981) 1 SCC 107	**relied on**	**Para 41**
1988 (3) Suppl. SCR 1102	**relied on**	**Para 41**
1998 (2) SCR 206	**relied on**	**Para 41**
2000 (3) SCR 858	**relied on**	**Para 41**
(2004) 7 SCC 634	**relied on**	**Para 41**
2006 (7) Suppl. SCR 81	**relied on**	**Para 41**
2011 (4) SCR 983	**relied on**	**Para 41**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl) D.No. 16039 of 2011.

Under Article 32 of the Constitution of India.

WITH

W.P. (Crl.) Nos. 146 & 86 of 2011.

K.T.S. Tulsi, Raj Kamal, Niraj Gupta, Paramjit Singh, Maheen Pradhan, Ravinder Singh, Gaurang Vardhan, Sudhakar Joshi, Nachiketa Joshi, Chaitanya Joshi for the Petitioner.

H.P. Raval, ASG, Sidhartha S. Dave, Ranjana Naryan, T.A. Khan S. Wasim A. Qadri, P.K. Dey, Harsh Parekh, Gargi Khanna, Shailender Saini, Shriniwas Khalap, Anirudh Sharma, B.K. Prasad, Anil Katiyar, Shreekant N. Terdal for the Respondent.

The Judgment of the Court was delivered by

G. S. SINGHVI, J. 1. Human life is perhaps the most precious gift of the nature, which many describe as the Almighty. This is the reason why it is argued that if you cannot give life, you do not have the right to take it. Many believe that capital punishment should not be imposed irrespective of the nature and magnitude of the crime. Others think that death penalty operates as a strong deterrent against heinous crimes and there is nothing wrong in legislative prescription of the same as one of the punishments. The debate on this issue became more intense in the second part of the 20th century and those belonging to the first school of thought succeeded in convincing the governments of about 140 countries to abolish death penalty.

2. In India, death was prescribed as one of the punishments in the Indian Penal Code, 1860 (IPC) and the same was retained after independence. However, keeping in view the old adage that man should be merciful to all living creatures, the framers of the Constitution enacted Articles 72 and 161 under which the President or the Governor, as the case may be, can grant pardons, reprieves, respites or remission

of punishment or suspend, remit or commute the sentence of any person convicted of any offence and as will be seen hereinafter, the President has exercised power under Article 72 in large number of cases for commutation of death sentence into life imprisonment except when the accused was found guilty of committing gruesome and/or socially abhorrent crime.

3. The campaign for the abolition of capital punishment led to the introduction of a Bill in the Lok Sabha in 1956 but the same was rejected on 23.11.1956. After two years, a similar resolution was introduced in the Rajya Sabha but, after considerable debate, the same was withdrawn. Another attempt was made in this regard in 1961 but the resolution moved in the Rajya Sabha was rejected in 1962. Notwithstanding these reversals, the votaries of 'no capital punishment' persisted with their demand. The Law Commission of India examined the issue from various angles and recommended that death penalty should be retained in the statute book. This is evinced from the 35th Report of the Law Commission, the relevant portions of which are extracted below:

> "The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.
>
> It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition nor does, the commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.
>
> Having regard, however, to the co[illegible]e

variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment."

4. The constitutionality of capital punishment was examined by the Constitution Bench in *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20. The facts of that case were that appellant Jagmohan Singh was convicted for the murder of Chhote Singh and was sentenced to death by the trial Court. The High Court confirmed the death sentence. Before this Court, the counsel for the appellant relied upon the judgment of the U.S. Supreme Court in *Furman v. State of Georgia,* 408 US 238 and argued that death penalty was per se unconstitutional. This Court distinguished that judgment by observing that even though the sentence of death was set aside by a majority of 5:4, only two of the five Judges, namely, Mr. Justice Brennan and Mr. Justice Marshall were of the opinion that in view of Eighth Amendment to the American Constitution, which forbade 'cruel and unusual punishments', the imposition of death penalty was unwarranted and the opinion of the third Judge, namely, Mr. Justice Douglas could not be read as advocating total abolition of capital punishment. The Constitution Bench then observed:

"So far as we are concerned in this country, we do not have, in our constitution any provision like the Eighth Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. Indeed what is cruel and unusual may, in conceivable circumstances, be regarded as unreasonable. But when we are dealing with punishments for crimes as prescribed by law we are confronted with a

serious problem. Not a few are found to hold that life imprisonment, especially, as it is understood in USA is cruel. On the other hand, capital punishment cannot be described as unusual because that kind of punishment has been with us from ancient times right up to the present day though the number of offences for which it can be imposed has continuously dwindled. The framers of our Constitution were well aware of the existence of capital punishment as a permissible punishment under the law. For example, Article 72(1)(*c*) provides that the President shall have power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence "in all cases where the sentence is a sentence of death". Article 72(3) further provides that "nothing in sub-clause (*c*) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force". The obvious reference is to Sections 401 and 402 of the Criminal Procedure Code. Then again Entries 1 and 2 in List III of the Seventh Schedule refer to Criminal Law and Criminal Procedure. In Entry No. 1 the entry Criminal Law is extended by specifically including therein "all matters included in the Indian Penal Code at the commencement of this Constitution". All matters not only referred to offences but also punishments—one of which is the death sentence. Article 134 gives a right of appeal to the Supreme Court where the High Court reverses an order of acquittal and sentences a person to death. All these provisions clearly go to show that the Constitution-makers had recognised the death sentence as a permissible punishment and had made constitutional provisions for appeal, reprieve and the like. But more important than these provisions in the Constitution is Article 21 which provides that no person shall be deprived of his life except according to procedure established by law. The implication is very clear. De s

constitutionally permissible if that is done according to procedure established by law. In the face of these indications of constitutional postulates it will be very difficult to hold that capital sentence was regarded per se unreasonable or not in the public interest."

(emphasis supplied)

5. The constitutional validity of Section 302 IPC, which prescribes death as one of the punishments, was considered by the Constitution Bench in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684. By a majority of 4:1, the Constitution Bench declared that Section 302 IPC was constitutionally valid. Speaking for the majority, Sarkaria, J. referred to the judgments of several countries, including India, opinions of Jurists and recorded his conclusion in the following words:

> "To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302 of the Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing

> crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware — as we shall presently show they were — of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302 of the Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19."

While dealing with the argument that Section 302 violates Article 21 of the Constitution, Sarkaria, J. referred to the judgment in *Maneka Gandhi v. Union of India* (1978) 1 SCC 248 and observed:

> "Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. Ther

indications, also, in the Constitution which show that the Constitution-makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code. Entries 1 and 2 in List III — Concurrent List — of the Seventh Schedule, specifically refer to the Indian Penal Code and the Code of Criminal Procedure as in force at the commencement of the Constitution. Article 72(1)(*c*) specifically invests the President with power to suspend, remit or commute the sentence of any person convicted of any offence, and also "in all cases where the sentence is a sentence of death". Likewise, under Article 161, the Governor of a State has been given power to suspend, remit or commute, inter alia, the sentence of death of any person convicted of murder or other capital offence relating to a matter to which the executive power of the State extends. Article 134, in terms, gives a right of appeal to the Supreme Court to a person who, on appeal, is sentenced to death by the High Court, after reversal of his acquittal by the trial court. Under the successive Criminal Procedure Codes which have been in force for about 100 years, a sentence of death is to be carried out by hanging. In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under Section 302 of the Penal Code, either per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile "the dignity of the individual" within the contemplation of the preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution."

(emphasis supplied)

Sarkaria, J. then considered the question whether the Court should lay down standards or norms for sentencing and answered the same in the negative by giving the following reasons:

> "Firstly, there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for a person convicted of a particular offence. According to Cessare Beccaria, who is supposed to be the intellectual progenitor of today's fixed sentencing movement, "crimes are only to be measured by the injury done to society". But the 20th Century sociologists do not wholly agree with this view. In the opinion of Von Hirsch, the "seriousness of a crime depends both on the harm done (or risked) by the act and degree of actor's culpability". But how is the degree of that culpability to be measured. Can any thermometer be devised to measure its degree? This is a very baffling, difficult and intricate problem.
>
> Secondly, criminal cases do not fall into set behavioristic patterns. Even within a single-category offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. "Simply in terms of blameworthiness or desert criminal cases are different from one another in ways that legislatures cannot anticipate, and limitations of language prevent the precise description of differences that can be anticipated." This is particularly true of murder. "There is probably no offence", observed Sir Ernest Cowers, Chairman of the Royal Commission, "that varies so widely both in character and in moral guilt a[illegible]n

the legal definition of murder". The futility of attempting to lay down exhaustive standards was demonstrated by this court in Jagmohan by citing the instance of the Model Penal Code which was presented to the American Supreme Court in McGoutha (1971) 402 US 183.

Thirdly, a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty.

Fourthly, standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation. When Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardise the sentencing discretion any further than that is encompassed by the broad contours delineated in Section 354(3), the court would not by overleaping its bounds rush to do what Parliament, in its wisdom, warily did not do."

The learned Judge also referred to the judgment in Jagmohan Singh's case and observed:

"In Jagmohan, this Court had held that this sentencing discretion is to be exercised judicially on well recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well recognised principles" the court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since Jagmohan — as we have discussed already — do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy

discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted *only* in gravest cases of extreme culpability; (2) In making choice of the sentence, in addition to the circumstances, of the offence, due regard must be paid to the circumstances of the offender, also.

xx xx xx xx xx xx

Pre-planned, calculated, cold-blooded murder has always been regarded as one of an aggravated kind. In Jagmohan, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer, J., speaking for the Bench in Ediga Anamma (1974) 4 SCC 443, in these terms:

> "The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence.""

The learned Judge then noted that in *Rajendra Prasad v. State of U.P.* (1979) 3 SCC 646, the majority judgment of the three-Judge Bench had completely reversed the view taken in *Ediga Anamma v. State of A.P.* (1974) 4 SCC 443 and observed:

> "It may be noted that this indicator for imposing the death sentence was crystallised in that case after paying due regard to the shift in legislative policy embodied in Section 354(3) of the Code of Criminal Procedure, 1973, although on the date of that decision (February 11, 1974), this provision had not come into force. In Paras Ram case (SLP(Crl.) Nos. 698 and 678 of 1953, decided on October, 1973) also, to which a reference has been made earlier, it was emphatically stated that a pe i-

social piety commits "blood-curdling butchery" of his child, fully deserves to be punished with death. In Rajendra Prasad, however, the majority (of 2:l) has completely reversed the view that had been taken in Ediga Anamma regarding the application of Section 354(3) on this point. According to it, after the enactment of Section 354(3), "murder most foul" is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. "Special reasons" necessary for imposing death penalty "must relate *not* to the crime as such but to the criminal".

With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard *both* to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

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In Rajendra Prasad, the majority said: "It is constitutionally permissible to swing a criminal out of corporeal existence *only* if the security of State and Society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)". Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and Society, public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302 of the Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its "ethos" nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of Section 302 of the Penal Code, fully apply to the case of Section 354(3), Code of Criminal Procedure, also. The same criticism applies to the view taken in *Bishnu Deo Shaw v. State of W.B.* (1979) 3 SCC 714 which follows the dictum in Rajendra Prasad."

6. Although, in Bachan Singh's case, the Constitution Bench upheld the constitutional validity of Section 302 IPC, it did not enumerate the types of cases in which death penalty should be awarded instead of life imprisonment. A three-Judge Bench considered this issue in *Machhi Singh v. State of Punjab* (1983) 3 SCC 470. M.P. Thakkar, J. wrote the judgment on behalf of the Bench with the following prelude:

"Protagonists of the "an eye for an eye" philosophy demand "death-for-death". The "Humanists" on the other hand press for the other extreme viz. "death-in-no-case". A synthesis has emerged in *Bachan Singh v. S*

the "rarest-of-rare-cases" formula for imposing death sentence in a murder case has been evolved by this Court. Identification of the guidelines spelled out in Bachan Singh in order to determine whether or not death sentence should be imposed is one of the problems engaging our attention, to which we will address ourselves in due course."

Thakkar, J. then noted that a feud between two families triggered five incidents in quick succession in five different villages resulting in death of 17 persons and approved the views expressed by the Sessions Court and the High Court that the appellants were guilty of committing heinous crimes. He then proceeded to observe:

"The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent of those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare

cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of commission of murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(*i*) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(*ii*) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(*iii*) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent

(*a*) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(*b*) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (*c*) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

The learned Judge then culled out the following propositions from the majority judgment in Bachan Singh's case:

"(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

7. The discussion on the subject would remain incomplete without a reference to the concurring judgment of Fazal Ali, J, who was a member of the Constitution Bench in *Maru Ram v. Union of India* (1981) 1 SCC 107. The main question considered in that case was whether Section 433A of the Code of Criminal Procedure, 1973 (Cr.P.C.) was violative of Article 14 of the Constitution and whether the provisions contained therein impinge upon the power vested in the President and the Governor under Articles 72 and 161 of the Constitution. While expressing his agreement with the main judgment authored by Krishna Iyer, J. on the scope of Section 433A

Cr.P.C., Fazal Ali, J. spelt out the following reasons for imposing deterrent sentences:

> "(1) to protect the community against callous criminals for a long time,
>
> (2) to administer as clearly as possible to others tempted to follow them into lawlessness on a war scale if they are brought to and convicted, deterrent punishment will follow, and
>
> (3) to deter criminals who are forced to undergo long-term imprisonment from repeating their criminal acts in future. Even from the point of view of reformative form of punishment "prolonged and indefinite detention is justified not only in the name of prevention but cure. The offender has been regarded in one sense as a patient to be discharged only when he responds to the treatment and can be regarded as safe" for the society."

The learned Judge then referred to the judgment in Bachan Singh's case and observed:

> "Taking into account the modern trends in penology there are very rare cases where the courts impose a sentence of death and even if in some cases where such sentences are given, by the time the case reaches this Court, a bare minimum of the cases are left where death sentences are upheld. Such cases are only those in which imposition of a death sentence becomes an imperative necessity having regard to the nature and character of the offences, the antecedents of the offender and other factors referred to in the Constitution Bench judgment of this Court in Bachan Singh v. State of Punjab. In these circumstances, I am of the opinion that the Parliament in its wisdom chose to act in order to prevent criminals committing heinous crimes from being released through easy remissions or substituted form of punishments without undergoing at least

> a minimum period of imprisonment of fourteen years which may in fact act as a sufficient deterrent which may prevent criminals from committing offences. In most parts of our country, particularly in the north, cases are not uncommon where even a person sentenced to imprisonment for life and having come back after earning a number of remissions has committed repeated offences. The mere fact that a long-term sentence or for that matter a sentence of death has not produced useful results cannot support the argument either for abolition of death sentence or for reducing the sentence of life imprisonment from 14 years to something less. The question is not what has happened because of the provisions of the Penal Code but what would have happened if deterrent punishments were not given. In the present distressed and disturbed atmosphere we feel that if deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals will be let loose endangering the lives of thousands of innocent people of our country. In spite of all the resources at its hands, it will be difficult for the State to protect or guarantee the life and liberty of all the citizens, if criminals are let loose and deterrent punishment is either abolished or mitigated. Secondly, while reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and sufferings which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences. Where one person commits three murders it is illogical to plead for the criminal and to argue that his life should be spared, without at all considering what has happened to the victims and their family. A person who has deprived another person completely of his liberty for ever and has endangered the liberty of his family has no right to ask the court to uphold his liberty. Liberty is not a one-sided concept, nor does Article 21 [illegible]n

contemplate such a concept. If a person commits a criminal offence and punishment has been given to him by a procedure established by law which is free and fair and where the accused has been fully heard, no question of violation of Article 21 arises when the question of punishment is being considered. Even so, the provisions of the Code of Criminal Procedure of 1973 do provide an opportunity to the offender, after his guilt is proved, to show circumstances under which an appropriate sentence could be imposed on him. These guarantees sufficiently comply with the provisions of Article 21. Thus, it seems to me that while considering the problem of penology we should not overlook the plight of victimology and the sufferings of the people who die, suffer or are maimed at the hands of criminals."

(emphasis supplied)

8. Even after the judgments in Bachan Singh's case and Machhi Singh's case, Jurists and human rights activists have persisted with their demand for the abolition of death penalty and several attempts have been made to persuade the Central Government to take concrete steps in this regard. It is a different story that they have not succeeded because in recent years the crime scenario has changed all over the world. While there is no abatement in the crimes committed due to personal animosity and property disputes, people across the world have suffered on account of new forms of crimes. The monster of terrorism has spread its tentacles in most of the countries. India is one of the worst victims of internal and external terrorism. In the last three decades, hundreds of innocent lives have been lost on account of the activities of terrorists, who have mercilessly killed people by using bullets, bombs and other modern weapons. While upholding the constitutional validity of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) in *Kartar Singh v. State of Punjab* (1994) 3 SCC 569, this Court took cognizance of the spread of terrorism in the world in general and in India in particular, in the following words:

"From the recent past, in many parts of the world, terrorism and disruption are spearheading for one reason or another and resultantly great leaders have been assassinated by suicide bombers and many dastardly murders have been committed. Deplorably, determined youths lured by hard-core criminals and underground extremists and attracted by the ideology of terrorism are indulging in committing serious crimes against the humanity. In spite of the drastic actions taken and intense vigilance activated, the terrorists and militants do not desist from triggering lawlessness if it suits their purpose. In short, they are waging a domestic war against the sovereignty of their respective nations or against a race or community in order to create an embryonic imbalance and nervous disorder in the society either on being stimulated or instigated by the national, transnational or international hard-core criminals or secessionists etc. Resultantly, the security and integrity of the countries concerned are at peril and the law and order in many countries is disrupted. To say differently, the logic of the cult of the bullet is hovering the globe completely robbing off the reasons and rhymes. Therefore, every country has now felt the need to strengthen vigilance against the spurt in the illegal and criminal activities of the militants and terrorists so that the danger to its sovereignty is averted and the community is protected.

Thus, terrorism and disruptive activities are a worldwide phenomenon and India is not an exception. Unfortunately in the recent past this country has fallen in the firm grip of spiralling terrorists' violence and is caught between the deadly pangs of disruptive activities. As seen from the Objects and Reasons of the Act 31 of 1985, "Terrorists had been indulging in wanton killings, arson, looting of properties and other heinous crimes mostly in Punjab and Chandigarh" and then slowly they expanded their activities to other parts of the country i.e. Delhi, Haryana, U.P. and Rajasthan. At present they have out

by spreading their wings far and wide almost bringing the major part of the country under the extreme violence and terrorism by letting loose unprecedented and unprovoked repression and disruption unmindful of the security of the nation, personal liberty and right, inclusive of the right to live with human dignity of the innocent citizens of this country and destroying the image of many glitzy cities like Chandigarh, Srinagar, Delhi and Bombay by strangulating the normal life of the citizens. Apart from many skirmishes in various parts of the country, there were countless serious and horrendous events engulfing many cities with blood-bath, firing, looting, mad killing even without sparing women and children and reducing those areas into a graveyard, which brutal atrocities have rocked and shocked the whole nation.

Everyday, there are jarring pieces of information through electronic and print media that many innocent, defenceless people particularly poor, politicians, statesmen, government officials, police officials, army personnel inclusive of the jawans belonging to Border Security Force have been mercilessly gunned down. No one can deny these stark facts and naked truth by adopting an ostrich like attitude completely ignoring the impending danger. Whatever may be the reasons, indeed there is none to deny that."

THE FACTS:

9. We shall now advert to the facts necessary for disposing the above noted writ petitions, one of which was jointly filed by Shri Devender Pal Singh Bhullar (hereinafter referred to as 'the petitioner'), who was convicted by the designated Court, Delhi for various offences under TADA and IPC and Delhi Sikh Gurdwara Management Committee. Later on, the Court accepted the oral request made by learned senior counsel for the petitioners and deleted the name of petitioner No.2 from the array of parties. The other writ petition has been filed by

the wife of the petitioner and the third has been filed by Justice on Trial Trust, a non-Government organization registered under the Bombay Public Trusts Act, 1950.

9.1. After obtaining the degree of Bachelor of Engineering from Guru Nanak Engineering College, Ludhiana in 1990, the petitioner joined as a teacher in the same college. He was suspected to be involved in the terrorist activities in Punjab and it is said that he was responsible for an attempt made on the life of Shri Sumedh Singh Saini, the then Senior Superintendent of Police, Chandigarh on 29.8.1991. Shri Saini's car was blasted by remote control resulting in the death of some of his security guards. The petitioner was also suspected to be responsible for an attack on the car cavalcade of the then President of Youth Congress Maninderjit Singh Bitta, in Delhi on 10.9.1993. As a result of the blast caused by using 40 kgs. RDX, 9 persons were killed and 17 were injured. Apprehending his arrest and possible elimination by the police as is alleged to have been done in the case of his father, uncle and friend Balwant Singh Multani, the petitioner decided to go to Canada. However, on the basis of information supplied by the Indian authorities, he was taken into custody at Frankfurt Airport and deported to India. He was charged with offences under Sections 419, 420, 468 and 471 IPC, Section 12 of the Passports Act, 1967 and Sections 2, 3 and 4 TADA. The designated Court, Delhi found him guilty and sentenced him to death. The appeal filed by him was dismissed by this Court vide judgment titled *Devender Pal Singh v. State (NCT of Delhi),* (2002) 5 SCC 234. The review petition filed by the petitioner was also dismissed by this Court vide order dated 17.12.2002.

9.2. Soon after dismissal of the review petition, the petitioner submitted petition dated 14.1.2003 to the President under Article 72 of the Constitution and prayed for commutation of his sentence. Delhi Sikh Gurdwara Management Committee sent letters dated 28.1.2003 to the then President, Dr. A.P.J. Abdul Kalam; the then Prime Minister, [illegible]ai

and the former Prime Minister, Shri H.D. Deve Gowda asking for a meeting with them in connection with commutation of the death sentence awarded to the petitioner. After three years, Delhi Sikh Gurdwara Management Committee submitted representations dated 6.4.2006 and 29.9.2006 to Dr. A.P.J. Abdul Kalam and the Prime Minister Dr. Manmohan Singh and reiterated their demand for a meeting. In the letter sent to Dr. Manmohan Singh, it was mentioned that the Governments of Germany and Canada had made strong representation for clemency. It was also pointed out that Germany has already abolished death penalty and in terms of Section 34C of the Extradition Act, 1962, death penalty cannot be imposed if the laws of the State which surrenders or returns the accused do not provide for imposition of death penalty for such crime. The Committee also made a mention of large number of representations made by the Sikh community, particularly those settled in Canada, for grant of clemency to the petitioner.

9.3. During the pendency of the petition filed under Article 72, the petitioner filed Curative Petition (Crl.) No. 5 of 2003, which was dismissed by this Court on 12.3.2003.

9.4. The files produced by the learned Additional Solicitor General show that even before the petition filed by the petitioner could be processed by the Ministry of Home Affairs, Government of India, the President's Secretariat forwarded letter dated 25.12.2002 sent by Justice A.S. Bains (Retd.), Chairman, Punjab Human Rights Organization and others in the name of 'Movement Against State Repression, Chandigarh', for commutation of death sentence awarded to the petitioner on the ground that in the case of Abu Salem, the Government of India had given an assurance to the Government of Portugal that on his deportation, Abu Salem will not be awarded death penalty.

9.5. In April 2003, the President's Secretariat forwarded to the Ministry of Home Affairs, the petitions received from the following personalities for showing clemency to the petitioner:

(1) Mr. David Kilgour, Secretary of State (Asia Pacific);

(2) Department of Foreign Affairs and International Trade, Canada;

(3) Congress of the United States, Washington;

(4) Mr. Tony Baldry, MP, House of Commons, London;

(5) Shri Ram Jethmalani, M.P. (Rajya Sabha);

(6) Shri Justice A.S. Bains, former Judge and Convenor, Devinderpal Singh Bhullar Defence Committee; and

(7) Shri Simranjit Singh Mann, M.P. (Lok Sabha).

9.6. On 3.6.2003, the Ministry of External Affairs forwarded two communications received by it from the Greek Ambassador, in his capacity as President of the European Union Ambassador in New Delhi, who conveyed the European Union's strong conviction against the death sentence and pleaded for clemency in favour of the petitioner. Similar communications were sent by Mr. Jean Lamberti, Member European Parliament, Brussels, and various Sikh forums/ organizations from Punjab and U.K.

9.7. After the matter was processed at different levels of the Government, in the backdrop of internal and external pressures, the case was finally submitted to the President on 11.7.2005 with the recommendation that the mercy petition of the petitioner be rejected. It is not borne out from the record as to what happened for the next five years and nine months, but this much is evident that no decision was taken by the President.

9.8. On 29.4.2011, the Ministry of Home Affairs sent a request to the President's Secretariat to return the file of the petitioner. On 6.5.2011, the file was withdrawn from the President's Secretariat for reviewing the petitioner's case. The matter was again examined in the Minis[illegible]d

on 10.5.2011, the then Home Minister opined that those convicted in the cases of terrorism do not deserve any mercy or compassion and accordingly recommended that the sentence of death be confirmed. The President accepted the advice of the Home Minister and rejected the mercy petition. The petitioner was informed about this vide letter dated 13.6.2011 sent by Deputy Secretary (Home) to the Jail Authorities. The relevant portion of the decision taken by the President, which was incorporated in letter dated 30.5.2011 sent by Joint Secretary (Judicial), Ministry of Home Affairs, Government of India to the Principal Secretary, Home Department, Government of NCT of Delhi, reads as under:

> "The President of India has, in exercise of the powers under Article 72 of the Constitution of India, been pleased to reject the mercy petition submitted by the condemned prisoner Devender Pal Singh and petitions on his behalf from others. The prisoner may be informed of the orders of the President act accordingly."

9.9. After rejection of his petition by the President, the petitioner sought leave of the Court and was allowed to amend the writ petition and make a prayer for quashing communication dated 13.6.2011.

9.10. While issuing notice of Writ Petition (Criminal) D. No.16039 of 2011 (unamended), this Court directed the respondent to clarify why the petitions made by the petitioner had not been disposed of for more than 8 years. In compliance of the Court's directive, Shri B.M. Jain, Deputy Secretary (Home) filed short affidavit dated 19/21.7.2011. Subsequently, Shri J. L. Chugh, Joint Secretary, Ministry of Home Affairs, filed detailed affidavit, paragraphs 7 and 8 of which are extracted below:

> "7. Since the Mercy Petitions remained pending consideration of the President's Secretariat a request was made by the Ministry of Home Affairs on 20.04.2011 for withdrawal of the file of the mercy petition from President's Secretariat for review of this case for consideration of the Hon'ble President of India. The file was received by the Ministry of Home Affairs on 03.05.2011 from the President's Secretariat and after reexamination of the case the file was again submitted on 10.05.2011 to the President's Secretariat for decision of the Hon'ble President of India. Finally the Hon'ble President was pleased to reject the Mercy Petition of the petitioner on 25.05.2011. It is submitted that the file of the Mercy Petition along with decision of the Hon'ble President was received by the M/o Home Affairs on 27.05.2011 and the M/o Home Affairs communicated the decision of the Hon'ble President to the GNCT of Delhi on 30.05.2011. The details of cases of mercy petitions submitted to President's Secretariat and decided are as under:

	Tenure	Cases submitted/ resubmitted to the President's Secretariat	Decision Arrived
NDA	(March 1998 to May 2004)	14	0
UPA I	(May 2004 to April 2009)	28	2
UPA II	(May 2009 to 30.9.2011)	25	13

> 8. With reference to the above figure, it is submitted that there were 28 Mercy petitions of death convicts pending under Article 72 of the Constitution in October 2009. Two cases were received in November 2009 and two new Mercy Petition cases have been received in 2011 (till 30th September, 2011). This makes the total number of Mercy Petitions 32 as on 30.09.2011. After the new Government was formed in May 2009, in Se[illegible]s

decided to recall the cases pending with the President's Secretariat for review in the Ministry of Home Affairs, to assist in expediting a decision by the President of India in each case. The cases were recalled from President's Secretariat one-by-one, on the basis of the date of trial court judgment and were resubmitted to the President's Secretariat after review. Recalling of the cases was not under a Constitutional provision but an administrative decision to ensure a fair and equal treatment of all cases and to assist in expediting a decision by the Hon'ble President. Till 30.09.2011, 25 Mercy Petition were resubmitted/submitted to the President's Secretariat. The Hon'ble President decided one Mercy Petition in November 2009, four Mercy Petitions in 2010 and eight Mercy Petitions in 2011 (till 30th September, 2011). Therefore, a total of 13 Mercy Petitions have been decided by the President since November 2009. Presently, 19 Mercy Petitions are pending under Article 72 of the Constitution; out of which 14 are pending with President's Secretariat and five are pending with Ministry of Home Affairs (including the two new mercy petitions which have been received in 2011)."

ARGUMENTS:

10. Shri K.T.S. Tulsi, learned senior counsel for the petitioner relied upon the judgments in *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68, *K.P. Mohd. v. State of Kerala* 1984 Supp. SCC 684 and *Javed Ahmed v. State of Maharashtra* (1985) 1 SCC 275 and argued that 8 years' delay in the disposal of mercy petition should be treated as sufficient for commutation of death sentence into life imprisonment. Shri Tulsi also referred to the judgments in *Peter Bradshaw v. Attorney General* Privy Council Appeal Nos. 36 of 1993, Court of Appeal, *Barbados, Henfield v. Attorney General* (1996) UKPK 36, *Catholic Commission v. Attorney General* (2001) AHRLR (ZWSC 1993), *Commonwealth v. O'Neal* (1975) 339

NE 2d 676 and *De Freitas v. Benny* (1976) AC 239 and argued that even though the judgments of other jurisdictions are not binding on this Court, the propositions laid down therein can provide useful guidance for proper understanding of the ambit and scope of the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution. Shri Tulsi then referred to the judgments in *Vivian Rodrick v. State of Bengal* (1971) 1 SCC 468, *State of U.P. v. Suresh* (1981) 3 SCC 653, *Neiti Sreeramulu v. State of Andhra Pradesh* (1974) 3 SCC 314, *State of U.P. v. Lala Singh* (1978) 1 SCC 4 and *Sadhu Singh v. State* (1978) 4 SCC 428 to show that this Court has ordered commutation of death sentence where the delay was between one and seven years. Learned senior counsel invited our attention to the information obtained from Rashtrapati Bhawan under the Right to Information Act, 2005 and argued that long delay on the President's part in deciding the mercy petitions is inexplicable. He emphasized that 8 years' delay has seriously affected the petitioner's health, who has become mentally sick and this should be treated as an additional factor for commutation of death sentence awarded to him. In support of this submission, Shri Tulsi relied upon the records of Deen Dayal Upadhyay Hospital, Hari Nagar, New Delhi and the Institute of Human Behaviors And Allied Sciences, Delhi as also certificate dated 2.9.2011 issued by Dr. Rajesh Kumar, Associate Professor in Psychiatry at the Institute. In the end, Shri Tulsi made an appeal that the Court should take a sympathetic view in the petitioner's case because there is a sea change in the situation in Punjab.

11. Shri Ram Jethmalani, learned senior counsel, who assisted the Court as an Amicus extensively referred to the judgments in Vatheeswaran's case, K.P. Mohd.'s case and Javed Ahmed's case and argued that the rejection of the petition filed by the petitioner should be quashed because there was unexplained delay of 8 years. Learned senior counsel forcefully argued that the judgment in *Triveniben v. State of Gujarat* (1989) 1 SCC 678 does not

because the Bench which decided the matter did not notice the judgment of another Constitution Bench in *Kehar Singh v. Union of India* (1989) 1 SCC 204. Learned senior counsel pointed out that while deciding the petition filed under Article 72 of the Constitution, the President can independently consider the issue of guilt of the accused and accept the mercy petition without disturbing the finding recorded by the Court. Shri Jethmalani submitted that attention of the Bench which decided Triveniben's case does not appear to have been drawn to the views expressed in other judgments that in cases where the accused is convicted for murder, life imprisonment is the normal punishment and death penalty can be inflicted only in the rarest of rare cases, which involve extraordinary brutality in the commission of the crime or other aspects of heinousness. Learned senior counsel then argued that delay in deciding a mercy petition filed under Article 72 or Article 161 of the Constitution due to executive indifference or callousness or other extraneous reasons should always be treated as sufficient for commutation of death sentence into life imprisonment.

12. Shri Andhyarujina, learned senior counsel, who also assisted the Court as an Amicus commenced his submissions by pointing out that the power reposed in the President under Article 72 and the Governor under Article 161 of the Constitution is not a matter of grace or mercy, but is a constitutional duty of great significance and the same has to be exercised with great care and circumspection keeping in view the larger public interest. He referred to the judgment of the *U.S. Supreme Court in Biddle v. Perovoch* 274 US 480 as also the judgments of this Court in *Kehar Singh's* case and *Epuru Sudhakar v. Government of A.P.* (2006) 8 SCC 161 and submitted that the power to grant pardon etc. is to be exercised by the President not only for the benefit of the convict, but also for the welfare of the people. Learned senior counsel submitted that inordinate delay in disposal of a petition filed under Article 72 or 161 is cruel, inhuman and degrading. He relied upon a passage from

the book titled "The Death Penalty" A Worldwide Perspective by Roger Hood & Carolyne Hoyle 4th Ed. Pages 175-186 and submitted that keeping a convict in suspense for years together is totally unjustified because it creates adverse physical conditions and psychological stress on the convict under sentence of death. Shri Andhyarujina relied on *Riley v. Attorney General of Jamaica* (1983) 1 AC 719, *Pratt v. Attorney General of Jamaica* (1994) 2 AC 1 and argued that except in cases involving delay by or on behalf of the convict, the Court should always lean in favour of commutation of death sentence. Learned senior counsel lamented that in a large number of cases, the President did not decide the petitions filed under Article 72 and, therefore, the Court should consider the desirability of ordering commutation of death sentence in all such cases.

13. Shri Shyam Divan, Senior Advocate, who appeared for the petitioner in SLP(Crl.) No.1105 of 2012 submitted that if delay in completion of the proceedings is considered as a relevant factor by the High Courts and this Court for converting the death sentence into life imprisonment, delay in the execution of the death sentence should be treated by the President as sufficient for invoking the power vested in him under Article 72 of the Constitution for grant of pardon. In support of his submissions, Shri Divan relied upon the judgments in *Vivian Rodrick'* case, *Madhu Mehta v. Union of India* (1989) 3 SCR 775, *Daya Singh v. Union of India* (1991) 3 SCC 61 and *Shivaji Jaising Babar v. State of Maharashtra* (1991) 4 SCC 375.

14. Shri K.V. Vishwanathan, learned senior counsel, who argued on behalf of the intervenor, PUDR, submitted that the attempt made by the respondent to equate the delay in judicial processes and the delay in executive processes should be rejected in view of the judgment in Triveniben's case because there is a marked qualitative difference between the judicial and executive processes. Learned senior c[illegible]at

when a matter remains pending before the Court, the State and the accused take adversarial positions and submit their dispute before the judiciary for resolution whereas under the clemency jurisdiction, the accused pleads for mercy before the same party that prosecuted him. Learned senior counsel emphasized that there is an element of total submissiveness and surrender when mercy/pardon is sought by the accused and there is no adversarial role at this stage. Shri Vishwanathan relied upon the minority judgment of the Privy Council in *Noel Riley v. Attorney General* (supra) and argued that the prolonged incarceration of a death row convict under the guise that the mercy petitions are pending disposal or due to gross delay in disposal of mercy petitions renders the sentence of death in-executable. Learned senior counsel pointed out that India is a signatory to a number of International Covenants and Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenants on Civil and Political Rights state that no-one should be subjected to cruel, inhuman or degrading treatment or punishment and submitted that long incarceration awaiting a verdict on a condemned prisoner's mercy petition amounts to cruel and inhuman treatment of such prisoner, which amounts to violation of these Covenants. Learned senior counsel also referred to the memorandum of the Ministry of Home Affairs relating to "Procedure regarding petitions for mercy in death sentence cases" and submitted that various clauses thereof recognise the need for handling the disposal of mercy petitions with utmost expedition and speed. In support of his argument that delay should be treated as sufficient for commutation of death sentence into life imprisonment, Shri Vishwanathan relied upon the judgments of this Court in *Madhu Mehta's* case and *Jagdish v. State of Madhya Pradesh* (2009) 9 SCC 495 and a judgment from Zimbabwe being Catholic Commission for Justice and Peace in *Zimbabwe v. Attorney General, Zimbabwe & Ors.* 1993 (4) SA 239 (ZS).

15. Shri Harin P. Raval, learned Additional Solicitor General emphasized that the disposal of petitions filed under

Articles 72 and 161 of the Constitution requires consideration of various factors, i.e., the nature of crime, the manner in which the crime is committed and its impact on the society and that the time consumed in this process cannot be characterised as delay. Shri Raval pointed out that the petitions filed by and on behalf of the petitioner were considered at various levels of the Government in the light of the representations made by various individuals including public representatives from within and outside the country apart from different organizations all of whom had espoused his cause and, therefore, it cannot be said that there was undue delay in the disposal of the petition. Learned Additional Solicitor General then submitted that no time frame can be fixed for the President to decide the petitions filed under Article 72 and delay cannot be a ground for commuting the death sentence imposed on the petitioner ignoring that he was convicted for a heinous crime of killing nine innocent persons. He relied upon the proposition laid down by the Constitution Bench in Triveniben's case that no fixed period of delay in the disposal of petitions filed under Article 72 or 161 can be judicially prescribed to make the sentence of death in-executable and argued that the contrary views expressed by smaller Benches in Vatheeswaran's case and Javed Ahmed's case should be declared as not laying down correct law.

16. The arguments of the learned counsel for the parties/ intervenor and the learned Amicus have given rise to the following questions:

(a) What is the nature of power vested in the President under Article 72 and the Governor under Article 161 of the Constitution?

(b) Whether delay in deciding a petition filed under Article 72 or 161 of the Constitution is, by itself, sufficient for issue of a judicial fiat for commutation of the sentence of death into life imprisonment irrespective of the nature and magnitude of the crime committed by the convict and the fact that the delay may have been o[illegible]ct

or indirect pressure brought upon the Government by the convict through individuals, groups of people and organizations from within or outside the country or failure of the concerned public authorities to perform their duty?

(c) Whether the parameters laid down by the Constitution Bench in Triveniben's case for judging the issue of delay in the disposal of a petition filed under Article 72 or 161 of the Constitution can be applied to the cases in which an accused has been found guilty of committing offences under TADA and other similar statutes?

(d) What is the scope of the Court's power of judicial review of the decision taken by the President under Article 72 and the Governor under Article 161 of the Constitution, as the case may be?

17. We can find abstract answers to each of the aforesaid questions in the judicial pronouncements of this Court and while doing so, we can also derive help from the judgments of other jurisdictions, but the most important issue which calls for indepth examination, elucidation and determination in these cases is whether delayed disposal of the petition filed under Article 72 can justify judicial review of the decision taken by the President not to grant pardon and whether the Court can ordain commutation of the sentence of death into life imprisonment ignoring the nature and magnitude of the crime, the motive and manner of commission of the crime, the type of weapon used for committing the crime and overall impact of crime on the society apart from the fact that substantial delay in the disposal of the petition filed under Article 72 can reasonably be attributed to the internal and external pressure brought upon the Government on behalf of the convict by filing a spate of petitions and by using other means.

Re: Question No. (a):

18. The nature of the power vested in the President under

Article 72 and the Governor under Article 161 of the Constitution was considered by the Constitution Bench in Maru Ram's case. The main question considered in that case was whether the power of remission vested in the Government under Section 433A Cr.P.C. is in conflict with Articles 72 and 162 of the Constitution. While answering the question in the negative, Krishna Iyer, J., who authored the main judgment, observed:

> "It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are coextensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is "untouchable" and "unapproachable" and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(a) is within the legislative power of Parliament.
>
> Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433-A does not and cannot affect even a wee bit the pardon power of the Governor or the President. The necessary sequel to this logic is that notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid articles.
>
> Are we back to square one? Has Parliament indulged in legislative futility with a formal victory but a real defeat? The answer is "yes" and "no". Why [illegible]e

President is symbolic, the Central Government is the reality even as the Governor is the formal head and sole repository of the executive power but is incapable of acting except on, and according to, the advice of his Council of Ministers. The upshot is that the State Government, whether the Governor likes it or not, can advice and act under Article 161, the Governor being bound by that advice. The action of commutation and release can thus be pursuant to a governmental decision and the order may issue even without the Governor's approval although, under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release. The position is substantially the same regarding the President. It is not open either to the President or the Governor to take independent decision or direct release or refuse release of anyone of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns being too deeply rooted as foundational to our system no serious encounter was met from the learned Solicitor-General whose sure grasp of fundamentals did not permit him to controvert the proposition, that the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers have in a narrow area of power. The subject is now beyond controversy, this Court having authoritatively laid down the law in Shamsher Singh case (1974) 2 SCC 831. So, we agree, even without reference to Article 367(1) and Sections 3(8)(b) and 3(60)(b) of the General Clauses Act, 1897, that, in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers. Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis-à-vis his Cabinet is no higher than the President save in

a narrow area which does not include Article 161. The constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government."

(emphasis supplied)

19. The proposition laid down in Maru Ram's case was reiterated by another Constitution Bench in *Kehar Singh's* case in the following words:

"The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. The Preambular statement of the Constitution begins with the significant recital:

"We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic ... do hereby adopt, enact and give to ourselves this Constitution."

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The c[illegible]al

liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr Justice Holmes, speaking for the Court in W.I. Biddle v. Vuco Perovich (71 L Ed 1161) enunciated this view, and it has since been affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of argument by learned counsel, Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for

the petitioners that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice."

(emphasis supplied)

In that case, the Constitution Bench also considered whether the President can, in exercise of the power vested in him under Article 72 of the Constitution, scrutinize the evidence on record and come to a different conclusion than the one arrived at by the Court and held:

> "We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. ....
>
> The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. ...
>
> It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the Preside o

the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.

....the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme."

20. In *State (Govt. of NCT of Delhi) v. Prem Raj* (2003) 7 SCC 121, this Court was called upon to consider whether in a case involving conviction under Section 7 read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, the High Court could commute the sentence of imprisonment on deposit of a specified amount by the convict and direct the State Government to pass appropriate order under Section 433(c) Cr.P.C. The two-Judge Bench referred to some of the provisions of the Cr.P.C. as also Articles 72 and 161 of the Constitution and observed:

"A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It affects both the punishment prescribed for the offence and the guilt of the offender; in other words, a full pardon may blot out the guilt itself. It does not amount to an acquittal unless the court otherwise directs. Pardon is to be distinguished from "amnesty" which is defined as "general pardon of political prisoners; an act of oblivion". As understood in common parlance, the word "amnesty" is appropriate only where political prisoners are released and not in cases where those who have committed felonies and murders are pardoned.

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"Pardon is one of the many prerogatives which have been recognized since time immemorial as being vested in the Sovereign, wherever the sovereignty might lie." This sovereign power to grant a pardon has been recognized in our Constitution in Articles 72 and 161, and also in Sections 432 and 433 of the Code. Grant of pardon to an accomplice under certain conditions as contemplated by Section 306 of the Code is a variation of this very power. The grant of pardon, whether it is under Article 161 or 72 of the Constitution or under Sections 306, 432 and 433 is the exercise of sovereign power."

21. In *Epuru Sudhakar v. Government of A.P.* (supra), which was also decided by a two-Judge Bench, Arijit Pasayat, J. referred to Section 295 of the Government of India Act, 1935, Articles 72 and 161 of the Constitution, 59 American Jurisprudence (2nd Edition), Corpus Juris Secundum Vol. 67-A, Wade Administrative Law (9th Edition), Maru Ram's case, Kehar Singh's case and reiterated the views expressed by him in Prem Raj's case on the nature of the power vested in the President and the Governor under Articles 72 and 161 of the Constitution. In his concurring judgment, S. H. Kapadia, J (as he then was) observed:

"Pardons, reprieves and remissions are manifestation of the exercise of prerogative power. These are not acts of grace. They are a part of constitutional scheme. When a pardon is granted, it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment has fixed.

The power to grant pardons and reprieves was traditionally a royal prerogative and was regarded as an absolute power. At the same time, even in the earlier days, there was a general rule that if the king is deceived, the pardon is void, therefore, any separation o of

falsehood vitiated the pardon. Over the years, the manifestation of this power got diluted.

Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations.

Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is *ipso facto* immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan

in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future.

The power under Article 72 as also under Article 161 of the Constitution is of the widest amplitude and envisages myriad kinds and categories of cases with facts and situations varying from case to case. The exercise of power depends upon the facts and circumstances of each case and the necessity or justification for exercise of that power has to be judged from case to case. It is important to bear in mind that every aspect of the exercise of the power under Article 72 as also under Article 161 does not fall in the judicial domain. In certain cases, a particular aspect may not be justiciable. However, even in such cases there has to exist requisite material on the basis of which the power is exercised under Article 72 or under Article 161 of the Constitution, as the case may be. In the circumstances, one cannot draw the guidelines for regulating the exercise of the power."

22. The propositions which can be culled out from the ratio of the above noted judgments are:

(i) the power vested in the Presider d

the Governor under Article 161 of the Constitution is manifestation of prerogative of the State. It is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of the people.

(ii) while exercising power under Article 72, the President is required to act on the aid and advice of the Council of Ministers. In tendering its advice to the President, the Central Government is duty bound to objectively place the case of the convict with a clear indication about the nature and magnitude of the crime committed by him, its impact on the society and all incriminating and extenuating circumstances. The same is true about the State Government, which is required to give advice to the Governor to enable him to exercise power under Article 161 of the Constitution. On receipt of the advice of the Government, the President or the Governor, as the case may be, has to take a final decision in the matter. Although, he/she cannot overturn the final verdict of the Court, but in appropriate case, the President or the Governor, as the case may be, can after scanning the record of the case, form his/her independent opinion whether a case is made out for grant of pardon, reprieve, etc.. In any case, the President or the Governor, as the case may be, has to take cognizance of the relevant facts and then decide whether a case is made out for exercise of power under Article 72 or 161 of the Constitution.

Re: Question Nos. (b) and (c):

23. These questions merit simultaneous consideration. But, before doing that, we may take cognizance of paragraphs I to VII of the instructions issued by the Government of India regarding the procedure to be observed by the States for dealing with the petitions for mercy from or on behalf of the convicts under sentence of death, which are extracted below:

"INSTRUCTIONS REGARDING PROCEDURE TO BE

OBSERVED BY THE STATES FOR DEALING WITH PETITIONS FOR MERCY FROM OR ON BEHALF OF CONVICTS UNDER SENTENCE OF DEATII AND WITH APPEALS TO THE SUPREME COURT AND APPLICATIONS FOR SPECIAL LEAVE TO APPEAL TO THAT COURT BY SUCH CONVICTS.

A. PETITIONS FOR MERCY.

I. A convict under sentence of death shall be allowed, if he has not already submitted a petition for mercy, for the preparation and submission of a petition for mercy, seven days after, and exclusive of, the date on which the Superintendent of Jail informs him of the dismissal by the Supreme Court of his appeal or of his application for special leave to appeal to the Supreme Court.

Provided that in cases where no appeal to the Supreme Court has been preferred or no application for special leave to appeal to the Supreme Court has been lodged, the said period of seven days shall be computed from the date next after the date on which the period allowed for an appeal to the Supreme Court or for lodging an application for special leave to appeal to the Supreme Court expires.

II. If the convict submits a petition within the above period, it shall be addressed: —

(a) in the case of States to the Governor of the State (Sadar-i-Riyasat in the case of Jammu and Kashmir) and the President of India: and

(b) in the case of Union Territories to the President of India.

The execution of sentence shall in all cases be postponed pending receipt of their orders.

III The petition shall in the first instance: —

(a) in the case of States be sent to the State Government concerned for consideration and orders of the Governor (Sadar-i-Riyasat in the case of Jammu and Kashmir). If after consideration it is rejected it shall be forwarded to the Secretary to the Government of India. Ministry of Home Affairs. If it is decided to commute the sentence of death, the petition addressed to the President of India shall be withheld and an intimation of the fact shall be sent to the petitioner;

Note:—The petition made in a case where the sentence of death is for an offence against any law exclusively relatable to a matter to which the executive power of the Union extends, shall not be considered by the State Government but shall forthwith be forwarded to the Secretary to the Government of India, Ministry of Home Affairs.

(b) in the case of Union Territories, be sent to the Lieut.-Governor/ Chief Commissioner/Administrator who shall forward it to the Secretary to the Government of India, Ministry of Home Affairs, stating that the execution has been postponed pending the receipt of the orders of the President of India.

IV. If the convict submits the petition after the period prescribed by Instruction I above, it will be within the discretion of the Chief Commissioner or the Government of the State concerned, as the case may be, to consider the petition and to postpone execution pending such consideration and also to withhold or not to withhold the petition addressed to the President. In the following circumstances, however, the petition shall be forwarded to the Secretary to the Government of India, Ministry of Home Affairs:

(i) if the sentence of death was passed by an appellate court on an appeal against the convict's acquittal or as a result of an enhancement of sentence by the appellate court, whether on its own motion or on an application for enhancement of sentence, or

(ii) when there are any circumstances about the case, which, in the opinion of the Lieut.-Governor/Chief Commissioner/Administrator or the Government of the State concerned, as the case may be, render it desirable that the President should have an opportunity of considering it, as in cases of a political character and those in which for any special reason considerable public interest has been aroused. When the petition is forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the execution shall simultaneously be postponed pending receipt of orders of the President thereon.

V. In all cases in which a petition for mercy from a convict under sentence of death is to be forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the Lieut.-Governor/Chief Commissioner/ Administrator or the Government of the State concerned, as the case may be. shall forward such petition as expeditiously as possible along with the records of the case and his or its observations in respect of any of the grounds urged in the petition. In the case of States, the Government of the State concerned shall, if it had previously rejected any petition addressed to itself or the Governor/Sadar-i-Riyasat, also forward a brief statement of the reasons for the rejection of the previous petition or petitions.

VI. Upon the receipt of the orders of the President, an acknowledgment shall be sent to the Secretary to the Government of India. Ministry of Home Affairs, immediately in the manner hereinafter provided. In the case of Assam and the Andaman and Nicobar Isla e

communicated by telegram and the receipt thereof shall be acknowledged by telegram. In the case of other States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letter in the case of Delhi and by telegram in all other cases and receipt thereof shall be acknowledged by express letter or telegram, as the case may be.

VII. A petition submitted by a convict shall be withheld by the Lieut.-Governor/Chief Commissioner/Administrator or the Government of the State concerned, as the case may be, if a petition containing a similar prayer has already been submitted to the President. When a petition is so withheld the petitioner shall be informed of the fact and of the reason for withholding it."

24. The above reproduced instructions give a clear indication of the seriousness with which the authorities entrusted with the task of accepting the mercy petitions are required to process the same without any delay.

25. The question whether delay in the judicial process constitutes a ground for alteration of death sentence into life imprisonment has been considered in several cases. In *Piare Dusadh v. Emperor* AIR 1944 FC 1, the Federal Court of India altered the death sentence into one of transportation for life on the ground that the appellant had been awaiting the execution of death sentence for over one year. While vacating the death penalty, similar approach was adopted in *Vivian Rodrick's* case, *Neiti Sreeramulu's* case, *Ediga Anamma's* case, *State of U.P. v. Suresh* (supra), *State of U.P. v. Lalla Singh* (1978) 1 SCC 142, *Bhagwan Bux Singh v. State of U.P.* (1978) 1 SCC 214, *Sadhu Singh v. State of U.P.* (supra) and *State of U.P. v. Sahai* (1982) 1 SCC 352.

26. In Ediga Anamma's case, the appellant was found

guilty of killing his own wife and a two year old child. After approving the reasons recorded by the trial Court and the High Court for holding the appellant guilty, this Court referred to Section 354(3) Cr.P.C., which casts a duty upon the Court to give special reasons for awarding death penalty as also the judgment in Jagmohan Singh's case and observed:

"Jagmohan Singh has adjudged capital sentence constitutional and whatever our view of the social invalidity of the death penalty, personal predilections must bow to the law as by this Court declared, adopting the noble words of Justice Stanley Mosk of California uttered in a death sentence case: "As a judge, I am bound to the law as I find it to be and not as I fervently wish it to be". (The Yale Law Journal, Vol. 82, No. 6, p. 1138.)

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Where the murderer is too young or too old the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302, read with Section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the Court may humanly opt for life, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendou[illegible]e

and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life."

(emphasis supplied)

27. In T.V. Vatheeswaran's case, on which learned senior counsel for the petitioner and the learned Amicus Shri Ram Jethmalani placed heavy reliance, the two Judge Bench considered whether the appellant, who was convicted for an offence of murder and sentenced to death in January, 1975 and was kept in solitary confinement for about 8 years was entitled to commutation of death sentence. The Court prefaced consideration of the appellant's plea by making the following observations:

"Let us examine his claim. First, let us get rid of the cobwebs of prejudice. Sure, the murders were wicked and diabolic. The appellant and his friends showed no mercy to their victims Why should any mercy be shown to them? But, gently, we must remind ourselves it is not Shylock's pound of flesh that we seek, nor a chilling of the human spirit. It is justice to the killer too and not justice untempered by mercy that we dispense. Of course, we cannot refuse to pass the sentence of death where the circumstances cry for it. But, the question is whether in a case where after the sentence of death is given, the accused person is made to undergo inhuman and degrading punishment or where the execution of the sentence is endlessly delayed and the accused is made to suffer the most excruciating agony and anguish, is it not open to a Court of appeal or

a court exercising writ jurisdiction, in an appropriate proceeding, to take note of the circumstance when it is brought to its notice and give relief where necessary?"

The Bench then referred to the judgments noted hereinabove, the minority view of Lord Scarman and Lord Brightman in *Noel Riley v. Attorney General* (supra) and observed:

"While we entirely agree with Lord Scarman and Lord Brightman about the dehumanising effect of prolonged delay after the sentence of death, we enter a little caveat, but only that we may go further. We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay."

After noticing some more judgments, the Bench observed:

"So, what do we have now? Articles 14, 19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They are available to prisoners as well as free men. Prison walls do not keep out Fundamental Rights. A person under sentence of death may also claim Fundamental Rights. The fiat of Article 21, as explained, is that any procedure which deprives a person of his life or liberty must be just, fair and reasonable. Just, fair and reasonable procedure implies a right to free legal services where he cannot avail them. It implies a right to a speedy trial. It implies humane conditions of detention, preventive or punitive. "Procedure established by law" does not end with the pronouncement of sentence; it includes the carrying out of sentence. That is as far as we have gone so far. It seems to us but a short step, but a step in the right direction, to hold that prolonged detention to await the execution of a sentence of death is an uniust. unfair and unreasonable procedure and the

wrong is to quash the sentence of death. In the United States of America where the right to a speedy trial is a Constitutionally guaranteed right, the denial of a speedy trial has been held to entitle an accused person to the dismissal of the indictment or the vacation of the sentence (vide Strunk v. United States). Analogy of American law is not permissible, but interpreting our Constitution sui generis, as we are bound to do, we find no impediment in holding that the dehumanising factor of prolonged delay in the execution of a sentence of death has the Constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the Constitutional guarantee that no person shall be deprived of his life or personal liberty except according to procedure established by law. The appropriate relief in such a case is to vacate the sentence of death."

(emphasis supplied)

28. In *K.P. Mohd.'s* case, a Bench headed by the then Chief Justice Y.V. Chandrachud noted that the petitioner who was sentenced to death had filed a petition under Article 72 of the Constitution in 1978 but the same was not decided for the next four and half years. The writ petition filed by the petitioner for commutation of death sentence into life imprisonment was adjourned by the Court from time to time with the hope that the Government will expedite its process and dispose of the mercy petition at an early date. Notwithstanding this, the mercy petition was not decided. After waiting for a sufficiently long period, the Court commuted the death sentence into life imprisonment by recording the following observations:

"…. It is perhaps time for accepting a self-imposed rule of discipline that mercy petitions shall be disposed of within, say, three months. These delays are gradually creating serious social problems by driving the courts to reduce death sentences even in those rarest of rare cases in which, on the most careful, dispassionate and humane

considerations death sentence was found to be the only sentence called for. The expectation of persons condemned to death that they still have a chance to live is surely not of lesser, social significance than the expectation of contestants to an election petition that they will one day vote on the passing of a bill.

Considering all the circumstances of the case, including those concerning the background and motivation of the crime in the instant case, we are of the opinion that the death sentence imposed upon the petitioner should be set aside and in its place the sentence of life imprisonment should be passed. We direct accordingly. It is needless to add that the death sentence imposed upon the petitioner shall *not* be executed. It is however necessary to add that we are not setting aside the death sentence merely for the reason that a certain number of years have passed after the imposition of the death sentence. We do not hold or share the view that a sentence of death becomes inexecutable after the lapse of any particular number of years."

(emphasis supplied)

29. After 13 days, a three-Judge Bench headed by the Chief Justice delivered the judgment titled *Sher Singh v. State of Punjab* (1983) 2 SCC 344. The petitioners in that case were convicted under Section 302 read with Section 34 IPC and were sentenced to death by the trial Court. The High Court reduced the sentence imposed on one of them to life imprisonment but upheld the sentence of death imposed on the remaining two accused. The petitioners then challenged the constitutional validity of Section 302 IPC. Their petition was dismissed by this Court. Soon thereafter, they filed writ petition for commutation of death sentence by relying upon the judgment in T. *V. Vatheeswaran's* case. The three-Judge Bench broadly agreed with the ratio of the judgment in *T.V. Vatheeswaran's* case, but refused to lay down any h… or

commutation of death sentence into life imprisonment on the ground of delay in the Court processes. Some of the passages of the judgment in Sher Singh's case are extracted below:

> "Like our learned Brethren, we too consider that the view expressed in this behalf by Lord Scarman and Lord Brightman in the Privy Council decision of Noel Riley is, with respect, correct. The majority in that case did not pronounce upon this matter. The minority expressed the opinion that the jurisprudence of the civilized world has recognized and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading: Sentence of death is one thing; sentence of death followed by lengthy imprisonment prior to execution is another. The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment in the circumstances of a given case.
>
> The fact that it is permissible to impose the death sentence in appropriate cases does not, however, lead to the conclusion that the sentence must be executed in every case in which it is upheld, regardless of the events which have happened since the imposition or the upholding of that sentence. The inordinate delay in the execution of the sentence is one circumstance which has to be taken into account while deciding whether the death sentence ought to be allowed to be executed in a given case."
>
> (emphasis supplied)

The area of disagreement between the two-Judge Bench, which decided T.V. Vatheeswaran's case and the three-Judge Bench, which decided Sher Singh's case is reflected in the following observations made in the latter judgment:

> "What we have said above delineates the broad area of agreement between ourselves and our learned Brethren who decided Vatheeswaran. We must now indicate with precision the narrow area wherein we feel constrained to differ from them and the reasons why. Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But, according to us, no hard and fast rule can be laid down as our learned Brethren have done that "delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence to death to invoke Article 21 and demand the quashing of the sentence of death". This period of two years purports to have been fixed in Vatheeswaran after making "all reasonable allowance for the time necessary for appeal and consideration of reprieve". With great respect, we find it impossible to agree with this part of the judgment. One has only to turn to the statistics of the disposal of cases in the High Court and the Supreme Court to appreciate that a period far exceeding two years is generally taken by those Courts together for the disposal of matters involving even the death sentence. Very often, four or five years elapse between the imposition of death sentence by the Sessions Court and the disposal of the special leave petition or an appeal by the Supreme Court in that matter. This is apart from the time which the President or the Governor, as the case may be, takes to consider petitions filed under Article 72 or Article 161 of the Constitution or the time which the Government takes to dispose of applications filed under Sections 432 and 433 of the Code of Criminal Procedure. It has been the sad experience of this Court that no priority whatsoever is given by the Government of India to the disposal of petitions filed to the President under Article 72 of the Constitution. Frequent reminders are issued by this Court for an expeditious disposal of such petitions but ev[illegible]s

remain undisposed of for a long time. Seeing that the petition for reprieve or commutation is not being attended to and no reason is forthcoming as to why the delay is caused, this Court is driven to commute the death sentence into life imprisonment out of a sheer sense of helplessness and frustration. Therefore, with respect, the fixation of the time limit of two years does not seem to us to accord with the common experience of the time normally consumed by the litigative process and the proceedings before the executive.

Apart from the fact that the rule of two years runs in the teeth of common experience as regards the time generally occupied by proceedings in the High Court, the Supreme Court and before the executive authorities, we are of the opinion that no absolute or unqualified rule can be laid down that in every case in which there is a long delay in the execution of a death sentence, the sentence must be substituted by the sentence of life imprisonment. There are several other factors which must be taken into account while considering the question as to whether the death sentence should be vacated. A convict is undoubtedly entitled to pursue all remedies lawfully open to him to get rid of the sentence of death imposed upon him and indeed, there is no one, be he blind, lame, starving or suffering from a terminal illness, who does not want to live. The Vinoba Bhaves, who undertake the "Prayopaveshana" do not belong to the world of ordinary mortals. Therefore, it is understandable that a convict sentenced to death will take recourse to every remedy which is available to him under the law to ask for the commutation of his sentence, even after the death sentence is finally confirmed by this Court by dismissing his special leave petition or appeal. But, it is, at least, relevant to consider whether the delay in the execution of the death sentence is attributable to the fact that he has resorted to a series of untenable proceedings which have the effect of defeating the ends of justice. It is

not uncommon that a series of review petitions and writ petitions are filed in this Court to challenge judgments and orders which have assumed finality, without any seeming justification. Stay orders are obtained in those proceedings and then, at the end of it all, comes the argument that there has been prolonged delay in implementing the judgment or order. We believe that the Court called upon to vacate a death sentence on the ground of delay caused in executing that sentence must find why the delay was caused and who is responsible for it. If this is not done, the law laid down by this Court will become an object of ridicule by permitting a person to defeat it by resorting to frivolous proceedings in order to delay its implementation. And then, the rule of two years will become a handy tool for defeating justice. The death sentence should not, as far as possible, be imposed. But, in that rare and exceptional class of cases wherein that sentence is upheld by this Court, the judgment or order of this Court ought not to be allowed to be defeated by applying any rule of thumb.

Finally, and that is no less important, the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence is vacated, are matters which must enter into the verdict as to whether the sentence should be vacated for the reason that its execution is delayed. The substitution of the death sentence by a sentence of life imprisonment cannot follow by the application of the two years' formula, as a matter of quod erat demonstrandum."

(emphasis supplied)

30. In *Javed Ahmed v. State of Maharashtra* (supra), a two-Judge Bench presided over by O. Chinnappa Reddy, J., who had authored the judgment in T.V. Vatheeswaran's case, while reiterating the proposition

Vatheeswaran's case, the learned Judge proceeded to doubt the competence of the larger Bench to what he termed as overruling of the two-Judge Bench judgment.

31. Although, the question whether delay in disposal of the petitions filed under Articles 72 and 161 of the Constitution constitutes a valid ground for commutation of sentence of death into life imprisonment did not arise for consideration in T.V. Vatheeswaran's case, Sher Singh's case or Javed Ahmed's case and only a passing reference was made in the last paragraph of the judgment in T.V. Vatheeswaran's case, the conflicting opinions expressed in those cases on the Court's power to commute the sentence of death into life imprisonment on the ground of delay simpliciter resulted in a reference to the Constitution Bench in Triveniben's case which related to the exercise of power by the President under Article 72 and by the Governor under Article 161 of the Constitution. After hearing the arguments, the Constitution Bench expressed its opinion in the following words:

> "Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran case cannot be said to lay down the correct law and therefore to that extent stands overruled."

(This order is reported in (1988) 4 SCC 574)

32. In paragraph 13 of the main judgment G.L. Oza, J., noted the argument made on behalf of the petitioners that delay causes immense mental torture to a condemned prisoner and observed:

> ".....It is no doubt true that sometimes in these procedures some time is taken and sometimes even long time is spent. May be for unavoidable circumstances and sometimes even at the instance of the accused but it was contended and rightly so that all this delay up to the final judicial process is taken care of while the judgment is finally pronounced and it could not be doubted that in number of cases considering (sic) the time that has elapsed from the date of the offence till the final decision has weighed with the courts and lesser sentence awarded only on this account."

The learned Judge then observed that while considering the question of delay after the final verdict is pronounced, the time spent on petitions for review and repeated mercy petitions at the instance of the convicted person himself shall not be considered and the only delay which would be material for consideration will be the delay in disposal of the mercy petitions or delay occurring at the instance of the executive.

33. While rejecting the argument that keeping a condemned prisoner in jail amounts to double jeopardy, Oza, J., referred to Section 366 Cr.P.C. and held that when a person is committed to jail awaiting the execution of the sentence of death, it is not an imprisonment but the prisoner has to be kept secured till the sentence awarded by the Court is executed. The learned Judge also rejected the argument that delay in execution of the sentence entitles a prisoner to approach this Court because his right under Article 21 is infringed and observed:

> "……..the only jurisdiction which could be sought to be exercised by a prisoner for infringe[illegible]n

be to challenge the subsequent events after the final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper. The nature of the offence, circumstances in which the offence was committed will have to be taken as found by the competent court while finally passing the verdict. It may also be open to the court to examine or consider any circumstances after the final verdict was pronounced if it is considered relevant……."

34. K. Jagannatha Shetty, J., who delivered a concurring opinion referred to the jurisprudential development in other countries on the issue of execution of the sentence of death and observed:

"Under Article 72 of the Constitution, the President shall have the power to "grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence". Under Article 161 of the Constitution, similar is the power of the Governor to give relief to any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. The time taken by the executive for disposal of mercy petitions may depend upon the nature of the case and the scope of enquiry to be made. It may also depend upon the number of mercy petitions submitted by or on behalf of the accused. The court, therefore, cannot prescribe a time-

limit for disposal of even for mercy petitions.

It is, however, necessary to point out that Article 21 is relevant at all stages. This Court has emphasised that "the speedy trial in criminal cases though not a specific fundamental right, is implicit in the broad sweep and content of Article 21". Speedy trial is a part of one's fundamental right to life and liberty. This principle, in my opinion, is no less important for disposal of mercy petition. It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture. He may be provided with amenities of ordinary inmates in the prison as stated in Sunil Batra v. Delhi Admn., but nobody could succeed in giving him peace of mind.

Chita Chinta Dwayoormadhya,

Chinta Tatra Gariyasi,

Chita Dahati Nirjivam,

Chinta Dahati Sajeevakam.

As between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there is every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed.

..... The court while examining the matter, for the reasons already s... o

account the time utilised in the judicial proceedings up to the final verdict. The court also cannot take into consideration the time taken for disposal of any petition filed by or on behalf of the accused either under Article 226 or under Article 32 of the Constitution after the final judgment affirming the conviction and sentence. The court may only consider whether there was undue long delay in disposing of mercy petition ; whether the State was guilty of dilatory conduct and whether the delay was for no reason at all. The inordinate delay, may be a significant factor, but that by itself cannot render the execution unconstitutional. Nor it can be divorced from the dastardly and diabolical circumstances of the crime itself....."

(emphasis supplied)

35. In *Madhu Mehta v. Union of India* (supra), this Court commuted the death sentence awarded to one Gyasi Ram, who had killed a Government servant, namely, Bhagwan Singh (Amin), who had attached his property for recovery of arrears of land revenue. After disposal of the criminal appeal by this Court, the wife of the convict filed a mercy petition in 1981. The same remained pending for 8 years. This Court considered the writ petition filed by the petitioner Madhu Mehta, who was the national convener of Hindustani Andolan, referred to the judgments in *T.V. Vatheeswaran's* case, Sher Singh's case and Triveniben's case and held that in the absence of sufficient explanation for the inordinate delay in disposal of the mercy petition, the death sentence should be converted into life imprisonment.

36. The facts of Daya Singh's case were that the petitioner had been convicted and sentenced to death for murdering Sardar Pratap Singh Kairon. The sentence was confirmed by the High Court and the special leave petition was dismissed by this Court. After rejection of the review petition, he filed mercy petitions before the Governor and the President of India, which were also rejected. The writ petition filed by his brother

Lal Singh was dismissed along with Triveniben's case. Thereafter, he filed another mercy petition before the Governor of Haryana in November, 1988. The matter remained pending for next two years. Finally, he sent a letter from Alipore Central Jail, Calcutta to the Registry of this Court for commutation of the sentence of death into life imprisonment. This Court took cognizance of the fact that the petitioner was in jail since 1972 and substituted the sentence of imprisonment for life in place of the death sentence.

37. The judgments of other jurisdictions, i.e., Riley v. Attorney General of Jamaica, which has been cited in Rajendra Prasad's case, Ediga Anamma's case, T.V. Vatheeswaran's case and Sher Singh's case, as also the judgment in Pratt v. Attorney General of Jamaica, which has been referred to with approval in T.V. Vatheeswaran's case do not provide any assistance in deciding the questions framed by us. The principle laid down in those cases is that delay in executing a sentence of death makes the punishment inhuman and degrading and the prisoner is entitled to seek intervention of the Court for release on the ground that there was no explanation for inordinate delay. Similarly, the study conducted by Roger Hood and Carolyn Hoyle of the University of Oxford, which has been published with the title "The Death Penalty – A Worldwide Perspective" does not advance the cause of the petitioner.

38. In the light of the above, we shall now consider the argument of Shri K.T.S. Tulsi, learned senior counsel for the petitioner, and Shri Ram Jethmalani and Shri Andhyarujina, Senior Advocates, who assisted the Court as Amicus, that long delay of 8 years in disposal of the petition filed under Article 72 should be treated as sufficient for commutation of the sentence of death into life imprisonment, more so, because of prolonged detention, the petitioner has become mentally sick. The thrust of the argument of the learned senior counsel is that inordinate delay in disposal of mercy petition has rendered the sentence of death cruel, inhuman and

nothing short of another punishment inflicted upon the condemned prisoner.

39. Though the argument appears attractive, on a deeper consideration of all the facts, we are convinced that the present case is not a fit one for exercise of the power of judicial review for quashing the decision taken by the President not to commute the sentence of death imposed on the petitioner. Time and again, (Machhi Singh's case, Ediga Anamma's case, Sher Singh's case and Triveniben's case), it has been held that while imposing punishment for murder and similar type of offences, the Court is not only entitled, but is duty bound to take into consideration the nature of the crime, the motive for commission of the crime, the magnitude of the crime and its impact on the society, the nature of weapon used for commission of the crime, etc.. If the murder is committed in an extremely brutal or dastardly manner, which gives rise to intense and extreme indignation in the community, the Court may be fully justified in awarding the death penalty. If the murder is committed by burning the bride for the sake of money or satisfaction of other kinds of greed, there will be ample justification for awarding the death penalty. If the enormity of the crime is such that a large number of innocent people are killed without rhyme or reason, then too, award of extreme penalty of death will be justified. All these factors have to be taken into consideration by the President or the Governor, as the case may be, while deciding a petition filed under Article 72 or 161 of the Constitution and the exercise of power by the President or the Governor, as the case may be, not to entertain the prayer for mercy in such cases cannot be characterized as arbitrary or unreasonable and the Court cannot exercise power of judicial review only on the ground of undue delay.

40. We are also of the view that the rule enunciated in Sher Singh's case, Triveniben's case and some other judgments that long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or

similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives. At times, their objective is to annihilate their rivals including the political opponents. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. While doing so, they do not show any respect for human lives. Before killing the victims, they do not think even for a second about the parents, wives, children and other near and dear ones of the victims. The families of those killed suffer the agony for their entire life, apart from financial and other losses. It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights.

Question No.(d):

41. While examining challenge to the decision taken by the President under Article 72 or the Governor under Article 161 of the Constitution, as the case may be, the Court's power of judicial review of such decision is very limited. The Court can neither sit in appeal nor exercise the power of review, but can interfere if it is found that the decision has been taken without application of mind to the relevant factors or the same is founded on the extraneous or irrelevant considerations or is vitiated due to malafides or patent arbitrariness – *Maru Ram v. Union of India,* (1981) 1 SCC 107, *Kehar Singh v. Union of India* (1989) 1 SCC 204, *Swaran Singh v. State of U.P.* (1998) 4 SCC 75, *Satpal v. State of Haryana* (2000) 5 SCC 170, *Bikas Chatterjee v. Union of Ind*

Epuru Sudhakar v. Government of A.P. (2006) 8 SCC 161 and *Narayan Dutt v. State of Punjab* (2011) 4 SCC 353.

42. So far as the petitioner is concerned, he was convicted for killing 9 innocent persons and injuring 17 others. The designated Court found that the petitioner and other members of Khalistan Liberation Front, namely, Kuldeep, Sukhdev Singh, Harnek and Daya Singh Lahoria were responsible for the blast. Their aim was to assassinate Shri M.S. Bitta, who was lucky and escaped with minor injuries. While upholding the judgment of the designated Court, the majority of this Court referred to the judgments in Bachan Singh's case and observed:

> "From *Bachan Singh v. State of Punjab* and *Machhi Singh v. State of Punjab* the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. It was observed:
>
> The community may entertain such sentiment in the following circumstances:
>
> (1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.
>
> (2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.
>
> (3) When murder of a member of a Scheduled Caste or

> minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
>
> (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
>
> (5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.
>
> If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

43. The finding recorded by the majority on the issue of the petitioner's guilt is conclusive and, as held in Triveniben's case and other cases, while deciding the issue whether the sentence of death awarded to the accused should be converted into life imprisonment, the Court cannot review such finding.

44. It is true that there was considerable delay in disposal of the petition filed by the petitioner but, keeping in view the peculiar facts of the case, we are convinced that there is no valid ground to interfere with the ultimate decision taken by the President not to commute the sentence of death awarded to the petitioner into life imprisonment. We can take judicial notice of the fact that a substantial portion of t h

be attributed to the unending spate of the petitions on behalf of the petitioner by various persons to which reference has been made hereinabove.

45. On their part, the Government of NCT of Delhi and the Central Government had made their respective recommendations within a period of just over two years. The files produced before the Court show that the concerned Ministries had, after threadbare examination of the factors like the nature, magnitude and intensity of crime committed by the petitioner, the findings recorded by the designated Court and this Court as also the plea put forward by the petitioner and his supporters recommended that no clemency should be shown to the person found guilty of killing 9 innocent persons and injuring 17 others by using 40 kgs. RDX. While making the recommendation, the Government had also considered the impact of such crimes on the public at large. Unfortunately, the petition filed by the petitioner remained pending with the President for almost 6 years, i.e., between May 2005 and May 2011. During this period, immense pressure was brought upon the Government in the form of representations made by various political and non-political functionaries, organizations and several individuals from other countries. This appears to be one of the reasons why the file remained pending in the President's Secretariat and no effort was made for deciding the petitioner's case. The figures made available through RTI inquiry reveal that during the particular period, a large number of mercy petitions remained pending with the President giving rise to unwarranted speculations. On its part, the Ministry of Home Affairs also failed to take appropriate steps for reminding the President's Secretariat about the dire necessity of the disposal of the pending petitions. What was done in April and May, 2011 could have been done in 2005 itself and that would have avoided unnecessary controversy. Be that as it may, we are of the considered view that delay in disposal of the petition filed by the petitioner under Article 72 does not justify review of the decision taken by the President in May 2011 not to entertain

his plea for clemency.

46. Though the documents produced by Shri K.T.S. Tulsi do give an indication that on account of prolonged detention in jail after his conviction and sentence to death, the petitioner has suffered physically and mentally, the same cannot be relied upon for recording a finding that the petitioner's mental health has deteriorated to such an extent that the sentence awarded to him cannot be executed.

47. Before parting with the judgment, we consider it necessary to take cognizance of a rather disturbing phenomena. The statistics produced by the learned Additional Solicitor General show that between 1950 and 2009, over 300 mercy petitions were filed of which 214 were accepted by the President and the sentence of death was commuted into life imprisonment. 69 petitions were rejected by the President. The result of one petition is obscure. However, about 18 petitions filed between 1999 and 2011 remained pending for a period ranging from 1 year to 13 years. A chart showing the details of such petitions is annexed with the Judgment as Schedule 'A'. The particulars contained in Schedule 'A' give an impression that the Government and the President's Secretariat have not dealt with these petitions with requisite seriousness. We hope and trust that in future such petitions will be disposed of without unreasonable delay.

48. For the reasons stated above, we hold that the petitioners have failed to make out a case for invalidation of the exercise of power by the President under Article 72 of the Constitution not to accept the prayer for commutation of the sentence of death into life imprisonment. The writ petitions are accordingly dismissed.

K.K.T. Writ Petitions dismissed.

SCHEDULE 'A'

Details of Mercy Petitions filed between 2009 and 2011, which remained pending till 12.5.2011.

S. No.	Name of convicts	Date of Supreme Court Judgment	Date Mercy Petition receiv-ed by MHA	Date Mercy Petition decide-ed by the Presi-dent	Rejected/ Commuted/ Pendency	Period of Pendency
1.	Dharam Pal	18.03.1999	1999		Pending	13 years
2.	Sheikh Meeran, Selvam and Radhakrishnan	21.06.1999 05.07.1999 (Review)	2000		Pending	12 years
3.	Suresh and Ramji	03.02.2001	2002		Pending	10 years
4.	Om Prakash	04.03.2003	2003		Pending	9 years
5.	Lalila Doom and Shivlal	20.02.2004	2004		Pending	8 years
6.	Praveen Kumar	25.10.2003	2004		Pending	8 years
7.	Madaiah and Bilavandra	29.01.2004	2004		Pending	8 years
8.	Karan Singh and Kunwar Bahadur Singh	19.07.2005	2005		Pending	7 years
9.	Jafar Ali	04.05.2004	2006		Pending	6 years
10.	Mohd. Afzal Guru	08.04.2005	2006		Pending	6 years
11.	Bandu Baburao Tidake	07.10.2006	2007		Pending	5 years
12.	Gurmeet Singh	28.09.2005	2007		Pending	5 years
13.	Saibanna Ningappa Natikar	21.04.2005	2007		Pending	5 years
14.	Satish	02.08.2005	2007		Pending	5 years
15.	Sonia and Sanjeev		2007		Pending	5 years
16.	Bantu	23.07.2008	2009		Pending	3 years
17.	Prajeet Kumar		2011		Pending	1 year
18.	Sunder Singh		2011		Pending	1 year

CENTRE FOR ENVIRONMENT LAW, WWF-I
v.
UNION OF INDIA & OTHERS
I.A. No. 100
In
Writ Petition (Civil) No. 337 of 1995.

APRIL 15, 2013

[K.S. RADHAKRISHNAN AND CHANDRAMAULI KR. PRASAD, JJ.]

Wildlife Protection Act, 1972:

Ex-situ conservation – Translocation of Asiatic Lion (Panthera Leo Persica) – To Kuno wildlife Sanctuary in State of Madhya Pradesh – From Gir forest in the State of Gujarat, the single habitat of Asiatic Lion – For providing second natural habitat for long term conservation of Asiatic Lion – State of Gujarat not agreeing for the proposal of translocation – Interlocutory application for direction to the State of Gujarat to translocate the Lions as per the plan – Held: For long term conservation of Asiatic Lion, an endangered specie, it is necessary to provide it a second home – Kuno, is the historical habitat of Asiatic Lions, and all steps have been taken for making Kuno Wildlife Sanctuary fit for re-introduction of Asiatic Lion with the approval of National Board for Wildlife (NBWL) – Animals in the wild are the properties of the nation – No State, can claim ownership or possession over them – NBWL having been constituted by Central Government, its views shall prevail over the views of State Board for wildlife, Gujarat constituted by the State Government – Direction to Ministry of Environment and Forest to take urgent steps for re-introduction of Asiatic Lion from Gir forest to Kuno Wildlife Sanctuary, in accordance with guidelines issued by IUCN and with active participation of experts in the field – Bio-diversity

Act, 2002 – Forest Conservation Act, 1980 – Constitution of India, 1950 – Articles 48A and 51A(g).

Decision of Ministry of Environment and Forests to import Arican Cheetahs from Namibia to India – To be introduced at Kuno Wildlife Sanctuary before reintroduction of Aisiatic lions from Gir forest – Interlocutory application objecting to the decision – Held: The decision is arbitrary, illegal and in violation of the statutory requirements provided under the wildlife Protection Act.

Environmental Law – Preservation and protection of endangered species – Need for parliamentary legislation – Direction to Government of India and Ministry of Environment and Forests to take urgent steps for preservation of the endangered species identified by National Wildlife Action Plan 2002-2016 and to initiate recovery programmes – Direction also to identify all endangered species of flora and fauna, study their needs, their environs and habitats to establish the current level of security and the nature of threats.

Constitution of India, 1950 – Art.21 – Right to life – Scope of – Conservation and protection of environment is an inseparable part of right to life – Environmental Law.

Words and Phrases – 'Wild Life' – Meaning of, in the context of Wild Life Protection Act, 1972.

The Wildlife Institute of India (WII), an autonomous institution under the Ministry of environment and Forests (MoEF), Government of India, conducted research at the Gir Forest in the State of Gujarat, through its biologists, for the better management of the Gir Forest enhancing the prospects for the long term conservation of lions at Gir, a single habitat of Asiatic lion. The data collected by biologists highlighted the necessity of a second natural habitat for its long term conservation. In a workshop held in October, 1993, three alternative s d

for re-introduction of Asiatic lions. After survey of the three sites, Kuno Wildlife Sanctuary in the State of Madhya Pradesh was found to be the most suitable site for re-introduction in establishing a free ranging population of Asiatic lions, as Kuno was historical distribution range of Asiatic lions.

The State of Madhya Pradesh undertook massive rehabilitation package for the villagers settled in and near Kuno, so as to push forward the scheme. The State Government of Gujarat did not agree with the proposal for translation of the lions from Gujarat to Kuno.

Since nothing transpired despite the fact that crores of rupees were spent by the Government for the re-introduction protect, the present intervention application (IA No.100) in Writ petition (W.P.(C) No. 337 of 1995) was filed seeking a direction to the respondents to implement the relocation programme. Another I. A.No. 3452 in W.P.(C) No. 202 of 1995 was filed by *Amicus Curiae* objecting to the decision of MoEF to introduce African *'Cheetah'* to Kuno before translocation of the Asiatic lions from Gir forest.

Allowing the Interlocutory applications, the Court

HELD: I.A. No.100 in W.P. No.337 of 1995:

1.1. All efforts must be made to implement the spirit and provisions of the Wild Life (Protection) Act, 1972; the provisions of which are salutary and are necessary to be implemented to maintain ecological chain and balance. The Stockholm Declaration, the Declaration of United Nations, Conventions on Human Environment signed in the year 1972, to which India is the signatory, have laid down the foundation of sustainable development and urged the nations to work together for the protection of the environment. Conventions on Biological Diversity,

signed in the year 1962 at Rio Summit, recognized for the first time in International Law that the conservation of biological diversity is "a common concern of human kind" and is an integral part of the development process. [Para 29] [788-D-G]

Sansar Chand vs. State of Rajasthan **(2010) 10 SCC 604: 2010 (12) SCR 583 – relied on.**

1.2. For achieving the objectives of various conventions including Convention on Biological Diversity (CBD) and also for proper implementation of IUCN, CITES etc., and the provisions of the Wild Life (Protection) Act, Bio-diversity Act, Forest Conservation Act etc. in the light of Articles 48A and 51A(g), the Government of India has laid down various policies and action plans such as the National Forest Policy (NFP) 1988, National Environment Policy (NEP) 2006, National Bio-diversity Action Plan (NBAP) 2008, National Action Plan on Climate Change (NAPCC) 2008 and the Integrated development of wild life habitats and centrally sponsored scheme framed in the year 2009 and integrated development of National Wild-life Action Plan (NWAP) 2002-2016. The 'Integrated Development of Wile Life Habitat' under the Centrally Sponsored Scheme of 2009 and the NWAP (2002-2016) have to be read along with the provisions of the Wile Life (Conservation) Act. [Para 32] [789-G-H; 790-A-C]

Lafarge Umiam Mining Private Limited, T.N. Godavarman Thirumulpad vs. Union of India and Ors. **(2011) 7 SCC 338: 2011 (7) SCR 954 – relied on.**

1.3. Keeping in view the necessity for ensuring better protection of wildlife outside the protected areas and initiating recovery programmes for saving critically endangered species and habitats, a comprehensive Centrally Sponsored Scheme d

Development of Wildlife Habitats' has been made operational on 30.7.2009 which was in addition to the erstwhile Centrally Sponsored Scheme – 'Assistance for the Development of National Parks and Sanctuaries'. The scheme incorporated additional components and activities for implementing the provisions of the Wildlife (Protection) Act, 1972, the National Wildlife Action Plan (2002-2016), recommendations of the Tiger Task Force, 2005 and the National Forest Commission, 2006 and the necessities felt from time to time for the conservation of wildlife and biodiversity in the country. [Para 35] [792-G-H; 793-A-C]

1.4. The Centrally Sponsored Scheme, specifically refers to the Asiatic lions as a critically endangered species and highlighted the necessity for a recovery programme to ensure the long term conservation of lions. NWAP 2002-2016 and the Centrally Sponsored Scheme 2009 relating to integrated development of wildlife habitats are schemes which have statutory status and have to be implemented in their letter and spirit. [Para 37] [793-F-H]

Lafarge Umiam Mining Private Limited, T.N. Godavarman Thirumulpad vs. Union of India and Ors. **(2011) 7 SCC 338: 2011 (7) SCR 954 – relied on.**

T. N. Godavarman Thirumulpad vs. Union of India and Ors. **(2012) 3SCC 277: 2012 (3) SCR 460 – referred to.**

1.5. Article 21 of the Constitution of India protects not only the human rights but also casts an obligation on human beings to protect and preserve a specie becoming extinct, conservation and protection of environment is an inseparable part of right to life. The State, as a custodian of the natural resources, has a duty to maintain them not merely for the benefit of the public, but for the best interest of flora and fauna, wildlife and so on. The doctrine of 'public trust' has to be addressed in that perspective.

[Para 41] [795-D-E, E-F]

M. C. Mehta vs. Kamal Nath and Ors. **(1997) 1 SCC 388: 1996 (10) Suppl. SCR 12 – relied on.**

1.6. The human beings have a duty to prevent the species from going extinct and have to advocate for an effective species protection regimes. NWAP 2002-2016 and the Centrally Sponsored Scheme 2009 indicate that there are many animal species which are close enough to extinction and some of the other species have already disappeared from this earth. No species can survive on the brink of extinction indefinitely and that the continued existence of any specie depends upon various factors like human-animal conflict, epidemics, forest fire and other natural calamities etc. [Para 48] [795-H; 796-A-B]

1.7. The Wildlife Biologists of Wildlife Institute of India (WII), an autonomous body under the Ministry of Environment and Forests (MoEF), after conducting a research on Gir Forests, noticed the necessity for long term conservation of Asiatic lion in Gir and also highlighted the necessity of a second natural habitat for its long term conservation. Population and Habitat Analysis Workshop held at Baroda in October, 1993 also highlighted that fact. National Board for Wildlife (NBWL), has taken a consistent view in all its meetings about the necessity of a second habitat for Asiatic Lion, an endangered species. Asiatic Lion, has been restricted to only one single habitat, i.e. the Gir National Forest and its surrounding areas and an outbreak of possible epidemic or natural calamity might wipe off the entire species. A smaller population with limited genetic strength are more vulnerable to diseases and other catastrophes in comparison to large and widespread population. Threat, therefore, is real and has proved by the outbreak of canine distemper in the lions of Serengeti NP, Tanzania in 1994. It was felt that if an epidem e

to affect the lions in Gir, it would be very difficult to save them from extinction, given the much smaller area of the Gir forests and the smaller lion population. The possibility of the decease spreading to the pockets of habitat such as Girnar, Mityala, Rajula, Kodinar and the surrounding areas, cannot be ruled out. [Para 43] [796-B-G]

1.8. There is uniformity in the views expressed by the Bio-Scientists of WII, NBWL, MoEF and other experts that to have a second home for the endangered species like Asiatic Lion is of vital importance. A detailed study has been conducted to find out the most suitable habitat for its re-introduction and Kuno Wildlife Sanctuary in Madhya Pradaesh, has been found to be the most ideal habitat. [Para 44] [796-H; 797-A-B]

1.9. No State, organisation or person can claim ownership or possession over wild animals in the forest. Wild Animal is defined under the Wild Life (Protection) Act, 1972 under Section 2(36) to mean any animal specified in schedules I to IV and found wild in nature. 'Wild Life' has been defined under Section 2(37) to include any animal, bees, butterflies, crustacean, fish and moths, and or land vegetation which forms part of any habitat. Section 9 prohibits hunting of wild animals, specified in Schedule I, II, III and IV except as provided under Section 11 and Section 12. Section 40 of the Act obliges a person to make a declaration and Section 41 enables the Chief Wild Life Warden to make an enquiry and preparation of inventories and Section 42 deals with the issue of certificates and confers, no ownership of the wild animals to a particular State or others. Animals in the wild are properties of the nation for which no state can claim ownership and the State's duty is to protect the wild life and conserve it, for ensuring the ecological and environmental security of the country. [Para 45] [797-C-F]

1.10. Several migratory birds, mammals, and animals

in wild, cross national and international borders created by man and every nation have a duty and obligation to ensure their protection. No nation or organisation can claim ownership or possession over them, the Convention on the conservation of migratory species of wild animals held at Bonn, 1979, supports this principle and the convention recognises that wild animals in their innumerable forms are irreplaceable part of the earth; natural system and must be conserved for the good of the mankind. It has recognised that the States are and must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries. Convention highlights that conservation and effective management of migratory species of wild animals require the concerted action of all States within the national jurisdictional boundaries of which such species spend any part of their life cycle. India is also a signatory to that convention. [Para 46] [797-G-H; 798-A-B]

1.11. State Board for Wildlife, Gujarat (SBWL, Gujarat), which has been constituted by the State Government under Section 6 of the Wildlife Protection Act, 1972, did not agree with the proposal for translocation of lion from Gujarat to Kuno, a stand endorsed by the State of Gujarat. The views of NBWL constituted by the Central Government in exercise of its powers conferred under Section 5A of the Wildlife Protection Act, have to prevail over the views expressed by SBWL. The duties conferred on the National Board under Section 5C of the Act and on the State Board under Section 8 of the Act are entirely different. Statutorily, it is the duty of NBWL to promote conservation and development of wildlife with a view to ensuring ecological and environmental security in the country. Legislation in its wisdom has conferred a duty on NBWL to provide conservation and development of w

NBWL is, therefore, the top most scientific body established to frame policies and advise the Central and State Governments on the ways and means of promoting wild life conservation and to review the progress in the field of wild life conservation in the country and suggesting measures for improvement thereto. The Central and the State Governments cannot brush aside its opinion without any cogent or acceptable reasons. The decisions taken by NBWL that Asiatic Lion should have a second home to save it from extinction, due to catastrophes like epidemic, large forest fire etc, which could result in extinction, is justified. [Paras 28, 48 and 50] [788-B-D; 800-A-B; 798-G; 799-D-H]

1.12. Reintroduction of an animal or plant into the habitat from where it has become extinct is also known as *ex-situ* conservation. India has successfully achieved certain re-introduction programmes, for example, the Rhino from Kaziranga, re-introduction of Gangetic gharial in the rivers of Uttar Pradesh, Rajasthan etc. Re-introduction of an organism is the intentional movement of an organism into a part of its native range from which it has disappeared or become extirpated in historic times as a result of human activities or natural catastrophe. Kuno was proved to be a historical habitat of Asiatic Lions. [Paras 51 and 52] [800-D-G]

1.13. After survey of the potential status for re-introduction of Asiatic Lion, a final report was submitted by WII, which was published on 31.1.1995, whereby Kuno Wildlife Sanctuary (Madhya Pradesh) emerged as the most suitable habitat for re-introduction of the Asiatic lion. The Council of Ministers approved the project on 28.2.1996. Between 1996 and 2001, 24 villages with about 1547 families had been translocated from the sanctuary by the Madhya Pradesh Forest Department. Government of Madhya Pradesh had also demarcated 1280 sq. kms.

Kuno Wildlife Division, encompassing the Sironi, Agra and Morawan forest ranges around the sanctuary. Government of India vide its order dated 21.1.1997 ordered diversion of 3720.9 hectares of forest land, including 18 villages were protected under Section 2 of the Forest Conservation Act. A 20-years Project envisaged by the Government of India was also approved by NBWL in its meeting held on 10.3.2004. The Government of Madhya Pradesh took up a massive re-location of villages and giving them alternative sites. Government of India has spent a sum of Rs.15 crores for the said purpose. Thus all possible steps have been taken by the State of Madhya Pradesh, MoEF and the Union of India making Kuno Wildlife Sanctuary fit for re-introduction of Asiatic lion, with the approval of NBWL. [Paras 52 and 53] [800-G-H; 801-A-E]

1.14. Re-introduction of Asiatic lion should be in accordance with the guidelines issued by IUCN and with the active participation of experts in the field of re-introduction of endangered species. MoEF is therefore directed to take urgent steps for re-introduction of Asiatic Lion from Gir forests to Kuno. MoEF has to constitute an Expert Committee consisting of senior officials of MoEF, Chief Wildlife Wardens of the States of Madhya Pradesh and Gujarat. Technical experts should also be the members of the Committee. Any other expert can also be co-opted as the members of the Committee. The number of lions to be re-introduced would depend upon the density of prey base and other related factors, which the Committee will assess. [Para 61] [808-C-F]

I.A. No. 3452 of 2012 in W.P.(C) No. 202 of 1995:

2. The decision taken by MoEF for introduction of African Cheetahs before introduction of Asiatic Lion to Kuno Wildlife Sanctuary, is arbitrary, illegal and in clear violation of the statutory requirement[illegible]e

Wildlife Protection Act. MoEF has not conducted any detailed study before passing the order of introducing foreign cheetah to Kuno. Kuno is not a historical habitat for African cheetahs. No materials have been placed before the Court to establish that fact. A detailed scientific study has to be done before introducing a foreign species to India, which has not been done in the instant case. NBWL, which is Statutory Board established for the purpose under the Wildlife Protection Act was also not consulted. The order of MoEF to introduce African Cheetahs into Kuno cannot stand in the eye of law and the same is quashed. [Paras 59 and 60] [807-E-H; 808-A]

3. There is necessity of an exclusive parliamentary legislation for the preservation and protection of endangered species so as to carry out the recovery programmes before many of the species become extinct. NWAP (2002-2016) has already identified species like the Great Indian Bustard, Bengal Florican, Dugong, the Manipur Brow Antlered Deer, over and above Asiatic Lion and Wild Buffalo as endangered species and hence, the Government of India and the MoEF are directed to take urgent steps for the preservation of those endangered species as well as to initiate recovery programmes. The Government of India and the MoEF are also directed to identify all endangered species of flora and fauna, study their needs and survey their environs and habitats to establish the current level of security and the nature of threats. They should also conduct periodic reviews of flora and fauna species status, and correlate the same with the IUCN Red Data List every three years. Courts and environmentalists should pay more attention for implementing the recovery programmes and the same be carried out with imagination and commitment. [Para 63] [808-H; 809-A-E]

Case Law Reference:

2010 (12) SCR 583	**relied on**	**Para 29**

2011 (7) SCR 954	**relied on**	**Paras 32**
2012 (3) SCR 460	**referred to**	**Para 37**
1996 (10) Suppl. SCR 12	**relied on**	**Para 41**

CIVIL ORIGINAL JURISDICTION : I.A. No. 100

IN

Writ Petition (Civil) No. 337 of 1995.

Under Article 32 of the Constitution of India.

WITH

IA No. 3452 in W.P. (C) No. 202 of 1995.

P.P. Malhotra, ASG, P.S. Narasimha, (A.C.) T.S. Deobia, Raj Panjwani, Shyam Divan, Sukhbeer Kaur Bajwa, Kiran Bhardwaj, B.K. Prasad, Asha G. Nair, Md. Khithey, D.S. Mahra, Vijay Panjwani, Rahul Choudary, Aditya Shamlal, Anitha Shenoy, Hemantika Wahi, Nirman Sharma, Jesal, Gaurav Agrawal, K. Parameshwar, Haris Beeran, P.K. Manohar, Rajeev K. Dubey, Shiv Prakash Pandey, Kamlendra Mishra, Vibha Dutta Makhija for the appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. Application for Intervention is allowed.

1. We have been called upon to decide the necessity of a second home for Asiatic Lion (*Panthera leo persica*), an endangered species, for its long term survival and to protect the species from extinction as issue rooted on eco-centrism, which supports the protection of all wildlife forms, not just those which are of instrumental value to humans but those which have intrinsic worth.

FACTS:

2. The Wildlife Institute of India (for short 'WII'), an autonomous institution under the Ministry of Environment and Forests (for short 'MoEF'), Government of India, through its wildlife Biologists had done considerable research at the Gir Forest in the State of Gujarat since 1986. All those studies were geared to provide data which would help for the better management of the Gir forest and enhance the prospects for the long term conservation of lions at Gir, a single habitat of Asiatic lion in the world. The data collected by the Wildlife Biologists highlighted the necessity of a second natural habitat for its long term conservation. Few of the scientists had identified the Asiatic lions as a prime candidate for a re-introduction project to ensure its long term survival. In October 1993, a Population and Habitat Analysis Workshop was held at Baroda, Gujarat. Various issues came for consideration in that meeting and the necessity of a second home for Asiatic lions was one of the issues deliberated upon in that meeting. Three alternative sites for re-introduction of Asiatic lions were suggested for an intensive survey, the details of which are given below:

1. Darrah-Jawaharsagar Wildlife Sanctuary (Rajasthan)

2. Sitamata Wildlife Sanctuary (Rajasthan)

3. Kuno Wildlife Sanctuary (Madhya Pradesh)

3. The Research Advisory Committee of WII recognized the need for a prior survey to assess the potential of those sites. Accordingly, a field survey was conducted. Surveys of the three sites were made during winter as well as summer, to assess water availability during the summer and also to ascertain the changes in human impact on the habitat during the seasons. The surveyors concentrated on ascertaining the extent of forest area in and adjoining the chosen protected areas with the aim of establishing the contiguity of the forested habitat. Attempts were also made to establish the relative abundance of wild ungulate prey in the three sites based on direct sightings as well as on indirect evidence. An assessment of the impact on the people and their livestock on habitat quality in all three sites was also made. Of the three sites surveyed, Kuno Wildlife Sanctuary (for short 'Kuno') was found to be the most suitable site for re-introduction in establishing a free ranging population of Asiatic lions. A draft report to that effect was prepared by eminent Scientists like Ravi Chellam, Justus Joshwa, Christy A. Williams and A. J. T. Johnsingh on behalf of WII. The report revealed that the Kuno was a historical distribution range of Asiatic lions. Report also highlighted the necessity of a long term commitment of resources, personnel, the necessity of a comprehensive rehabilitation package, adequate staff and facilities. Committee did not consider the presence of tigers in Kuno to be a major limiting factor, especially since the tigers occur in such low numbers and density. Since lions live in stable social units, report highlighted that it is important to take lions for the translocation also from a single pride. Further, it was also pointed out that genetic consideration would not be a major factor, provided fresh male lions are moved from Gir to Kuno every three to five years and the resident males in Kuno selectively captured for Zoos.

4. State of Madhya Pradesh then undertook a massive rehabilitation package for the villagers settled in and near Kuno so as to push forward the scheme of relocation of Asiatic lions in Kuno. It was noticed that about 1545 families of 24 revenue villages were living inside Kuno and they had to be rehabilitated outside the sanctuary. Since suitable and sufficient revenue land was not available in adjoining areas, it was decided to relocate those villages on degraded protected forests. Since proposed site of resettlement fell in various blocks of protected forest, the use as a rehabilitation purpose involved a legal obligation to obtain prior sanction from MoEF under Section 2 of the Forest (Conservation) Act, 1980.

5. The Secretary (Forests), Government of Madhya Pradesh, therefore, sent a letter dated 24.7.1996 to MoEF seeking final approval of the Central Government in accordance with the Forest (Conservation) Act, 1980. MoEF, after examining the request of the State of Madhya Pradesh, conveyed its approval under Section 2 of the Forest (Conservation) Act, 1980 for diversion of 3720.9 hectare of forest land for rehabilitation of 18 villages located inside the Kuno, subject to fulfillment of certain conditions. Out of 3720.9 hectare of the 13-forest compartments, 3395.9 hectare forest area of 12 compartments was finally approved by the Government of India for de-notification. Compartment No. P-442 of Umarikaia forest block was left out from the original proposal by Government of India letter dated 1.2.2000 and hence, the released area in first phase had been de-notified after due permission from the Government of India. Forest area of 1263.9 hectare released in the second phase could not be de-notified for want of permission from the Government of India. The Government of India constituted a Monitoring Committee for the effective implementation of the Asiatic Lion Reintroduction Project at Kuno which met on 10.3.2004. The Survey report of WII was discussed in the meeting and it was noticed that Kuno Paipur Sanctuary of M.P. was identified as the project site/and a 20 year project was conceived in three phases as below:

a. Phase I (1995-2000 A.D.) Village relocation and habitat development.

b. Phase II (2000-2005) Fencing at the side, translocation, research and monitoring.

c. Phase III (2005-2015) Eco-development.

It was pointed out in the meeting that, currently, the project was in Phase II and 18 villages had been rehabilitated from Kuno. Further, in the meeting, the Chief Wildlife Warden of Gujarat had, however, opined that there was no commitment

on the part of the State of Gujarat for providing lions and the State Government had not agreed for the same. Based on the discussion, the Chairman summed up the consensus which emerged out of the deliberations as follows:

1. A letter from MOS, MoEF should be sent to the Chief Minister of Gujarat, highlighting the project justification with a request to provide lions for translocation to Kuno Palpur Sanctuary.

2. State of Gujarat should be provided with a set of project documents.

3. The Chief Wildlife Warden, MP should prepare a road map with a final detail for translocation of lions from Gir to Kuno.

4. An assessment of prey base in Kuno should be done by WII.

5. No further expenditure should be incurred with a focus on lion; however, funding support for habitat improvement/ welfare initiatives for other wild animals can continue.

6. The scheme for rehabilitation of villagers was prepared by the centrally sponsored "Beneficiary-oriented Scheme for Tribal Development". It was stated in the scheme that a total of more than Rs.1545 lacs would be required for the satisfactory re-location of 1545 families of 24 villages out of the limit of Kuno. Out of 1545 lacs, 1061 lacs had been spent on relocation process. Balance 484 lacs were required to be released for the remaining rehabilitation works. The Chief Wildlife Warden, M.P. had certified the said expenditure.

7. WII, in the meantime, had made a detailed assessment of prey population for lion re-location in Kuno. It was noticed that since re-location of villages from Kuno was complete, Government of M.P. was keen to assess the prey base in the sanctuary so as to plan obtaining lion

introduction as early as possible. For the said purpose, the task of evaluating for wild prey base was entrusted to WII. Consequently, the faculty from WII, with the help of 34 forest staff, had undertaken the study of ungulates in Kuno under the guidance of Dr. Raghu Chundawat and carried out the prey assessment exercise from 2.1.2005 to 8.1.2005 and 8.2.2005 to 13.2.2005. A report was filed in June 2006 (July 2006). The Minister of MoEF sent a letter dated 20.7.2006 to the Chief Minister of Gujarat for translocation of two numbers of lions to Kuno. The Chief Minister of Gujarat vide his letter dated 30.4.2006 replied stating that the matter had been placed before the concerned department for further views. But nothing had been transpired in spite of the fact that crores and crores of rupees were spent by the Government of India for re-location of villages, de-notifying the reserve forest and so on which led to the filing of this public interest litigation seeking a direction to the respondents to implement the re-location programme as recommended by WII, and approved by the Government of India.

8. The Minister for Tribal Welfare, Forests and Environment, Government of Gujarat vide his D.O. letter dated 18.8.2007 had indicated that it was not possible for the State Government to agree to the proposal for creation of a second home at Kuno in Madhya Pradesh for Asiatic Lions. When the matter came up for consideration before this Court on 30.11.2007 and this Court passed the following order:

> "There was a proposal for translocation of some of the Asiatic Lions found in the Gir National Park to a forest in Madhya Pradesh. The State of Gujarat has raised certain objections. The State of Madhya Pradesh wants to file its response..... The proposal is directed to be submitted to the National Board for Wildlife. NBWL may consider the objections of State of Gujarat and response of Madhya Pradesh and submit is recommendation in this court in four months."

9. NBWL then convened a meeting on 18.2.2008 under the Chairmanship of Hon'ble Minister of State for Forests and Wildlife. The Chief Wildlife Warden, Gujarat informed the Board about the various steps taken by the State Government for providing protection to Lions and their habitat and submitted as follows:

(a) That Kuno Palpur has a population of 6 to 8 tigers and co-existence of large cats of almost equal size was unlikely.

(b) That Lions world over are known to prefer grasslands in sub-topical to near sub-tropical climates with normal temperature during hot period below 42 degree C. (approx) while Kuno is known to have hot climate during summer with temperature exceeding 45 degree C. for a number of days.

(c) The prey base at Kuno is also not adequate enough for the lions.

(d) Lions are increasing in number and geographical distribution in vicinity of Gir in Amreli & Bhavnagar districts. This is a natural increase in home range of lions, which is well received by local population. Besides, Gir National Park and Gir-Paniya-Mithiyal Sanctuary and Devalia Interpretation Park, lions have made home in Girnar, grasslands of Savarkundla, Palitana and Mahuva hills and in the coastal region of Jafrabad and Rajula in Amreli districts, Mahuva and Palitana talukas of Bhavnagar district.

(e) The Barda Sanctuary area is being effectively prepared as home for lion with vegetation having improved while spotted deer are introduced.

(f) The natural expansion of h[illegible]e effective way of establi[illegible]a

population that infrequently interact among populations located at different places in Gir region. Thus effectively isolated populations which may still received genetic inputs from the base populations are establishing, providing efficient method of conservation.

(g) During the year 2007-2008, Government of Gujarat has launched a special programme for conservation of lion with the Hon'ble Chief Minister of Gujarat announcing a five year action plan package of Rs.40 crore for lion conservation which includes increase in protection force, habitat management, raising awareness to enlist people's participation etc.

10. The Chairman, NBWL then sought the opinion of the Government of Madhya Pradesh on the points raised by the Chief Wildlife Warden, Gujarat.

11. The Additional PCCF (WL), Government of Madhya Pradesh informed that the Kuno was waiting for the release of lions from Gujarat and that the Madhya Pradesh Government had taken all the necessary measures to make Kuno the ideal second home for the lions. Further, it was pointed out that the State had already relocated 24 villages from the sanctuary for the said purpose. Further, it was pointed out that Kuno was suggested as a second home for lions after due scientific studies conducted by WII and the Kuno had posed no threat to the conservation of lions. Further, it was also pointed out that the prey base was in plenty in Kuno and he requested that the lions be translocated to Kuno at the earliest.

12. Dr. Asad Rehmani, Director, Bombay Natural History Society and member of the Standing Committee pointed out that sporadic presence of tiger in Kuno was in no case detrimental to re-introduction of lions. Dr. Divyabhanusinh Chavda, member of the Standing Committee had also

emphasized the fact that there was a need to create a second home for lions. Dr. Chavda cited an example of the death of large number of lions in the Serengeti National Park at Tanzania and other areas in Africa due to epidemics. Dr. Chavda cautioned, it could happen at Gir as well. Rest of the members of the Standing Committee also supported the decision for translocation of lions from Gujarat to Kuno. The Standing Committee of NBWL recorded that it was unanimously recommended for translocation of lions from Gujarat to Kuno.

13. The State of Gujarat filed a detailed affidavit before this Court on 4.4.2009 stating that the State had objected to the translocation of lions and that the decision of the Standing Committee was not unanimous. Further, it was also pointed out that there was no sufficient prey base at Kuno so as to receive lions.

14. This Court, after perusing the affidavit filed by the States of Gujarat, Madhya Pradesh as well as MoEF, again passed an order dated 22.4.2009 directing NBWL to have a fresh look on the subject and file a report. It was also ordered that NBWL should hear both the States, if necessary before filing the report. The additional affidavit filed by the State of Gujarat was also placed for consideration before NBWL in its meeting held on 17.7.2009. In that meeting, the Chief Wildlife Warden and the Principal Secretary (Forests) were present on behalf of the State of Gujarat. After detailed discussion, the Standing Committee of NBWL had unanimously decided to have an in-house technical discussion on the subject before taking a final view. The technical discussion was, therefore, held during the 16th meeting of the Standing Committee which was convened on 16.9.2009. In that meeting, the representatives of the Government of Madhya Pradesh (Additional Chief Secretary and Chief Wildlife Warden), Government of Gujarat (Principal Secretary – Forest and Chief Wildlife Warden) along with non-official members of the Standing Committee of National Board of Wildlife were als

discussions. The following decisions were taken in the technical discussion held on 16.9.2009:

"TECHNICAL DISCUSSION ON THE ISSUE TRANSLOCATION OF ASIATIC LION FROM GIR TO KUNO PALPUR

It was followed by discussion on Agenda Item No.4

Member Secretary apprised the Committee that during the last meeting it was decided to have detailed technical discussion on the issue of translocation of lions to Madhya Pradesh (M.P.) in Kuno Palpur Sanctuary. Chairman observed that the issue is not mere translocation of lions from Gujarat to M.P. but also the long term viability of survival of the translocated lions. He also pointed out that in past lions have been translocated in M.P. as well as in U.P. unsuccessfully. Further, at present tiger conservation in M.P. also requires focused efforts on the part of the State Government. Under these circumstances any decision for translocation of lions needs to be taken very carefully after judicious consultations.

Dr. Divyabhanusinh Chavda informed that in the previous instances of lion's translocation in both the cases, lions were hunted because they became cattle lifters and caused acute lion-man conflict in the introduced areas as the introduced areas were small and devoid of adequate prey based. However, this is not the present case. At present hunting is legally banned and proposed introduction area is not only having enough prey base but also devoid of human population. CWLW, M.P. also informed that Kuno Palpur Sanctuary could accommodate even 60 lions as there was about 900 sq. Km of buffer area around the Sanctuary. There was enough prey base as per the survey of the State Forest Department. The additional Chief Secretary, Govt of M.P. submitted that the issue was not between the two States but was survival of lions and it

needs to be provided an alternative home outside 8the Gujarat State. More than Rs.34.00 crores have already been spent on the project. In case wild lions are not available, zoo bred lions could be introduced in the identified area following soft release as has been proposed in past. Dr. M.K. Ranjitsinh was of the opinion that introduction of zoo bred or captive bred lions in the wild were not correct approach. The only solution was to introduce wild population of lions. Dr. Asad Rahmani also supported these views of Dr Ranjitsinh.

While elaborating the issue of introduction of captive bred lions, Director, WII informed that introduction of such animals in wild is a long drawn process involving 6-12 years. Only filial-2 or filial-3 of the captive bred population could be introduced in wild through soft release and it would require strict monitoring with scientific inputs at all levels supported with strong political, administrative and financial commitments. Member Secretary pointed out that Hon'ble Supreme Court has referred this issue to the Standing Committee with particular reference to additional affidavit filed by Gujarat State Government. Chairman desired that Ministry could prepare a draft response in the matter and get it circulated amongst the members of the Standing Committee and after incorporating their views, a decision on the response to be filed before the Hon'ble Court would be taken. It was also desired that this draft should be circulated within one month among all the members. Chairman also observed that ministry may restart the earlier approved programme of soft release of captive bred lions in Kunopalpur."

15. The Standing Committee of NBWL then met on 22.12.2009, perused the report of the Technical Committee and made the following observations:

"It is submitted that in view of the above background, the following are the observat g

Committee of National Board for Wildlife on the issue of translocation of lion from Gujarat to Madhya Pradesh:

3.1. The population of Asiatic Lions in India has been restricted to its habitat in the Gir National Park and Gir Sanctuary alone, where they face threats due to man-animal conflict, outbreak of possible epidemic or any natural calamity, etc. Such actions may wipe out the whole population. The need for a second home for the Asiatic Lions was therefore felt and accordingly, based on habitat feasibility studies by the Wildlife Institute of India in various Protected Areas and forests of Gujarat, Rajasthan and Madhya Pradesh, three different sites were finally studied in greater detail out of which Kuno Palpur sanctuary in Morena District of Madhya Pradesh was found most suitable for re-introduction and establishing a second free ranging population of Asiatic Lion outside Gir.

3.2. The contention of the Government of Gujarat that the Lions would not be able to survive in Kuno Palpur due to its extreme climatic conditions is not true. It may be mentioned here that the lions have thrived in extreme climate from the deserts of Palestine and Arabia to the cold coniferous forest in Iran in historical times. They were destroyed not by climate, but by the human action. Lions exist and survive in a variety of habitats with varied prey densities, temperatures and vegetation communities across their range, and while the overall prey densities of Gir are in the higher range of lion densities while that of Kuno are in the medium to low density areas of lions, the natural prey densities in Kuno are significantly higher than the natural prey densities in areas in south Saurashtra outside the Gir where Lions have now taken residence and where the State Government wishes to retain them. It was fro these "outlying" Lion populations outside of the Gir that translocation to Kuno Palpur was planned. Therefore, it would be unreasonable to compare Kuno prey densities

with that of Gir and then come to a conclusion that Kuno is unsuitable habitat for lions. It is well within the lion range of habitats and prey densities currently.

3.3. The Government of Gujarat, vide para 11 of the additional affidavit, had stated that the wildlife Institute of India has used simple logistic model for projections and predictions, while presenting population growth of wild ungulates. This contention of the Government of Gujarat is not appropriate. In fact, models are abstractions of reality – Simplistic Models have general applications and fewer assumptions. Complex models represent specific ecosystems more realistically but are extremely data intensive. Data needed for models like the one suggested by the Government of Gujarat is not available for most populations in India and therefore remain there academic exercises. Model outcomes/recommendations should not be followed blindly. In any case, an evaluation of prey densities should be done again prior to the proposed reintroduction of lions and the reintroduction schedule/plan appropriately modified to be in tune with the realized rate of increase by prey populations of Kuno. It is part of the original plan and in any case, as noted above, the natural prey densities in Kuno are higher than in areas where Lions have taken residence outside of Gir in Gujarat and where they live mainly by preying on livestock.

3.4. The Gir lions have passed through two bottle necks on about 1 to 4 thousand years ago and another about 150-200 years ago and are therefore highly inbred. The reintroduction effort does not end with the introduction of a pride of lions into Kuno. A continued program of exchange/supplementation of individual lions between Gir and Kuno is needed at the rate of 2-3 lions per generation. This supplementation needs to continue till the Kuno lion population Gene pool nears that of Gir lions. It is envisaged that such exchanges to last for a m[illegible]5-30 years but would benefit from cor[illegible]er

a longer time scale. The Kuno and Gir populations could be managed as a meta-population that would provide demographic as well as genetic benefits to the Gir lion population as well.

3.5. The contention of Government of Gujarat that translocation of Lions made in earlier occasion during early 20th century and during 1956, especially to the Chandraprabha Wildlife Sanctuary in Uttar Pradesh was unsuccessful and therefore the present translocation also would not yield much results is not correct. The reason being that in the previous instances of Lion's translocation, lions were hunted because they became cattle lifters and caused acute lion-man conflict in the introduced areas as the introduced areas were small and devoid of adequate prey base and burdened with human population. However, this is not the present case. At present hunting is legally banned and proposed introduction area is not only having enough prey base but also devoid of human population. Further there are better scientific inputs, full commitment on the part of State Government of Madhya Pradesh and required home work has been done. Therefore, present relocation is not comparable with earlier efforts.

3.6. The issue of poaching is vital. The Government of Gujarat has dealt with it quite well. Poaching will continue to be a threat as long as there is a demand for lion0tiger parts. In the Kuno area also the management have to be much more vigilant with regard to poaching. Further, there is also a need for a collective action by the Central Government, State Governments along with a strong political and bureaucratic commitment as well as full and dedicated support of technocrats and scientists for better and long term conservation of such a species of national pride and what was once Indi's National Animal.

3.7. The objective of the Government of India is to conserve Asiatic lions for posterity and this effort does not

end by mere introduction of a lion pride to Kuno. It would be imperative that Gujarat and Madhya Pradesh work together in designing a Meta-population management plan based on genetic and demographic data of the Asiatic lions to ensure that this objective is met. Without this cooperative approach, lion conservation objective of the Nation/World will not be met.

In view of the aforesaid, it is recommended that the translocation of lions from Gir area to an alternate area, presently to the Kuno-Palpur Sanctuary, is the necessity of the hour essential for conservation of lions for posterity. As mentioned above, the efforts for conservation of lions would not stop by mere translocation efforts, but it would continue through the active involvement of all the stakeholders."

16. The Standing Committee then authorized the MoEF to file an affidavit to that effect before this Court. Accordingly, an affidavit was filed before this Court by MoEF on 7.1.2010. State of Gujarat also filed a detailed affidavit on 12.11.2010. In its affidavit, the State of Gujarat highlighted the insufficiency of prey base at Kuno and the presence of tigers in the occupied area at Kuno as the major limiting factors. Further, it was also pointed out that the current Asiatic lion population is not a single population confined to one place but consists of meta-population spread over several locations within the Greater Gir Region and that good conservation practices and intensive wild life health care, has lead to epidemic free regime over generations of wildlife including Asiatic Lion in the area.

17. The State of Gujarat took up the stand that, though the issue was discussed by the Standing Committee of NBWL, it had not been placed before the State Board for Wildlife (Gujarat), which is a statutory requirement under the Wild Life (Protection) Act. This Court, therefore, on 27.2.2012, directed the State Board to consider the issue of lions' translocation and to submit its report. Accordingly, the ma[illegible]e

the State Board. The State Board took the view that there was no threat to Asiatic Lion in the Gir forest from epidemic diseases or other such factors. It was pointed out that the present Asiatic lion population has risen from a broad based and a reasonably good population has been achieved. Further, it was pointed out that previous attempts for translocation from Gujarat were also a failure and since the Greater Gir region being an ideal preservation and conservation for Asiatic lions, there is no necessity of finding out a second home for Asiatic lion at Kuno.

ARGUMENTS:

18. We heard Shri Raj Panjwani, learned senior counsel appearing for the applicant, who submitted that this 20-year project is hanging on fire due to the indifferent attitude of the Gujarat Government. Learned senior counsel submitted that the necessity of re-introduction of Asiatic lion at Kuno has been keenly felt and the scientific world has unanimously advocated for translocation of this endangered species to Kuno for its long term survival and preservation. Learned senior counsel pointed out that NBWL, the expert technical body at more than one occasions has approved and granted technical sanction to go ahead with the project, but could not pick up expected momentum due to the indifferent and defiant attitude of the State of Gujarat.

19. Ms. Vibha Datta Makhija, learned counsel appearing for the State of Madhya Pradesh, highlighted the steps taken by the State of Madhya Pradesh for pushing the project forward. Learned counsel referred to the various counter affidavits filed by the State of Madhya Pradesh for completing the first phase of the project. Necessary sanction has already been obtained to declare Kuno as Sanctuary under the Wildlife Protection Act. MoEF has already granted its approval under Section 2 of the Forest (Conservation) Act for diversion of 3395.9 hectare of forest land for the rehabilitation of eighteen villages located inside Kuno, subject to fulfillment of certain

conditions. The area at Kuno was increased to 1268.861 Sq. Km in April 2002 by creating a separate Kuno Wildlife Division. For the above purpose, a total amount of Rs.1545 lakh had been granted by the Government of India and utilized by the State Government. Learned counsel also pointed out that altogether 24 villages and 1543 families were relocated outside Kuno by the year 2002-2003 and the lands abandoned by them have been developed into grass lands.

20. Learned counsel also pointed out that prey density at Kuno has far exceeded the prey density at Gir. Reference was made to the Prey Density Survey conducted during 2004-2005 by Mr. Fiaz A. Khudsar and Mr. Raman in the year 2008. Firstly, it was pointed out that WII had also conducted an independent study in the year 2012, which also supported the stand taken by the State of Madhya Pradesh that there is sufficient prey base to receive sufficient numbers of lions. Over and above, adequate training has also been given to the forest staff, guards etc. for receiving the lions and for their upkeep and monitoring.

21. Shri P. K. Malhotra, learned Additional Solicitor General, submitted that the population of Asiatic lion is increasing at Gir, but there are conceivable threats to their survival; man-made, natural calamity as well as outbreak of epidemic, which may wipe out the entire population, due to their small population base and limited geographical area of spread. It is under such circumstances, the need for a second home for lions was felt, for which Kuno was found to be the most suitable habitat. However, it was pointed out that the lions could be translocated only if sufficient number of ungulates is available and after taking effective measures, such as, control of poaching, grassland management, water management, building rubble wall around the division etc. Learned senior counsel made reference to the study conducted by the experts of WII and Wildlife Trust of India of the programme of re-introduction of Cheetah in Kuno, on import from Namibia. Referring to the correspondence betwe[illegible]e

(External Affairs) and Chief Minister of Madhya Pradesh, it was pointed out that subsequent re-introduction of lions is in no way expected to affect the cheetah population, which would have established in the area, by that time.

22. Shri P. S. Narasimha, learned senior counsel and learned Amicus Curiae apprised the court of the extreme urgency for the protection of the Asiatic lion which has been included in the Red List published by the International Union for Conservation of Natgure (IUCN) as critically endangered species, endorsed by NBWL in various meetings. NBWL, being the highest scientific statutory body, it commands respect and its opinion is worthy of acceptance by the MoEF and all the State Governments. Learned senior counsel also referred to Article 48 and Article 51-A of the Constitution of India and submitted that the State has a duty to protect and improve environment and safeguard the forests and wildlife in the country, a duty cast upon all the States in the Union of India. Reference was also made to the conservatism in Bio-Diversity and the Eco-centric principle, which have been universally accepted. Learned senior counsel also referred to the National Wildlife Action Plan 2002-2016, and submitted that translocation of Asiatic lions has been treated as a priority project after having found that an alternative home for Asiatic lion is vital for its survival. Learned senior counsel also submitted that the National Forest Policy and the Scheme of 2009 and NWAP (2002-2016) and the plans have legislative force as decided in *Lafarge Umiam Mining Private Limited, T.N. Godavarman Thirumulpad* v. *Union of India and others* (2011) 7 SCC 338 case and can be enforced through Courts.

23. Shri Shyam Divan, learned senior counsel appearing for the State of Gujarat, refuted all those contentions and reiterated that there is no necessity of finding out a second home for Asiatic lions, since the population of Asiatic lion has been properly protected in Greater Gir forest and also in few other sanctuaries near Gir Forest. Shri Divan submitted that the

population of Asiatic lion has gone up reasonably since broader conservation methods have been adopted by the State of Gujarat and that at present, there is no immediate threat to the Asiatic lions calling for emergency measures, like translocation or reintroduction. Learned senior counsel further pointed out that past experience shows that such translocation of lions ended in failure and possibility of such recurrence cannot be ruled out, since Kuno is not well set to accept or preserve an endangered species like Asiatic lion; which is a success story at Gir.

24. Shri Divan also submitted that, so far, no acceptable translocation plan has been prepared or implemented for a successful translocation of an endangered species like Asiatic lion and the same has been taken note of and commented upon the State Wildlife Board, Gujarat in its meeting held on 16.3.2012. Shri Divan also submitted that the prey-base studies are totally inadequate and not a single study has been conducted or report placed before this Court to show that the benchmark of 480,000 kgs. of wild ungulates biomass has been attained at Kuno. Shri Divan also referred to the note dated 8.7.2012 submitted by Dr. Ravi Chellam and contended that no reliable information was furnished to support the view regarding adequacy of prey base at Kuno. Shri Divan also referred to Section 12 of the Wild Life (Protection) Act and submitted that the translocation should be to 'an alternative suitable habitat". Kuno, according to the learned senior counsel, is not a 'suitable habitat', not only due to inadequacy of prey-base, but also due to factors like presence of tigers, large scale poaching, unfavourable climate condition, lack of expertise, human-animal conflict etc.

25. Learned senior counsel also referred to the issues raised by the petitioner through this PIL and contended that it would not stand the tests laid in *Lafarge* case (supra), especially when the State Board of Wild Life has stated cogent reasons why translocation of lions to Kuno, at present, is not advisable, which is fully justified by the objecti

scientific material. Such decision, according to the learned senior counsel, is not amenable to judicial review and, even otherwise, no grounds are made out for issuing a *Writ of Mandamus* directing translocation of Asiatic lion from Gir to Kuno.

Legal Framework

26. We will first deal with the constitutional and the legal framework on which we have to examine the various issues which have come up for consideration in this case. The subject "Protection of wild animals and birds" falls under List III, Entry 17B of Seventh Schedule. The Parliament passed The Wild Life (Protection) Act 53 of 1972 to provide for the protection of wild animals and birds with a view to ensuring the ecological and environmental security of the country. The Parliament vide Constitution (42nd Amendment) Act, 1976 inserted Article 48A w.e.f. 03.01.1977 in Part IV of the Constitution placing responsibility on the State "*to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country*." Article 51A was also introduced in Part IVA by the above-mentioned amendment stating that "*it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures*".

27. By Act 23 of 1982, Section 12(bb) was inserted in the Wild Life (Protection) Act w.e.f. 21.05.1982 which authorised the Chief Wild Life Warden to grant a special permit for the purpose of scientific management which would include translocation of any wild animal to an alternative suitable habitat or population management of wild life without killing or poisoning or destroying any wild animals.

28. The Parliament later vide Act 16 of 2003 inserted Section 5A w.e.f. 22.09.2003 authorizing the Central Government to constitute the National Board for Wild Life (in short 'NBWL'). By the same Amendment Act, Section 5C was

also introduced eliciting functions of the National Board. Section 5B was also introduced by the aforesaid amendment authorizing the National Board to constitute a Standing Committee for the purpose of exercising such powers and performing such duties as may be delegated to the Committee by the National Board. NBWL is, therefore, the top most scientific body established to frame policies and advise the Central and State Governments on the ways and means of promoting wild life conservation and to review the progress in the field of wild life conservation in the country and suggesting measures for improvement thereto. The Central and the State Governments cannot brush aside its opinion without any cogent or acceptable reasons. Legislation in its wisdom has conferred a duty on NBWL to provide conservation and development of wild life and forests.

29. This Court in *Sansar Chand v. State of Rajasthan*, (2010) 10 SCC 604 held that all efforts must be made to implement the spirit and provisions of the Wild Life (Protection) Act, 1972; the provisions of which are salutary and are necessary to be implemented to maintain ecological chain and balance. The Stockholm Declaration, the Declaration of United Nations, Conventions on Human Environment signed in the year 1972, to which India is the signatory, have laid down the foundation of sustainable development and urged the nations to work together for the protection of the environment. Conventions on Biological Diversity, signed in the year 1962 at Rio Summit, recognized for the first time in International Law that the conservation of biological diversity is "a common concern of human kind" and is an integral part of the development process.

30. The Parliament enacted the Biological Diversity Act in the year 2002 followed by the National Biodiversity Rules in the year 2004. The main objective of the Act is the conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the bene

utilization of genetic resources. Bio-diversity and biological diversity includes all the organisms found on our planet i.e. plants, animals and micro-organisms, the genes they contain and the different eco-systems of which they form a part. The rapid deterioration of the ecology due to human interference is aiding the rapid disappearance of several wild animal species. Poaching and the wildlife trade, habitat loss, human-animal conflict, epidemic etc. are also some of the reasons which threaten and endanger some of the species.

31. India is known for its rich heritage of biological diversity and has so far documented over 91,200 species of animals. In India's bio-graphic regions, 45,500 species of plants are documented as per IUCN Red List 2008. India has many critically threatened animal species. IUCN has noticed today the only living representative of lions once found throughout much of south-west Asia occurred in India's Gir forest which has been noticed as a critically endangered species in IUCN Red List. The IUCN adopted a resolution of 1963 by which a multi-lateral treaty was drafted as the Washington Convention also known as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973. CITES entered into force on 1st July, 1975, which aims to ensure that international trade in specimens of wild animals and plants does not threaten the survival of the species in the wild, and it accords varying degrees of protection to more than 33,000 species of animals and plants. Appendix 1 of CITES refers to 1200 species which are threatened with extinction. Asiatic lion is listed in Appendix 1 recognizing that species is threatened with extinction.

32. We notice for achieving the objectives of various conventions including Convention on Biological Diversity (CBD) and also for proper implementation of IUCN, CITES etc., and the provisions of the Wild Life (Protection) Act, Bio-diversity Act, Forest Conservation Act etc. in the light of Articles 48A and 51A(g), the Government of India has laid down various policies

and action plans such as the National Forest Policy (NFP) 1988, National Environment Policy (NEP) 2006, National Bio-diversity Action Plan (NBAP) 2008, National Action Plan on Climate Change (NAPCC) 2008 and the Integrated development of wild life habitats and centrally sponsored scheme framed in the year 2009 and integrated development of National Wild-life Action Plan (NWAP) 2002-2016. In *Lafarge* case (supra) this Court held that National Forest Policy 1988 be read together with the Forest (Conservation) Act, 1980. In our view, the integrated Development of Wile Life habitat under the Centrally Sponsored Scheme of 2009 and the NWAP (2002-2016) have to be read along with the provisions of the Wile Life (Conservation) Act.

33. The Prime Minister of India on 1.1.2002, in the XXI Meeting of the Indian Board for Wildlife, released the 'National Wildlife Action Plan (2002-2016)' (in short NWAP 2002-2016). NWAP has highlighted that the wildlife encompasses all uncultivated flora and undomesticated fauna and every species has the right to live and every threatened species must be protected to prevent its extinction. It was noticed with the mounting agricultural, industrial and demographic pressures, wilderness areas, which are the richest repositories of wildlife and biodiversity have either shrunk or disappeared and their continued existence is crucial for the long term survival of the biodiversity and the ecosystems supporting them. NWAP, *inter alia,* highlighted the necessity to protect the long term ecological security of India and to identify and protect natural ecosystems from over-exploitation, contamination and degradation. NWAP has also urged the necessity to give primacy to *in situ* conservation which is a sheet anchor of wildlife conservation. *Ex situ* measures in zoological parks and gene banks may supplement this objective, without depleting scarce wild resources. NWAP also highlighted the ecological requirements for the survival of threatened, rare and endangered species together with their community associations of flora and fauna. It also highlighted the imperative neces e

homes for highly endangered species like the Great Indian Bustard, Bengal Florican, Asiatic Lion, Wild Buffalo, Dugong, the Manipur Brow Antlered Deer and the like. It was also noticed that where *in situ* conservation efforts are unlikely to succeed, *ex situ* captive breeding and rehabilitation measures may be necessary, in tandem with the preparation of their wild habitats to receive back captive populations, especially in respect of lesser-known species where status and distribution of wild animals are not fully known. NWAP also highlighted the necessity of taking the following actions:

1. To identify all endangered species of flora and fauna, study their needs and survey their environs and habitats to establish the current level of security and the nature of threats. Conduct periodic reviews of flora and fauna species status, and correlate the same with the IUCN Red Data List every three years.

2. Invest special care and resources to protect habitats that harbour highly endangered species especially those having single population and a high degree of endemism.

3. Initiate action to prevent the "genetic swamping" of wild species.

4. To undertake a programme of *ex situ* captive breeding and rehabilitation in the wild for critically endangered species in accordance with IUCN guidelines, after developing requisite techniques and capabilities in this regard.

5. To publish flora and fauna species status papers periodically, which should be translated into local languages.

6. To declare identified areas around Protected Areas and corridors as ecologically fragile under the Environment (Protection) Act, 1986, wherever necessary.

NWAP also highlighted the priority projects and to initiate a time-bound plan to identify and conduct status surveys of all endangered species covering all groups of rare and threatened species of flora and fauna and to provide protection to the environs and habitats of all rare and threatened species of flora and fauna under the priority projects. 2.2 of Para 3 of NWAP read as follows:

> "2.2. Identify suitable alternative homes for single isolated populations of species such as Jerdon's Courser, Asiatic Lion, Manipur Deer, Wroughton's Free Tailed Bat and the like, and manage the same as Protected Areas effectively."

34. NWAP also states that the same is the responsibility of MoEF, State Governments, Scientific Institutions and NGOs. The necessity to take immediate steps for preventing the entry of domestic and feral species that may lead to genetic swamping, has also been highlighted. The importance to safeguard genetically pure populations from future genetic contamination and where genetic swamping has occurred, to phase out such swamping, was also highlighted. NWAP, in chapter IV, has highlighted the necessity to the restoration and management of degraded habitats outside the protected areas.

35. MoEF noticed that the fragmented nature of wildlife rich areas, increased human pressure, habitat degradation, proliferation of invasive species, man-animal conflicts, poaching, impacts of changing climate etc. are some of the challenges that has to be addressed at a war footing. The necessity for ensuring better protection of wildlife outside the protected areas and initiating recovery programmes for saving critically endangered species and habitats has also been highlighted. Keeping that in view, a comprehensive Centrally Sponsored Scheme titled 'Integrated D e

Habitats' has been made operational on 30.7.2009 which was in addition to the erstwhile Centrally Sponsored Scheme – 'Assistance for the Development of National Parks and Sanctuaries'. The scheme incorporated additional components and activities for implementing the provisions of the Wildlife (Protection) Act, 1972, the National Wildlife Action Plan (2002-2016), recommendations of the Tiger Task Force, 2005 and the National Forest Commission, 2006 and the necessities felt from time to time for the conservation of wildlife and biodiversity in the country. The scheme was formulated during the 11th year plan.

36. India has a network of 99 national parks, 515 wildlife sanctuaries, 43 conservation reserves and 4 community reserves in different bio-geographic zones. Many important habitats, still exists outside those areas, which requires special attention from the point of view of conservation. The Centrally Sponsored Scheme also specifically refers to the recovery programmes for saving critically endangered species and habitats. Due to variety of reasons, several species and their habitats have become critically endangered. Snow leopard, Great Indian Bustard, Kashmir Stag, Gangetic Dolphin, Nilgiri Tahr, Malabar Civet, marine turtles, etc are few examples.

37. The scope of the Centrally Sponsored scheme was examined in *T. N. Godavarman Thirumulpad v. Union of India and others* (2012) 3 SCC 277 (Wilde Buffalo case) and this Court directed implementation of that scheme in the State of Chhattisgarh. The centrally sponsored scheme, as already indicated, specifically refers to the Asiatic lions as a critically endangered species and highlighted the necessity for a recovery programme to ensure the long term conservation of lions. NWAP 2002-2016 and the Centrally Sponsored Scheme 2009 relating to integrated development of wildlife habitats are schemes which have statutory status and as held in *Lafarge case* (supra) and have to be implemented in their letter and spirit. While giving effect to the various provisions of the Wildlife

Protection Act, the Centrally Sponsored Scheme 2009, the NWAP 2002-2016 our approach should be eco-centric and not anthropocentric.

ANTHROPOCENTRIC VS. ECO-CENTRIC

38. We may point out that has been wide ranging discussions and deliberations on the international platforms and conferences for re-building of certain principles laid down in the earlier conventions on the Principles of Sustainable Development. The United Nations Commission on Environment and Development defined the 'sustainable development' as follows:

> "Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs." (World Commission on Economic Development [WCED], 1987 : 43)

39. Sustainable development, it has been argued by various eminent environmentalists, clearly postulates an anthropocentric bias, least concerned with the rights of other species which live on this earth. Anthropocentrism is always human interest focussed thinking that non-human has only instrumental value to humans, in other words, humans take precedence and human responsibilities to non-human are based benefits to humans. Eco-centrism is nature-centred, where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. Eco-centrism is, therefore, life-centred, nature-centred where nature includes both humans and non-humans.

40. We re-iterate that while examining the necessity of a second home for the Asiatic lions, our approach should be eco-centric and not anthropocentric and we r s

best interest standard", that is the best interest of the Asiatic lions. We must focus our attention to safeguard the interest of species, as species has equal rights to exist on this earth. Asiatic Lion has become critically endangered because of human intervention. The specie originally existed in North Africa and South-West Asia formerly stretched across the coastal forests of northern Africa and from northern Greece across south-west Asia to eastern India. Today the only living representatives of the lions once found throughout much of South-West Asia occur in India's Gir Forest. Asiatic lion currently exists as a single sub-population and is thus vulnerable to extinction from unpredictable events, such as an epidemic or large forest fire etc. and we are committed to safeguard this endangered species because this species has a right to live on this earth, just like human beings.

41. Article 21 of the Constitution of India protects not only the human rights but also casts an obligation on human beings to protect and preserve a specie becoming extinct, conservation and protection of environment is an inseparable part of right to life. In *M. C. Mehta v. Kamal Nath and Others* (1997) 1 SCC 388, this Court enunciated the doctrine of "public trust", the thrust of that theory is that certain common properties such as rivers, seashores, forests and the air are held by the Government in trusteeship for the free and unimpeded use of the general public. The resources like air, sea, waters and the forests have such a great importance to the people as a whole, that it would be totally unjustified to make them a subject of private ownership. The State, as a custodian of the natural resources, has a duty to maintain them not merely for the benefit of the public, but for the best interest of flora and fauna, wildlife and so on. The doctrine of 'public trust' has to be addressed in that perspective.

42. We, as human beings, have a duty to prevent the species from going extinct and have to advocate for an effective species protection regimes. NWAP 2002-2016 and the Centrally Sponsored Scheme 2009 indicate that there are many

animal species which are close enough to extinction and some of the other species have already disappeared from this earth. No species can survive on the brink of extinction indefinitely and that the continued existence of any species depends upon various factors like human-animal conflict, epidemics, forest fire and other natural calamities etc.

43. The Wildlife Biologists of WII, after conducting a research on Gir Forests, noticed the necessity for long term conservation of Asiatic lion in Gir and also highlighted the necessity of a second natural habitat for its long term conservation. Population and Habitat Analysis Workshop held at Baroda in October, 1993 also highlighted that fact. NBWL, as already indicted, has taken a consistent view in all its meetings about the necessity of a second habitat for Asiatic lion, an endangered species. Asiatic lion, it has been noticed, has been restricted to only one single habitat, i.e. the Gir National Forest and its surrounding areas and an outbreak of possible epidemic or natural calamity might wipe off the entire species. A smaller population with limited genetic strength are more vulnerable to diseases and other catastrophes in comparison to large and widespread population. Threat, therefore, is real and has proved by the outbreak of canine distemper in the lions of Serengeti NP, Tanzania in 1994. 85% of the Serengeti lion population, it was noticed, had Canine Distemper Virus antibodies and at least 30% of the Serengeti and Mara lions died due to the infection. Compared with Gir, the lion population in the 40,000 sq. km. Serengeti-Mara ecosystem is large with about 2500 lions. It was felt that if an epidemic of this scale were to affect the lions in Gir, it would be very difficult to save them from extinction, given the much smaller area of the Gir forests and the smaller lion population. The possibility of the decease spreading to the pockets of habitat such as Girnar, Mityala, Rajula, Kodinar and the surrounding areas, cannot be ruled out.

44. We have already indicated tha[illegible]n

the views expressed by the Bio-Scientists of WII, NBWL, MoEF and other experts that to have a second home for the endangered species like Asiatic lion is of vital importance. A detailed study has been conducted to find out the most suitable habitat for its re-introduction and Kuno Wildlife Sanctuary (for short 'Kuno') in Madhya Pradaesh, as already indicted, has been found to be the most ideal habitat.

Ownership and Possession of wild Animals

45. No state, organisation or person can claim ownership or possession over wild animals in the forest. Wild Animal is defined under the Wild Life (Protection) Act, 1972 under Section 2(36) to mean any animal specified in schedules I to IV and found wild in nature. 'Wild Life' has been defined under Section 2(37) to include any animal, bees, butterflies, crustacean, fish and moths, and or land vegetation which forms part of any habitat. Section 9 prohibits hunting of wild animals, specified in Schedule I, II, III and IV except as provided under Section 11 and Section 12. Section 40 of the Act obliges a person to make a declaration and Section 41 enables the Chief Wild Life Warden to make an enquiry and preparation of inventories and Section 42 deals with the issue of certificates and confers, no ownership of the wild animals to a particular state or others. Animals in the wild are properties of the nation for which no state can claim ownership and the state's duty is to protect the wild life and conserve it, for ensuring the ecological and environmental security of the country.

46. Several migratory birds, mammals, and animals in wild cross national and international borders created by man and every nation have a duty and obligation to ensure their protection. No nation or organisation can claim ownership or possession over them, the Convention on the conservation of migratory species of wild animals held at Bonn, 1979, supports this principle and the convention recognises that wild animals in their innumerable forms are irreplaceable part of the earth; natural system and must be conserved for the good of the

mankind. It has recognised that the states are and must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries. Convention highlights that conservation and effective management of migratory species of wild animals require the concerted action of all states within the national jurisdictional boundaries of which such species spend any part of their life cycle. India is also a signatory to that convention.

47. State of Gujarat has taken up the stand that it has got its own conservation programme in respect of Asiatic lion. Due the effective conservation programme carried out by the State of Gujarat at Gir, it was pointed out, that the number of Asiatic lions in the wildlife has increased, the range of these lions has increased, the statutorily protected habitat has increased, so also the area occupied by these lions has increased. The State has maintained the stand that there is no present or immediate danger to the Asiatic lions warranting any emergency measures.

48. State Board for Wildlife, Gujarat (SBWL, Gujarat), which has been constituted by the State Government under Section 6 of the Wildlife Protection Act, 1972, convened a meeting on 16.3.2012 to discuss the issue relating to translocation of Asiatic lion from Gujarat to Madhya Pradesh. SBWL, Gujarat and took the view that that the issue of giving or not giving lions to Kuno is not an issue of conflict between States, but it is a collective Indian cultural approach in the interest of long term conservation of lions as part of our family. SBWL further maintained the stand that Asiatic Lion being a "family member" is beyond and higher than the "scientific reasoning". SBWL, therefore, did not agree with the proposal for translocation of lion from Gujarat to Kuno, a stand endorsed by the State of Gujarat.

49. Approach made by SWBL and the State of Gujarat is an anthropocentric approach, not eco-centric, though the State of Gujarat can be justifiably proud o[illegible]s

preserved an endangered specie becoming extinct. We are, however, concerned with a fundamental issue whether the Asiatic lions should have a second home. The cardinal issue is not whether the Asiatic lion is a "family member" or is part of the "Indian culture and civilization", or the pride of a State but the preservation of an endangered species for which we have to apply the "species best interest standard". Our approach should not be human-centric or family-centric but eco-centric. "Scientific reasoning" for its re-location has to supersede the family bond or pride of the people and we have to look at the species best interest especially in a situation where the specie is found to be a critically endangered one and the necessity of a second home has been keenly felt. We, therefore, find it difficult to agree with the reasoning of SBWL, Gujarat and the State of Gujarat that the Asiatic lion is a family member and hence be not parted with.

50. The views of NBWL constituted by the Central Government in exercise of its powers conferred under Section 5A of the Wildlife Protection Act, have to prevail over the views expressed by SBWL. The duties conferred on the National Board under Section 5C of the Act and on the State Board under Section 8 of the Act are entirely different. NBWL has a duty to promote conservation and development of wildlife and frame policies and advise the Central Government and the State Governments on the ways and importance of promoting wildlife conservation. It has to carry out/make assessment of various projects and activities on wildlife or its habitat. NBWL has also to review from time to time the progress in the field of wildlife conservation in the country and suggest measures for improving thereto. Those functions have not been conferred on the State Board. The State Board has been conferred with a duty to advise the State Government the selection and management of areas to be declared as protected areas and advise the State Government in formation of their policies for protection and conservation of the wildlife and specify plans etc. Statutorily, therefore, it is the duty of NBWL to promote

conservation and development of wildlife with a view to ensuring ecological and environmental security in the country. We are, therefore, of the view that the various decisions taken by NBWL that Asiatic lion should have a second home to save it from extinction, due to catastrophes like epidemic, large forest fire etc, which could result in extinction, is justified. This Court, sitting in the jurisdiction, is not justified in taking a contrary view from that of NBWL.

HISTORICAL HABITAT – RE-INTRODUCTION

51. No specie can survive on the brink of extinction indefinitely and the probabilities associated with a critically endangered specie make their extinction a matter of time. Convention biology is the science that studies bio-diversity and the dynamics of extinction. Eco-system approach to protecting endangered species emphasises on recovery, and complement and support eco-system based conservation approach. Reintroduction of an animal or plant into the habitat from where it has become extinct is also known as ex-situ conservation. India has successfully achieved certain re-introduction programmes, for example, the Rhino from Kaziranga, re-introduction of Gangetic gharial in the rivers of Uttar Pradesh, Rajasthan etc. Re-introduction of an organism is the intentional movement of an organism into a part of its native range from which it has disappeared or become extirpated in historic times as a result of human activities or natural catastrophe.

52. Kuno, as already stated, was proved to be a historical habitat of Asiatic Lions. After survey of the potential status for re-introduction of Asiatic lion, a final report has been submitted by WII, which was published on 31.1.1995 Kuno Wildlife Sanctuary (Madhya Pradesh) emerged as the most suitable habitat for re-introduction of the Asiatic lion. The Council of Ministers approved the project on 28.2.1996. Between 1996 and 2001, 24 villages with about 1547 families had been translocated from the sanctuary by the M[illegible]st

Department. Government of Madhya Pradesh had also demarcated 1280 sq. kms. Kuno Wildlife Division, encompassing the Sironi, Agra and Morawan forest ranges around the sanctuary. Government of India vide its order dated 21.1.1997 ordered diversion of 3720.9 hectares of forest land, including 18 villages were protected under Section 2 of the Forest Conservation Act. A 20-years Project envisaged by the Government of India was also approved by NBWL in its meeting held on 10.3.2004. The Government of Madhya Pradesh took up a massive re-location of villages and giving them alternative sites. A male over 18 years of age was considered to be a family and each family was given 2 hectares of cultivate land, in addition to 500 sq. mtrs. Land was also given for house construction. Financial assistance to the tune of Rs.1,00,000/- in the form of housing material was also given. Government of India has spent a sum of Rs.15 crores for the said purpose.

53. We also notice that all possible steps have been taken by the State of Madhya Pradesh, MoEF and the Union of India making Kuno Wildlife Sanctuary fit for re-introduction of Asiatic lion, with the approval of NWLB.

PREY DENSITY:

54. WII was requested to assess the availability of prey density in the year 2005. With the assistance of various staff, 17 transects totalling 461 km were surveyed over an area of 280 sq. kms. The density of catchable wild prey (chital, sambar, nilgai, wild pig) by lions was 13 animals/sq. km. There were about 2500 cattle, left behind by the translocated people which were considered to be the buffer prey for lions to tide over the likely problem of drought periodically killing wild ungulates. WII noticed that with the implementation of the recommendations such as the control of poaching, grassland management, building rubble wall around the Division and water augmentation, a substantial rise (ca. 20 animals/Sq. km) in the wild prey base for lions by the end of 2007. A detailed

report on the assessment of prey population was submitted by WII in July 2006.

55. State of Gujarat had raised serious objection with regard to prey density at Kuno. Various studies have been conducted with regard to prey density. Reports and studies conducted by the Government of Madhya Pradesh revealed that the prey density at Kuno has far exceeded the estimated prey density as recommended by Prof. Chellam in his 1993 report. The data collected regarding prey density by Mr. Fiaz A. Khudsar and Mr. Raman in the year 2008 shows the following picture:

	Mr. F.A. Khudsar year 2004	**Mr. F. A. Khudsar year 2006**	**Mr. Raman, WPO in year 2008**	**WII in 2011 (Cheetah task force report**
All prey density excluding feral cattle	17.35	24.6	49.477	N.A.
All prey density including feral cattle	-	63.97	67.406	85.91 ± 23

We notice that Mr. Khudsar collected his data regarding prey base density April-May 2004 and May 2005, that report was published in 2008. However, the census carried out by Mr. Rehman (WPO) was in March 2008. Census was carried out as per All India Tiger Census procedure. For the said purpose, the officials and staff of Government of India was trained by the scientists of WII in 2008, from 19-21 January. The Staff/officials of working plan was later trained for one week from 18-23 February, 2008 in Game Guard Training School, Bandhavgarh and then census was carried out from

under the supervision and guidance of Dr. Quarnar Qureshi, Scientist WII. We, therefore, find that the census carried out by Shri Raman (WPO) is latest in point of time. The actual comparative statement between density estimation of Shri Raman WPO, 2008 and Shri F.A. Khudsar is as follows:

Species	**Density Recorded by Shri F.A. Khudsar year 2004**	**Density Recorded by Shri F.A. Khudsar year 2006**	**Density Recorded by Shri Raman WPO in Year 2008**	**Density Recorded by WII in 2001 (Cheetah task force report)**
Chital	6.6	12.5	18.834	35.87
Sambar	0.3	0.78	1.634	N.A.
Nilgai	0.77	1.61	5.603	N.A.
Four horned Antelope	0.02	0.0	0.0	N.A.
Chinkara	3.6	6.52	1.983	N.A.
Wild Pig	0.79	3.19	3.534	N.A.
Feral Cattle	0.0	39.37	17.929	N.A.

In order to get latest figure of prey base, an exercise of prey base estimation was done in Kuno in the month of June 2012 by the team of expert independent scientists and various officers of M.P. In June 2012, WII was requested to conduct a survey to assess the latest status of prey base in Kuno. An exercise was carried out jointly by the independent members i.e. scientists/experts from WII, WWF India and the personnel of Kuno Wildlife Division to determine the accurate prey base. The following was the methodology taken up by them.

"(ii) **Prey base density estimation:** The methodology of exercise was – Distance sampling on systematic line transect method as developed by Buckland et al., 2011. Fixed line transects distributed across Kuno WLS, were sampled. All the line transects were walked three times. All ungulates and other prey species observed along with their group size were recorded. The total sampling effort was 208.5 km and 144 man-days.

(iii) **Analysis:-** The density of prey species which include Chital, Sambhar, Nilgai, Wildpig, Chinkara, Langur, Peafowl and Feral Cattle was estimated using the software DISTANCE 6.0. The analysis of the collected data was done by Dr. Jhala and researchers working under him.

(iv) **Population Density:-** As a result of exercise done for estimation of prey-base, density estimates of Chital, Sambhar, Nilgai, Wildpig, Chinkara, Lungur, Peafowl and Feral Cattle were calculated. Population density of prey species in Kuno WLS was found as follows:

Species	**Population Density/ Sq. km. ± Standard Error**
Chital	51.59 ± 8.84
Sambhar	3.59 ± 1.01
Nilgai	2.32 ± 0.59
Wild Pig	4.68 ± 1.54
Chinkara	0.99 ± 0.35
Langur	17.2 ± 4.6
Peafowl	6.44 ± 2.34
Feral Cattle	1.83 ± 0.77

State of Madhya Pradesh has also taken up the stand that the prey base in Kuno is more than the existing prey base in Gir. A chart comparing the same as also been produced before us, which is as follows:

2012 Scenario:-

Species	**Av. Wt. (kg)**	**Gir N.P.**		**Kuno WLS**	
		Density per sq. Km.	**Biomass (kg)**	**Density per sq. Km.**	**Biomass (kg)**
Chital	47	50.8	2387.60	51.59	2424.7
Sambar	134	2.00	268.00	3.59	481.06
Nilgai	125	0.58	72.50	2.32	290
Four horned antelope	21	0.42	8.82	-	-
Chinkara	20	2.40	48.00	0.99	19.8
Wild Pig	32	0.00	0.00	4.68	149.76
Common Langur	09	0.00	0.00	17.2	154.8
Total including Langur		**56.2**	**2785**	**80.37**	**3520.12**
Total excluding langur & feral cattle				**63.17**	**3365.32**

State of Madhya Pradesh, therefore, maintained the stand that, in 2012 scenario, the biomass per sq/km in Kuno Wildlife Sanctuary excluding feral cattle and langur (3365.32 kg per sq/km) is more than the biomass in Gir PA (2785 kg per sq/km).

56. State of Gujarat filed an application on 2.7.2012 on the basis of the above estimation of prey base and sought a direction to the parties to take a fresh survey on prey base. Shri Ravi Chellam in his written note on 8.7.2012 made some remarks on prey-base stating that prey density estimation seems to be inadequate in terms of design, data-collection, protocols, and analytical methods, when compared with the internationally accepted standards. Shri Chellam suggested that prey studies have to be conducted at least twelve months covering all seasons and habitat.

57. State of Gujarat has also raised various other objections stating that the past track record would indicate that State of Madhya Pradesh is not taking any effective steps to control poaching which is also a threat if lions are translocated to Kuno. To meet that contention, the State of Madhya Pradesh stated that the Tiger Authority of India in its report – Tiger Meets, July 2011 – has assessed the performance of the State of Madhya Pradesh as outstanding, which would indicate that they had taken effective steps against poaching of animals at Kuno. We notice that poaching of wild animals is of great concern which calls for attention by all State Governments, so as to protect the endangered species from extinction. It is a matter which has to be dealt with effectively and poaches, if caught, should be brought to justice.

Cheetah to Kuno

58. We notice that while the matter was being heard, a decision has been made by MoEF to import African Cheetahs from Namibia to India and to introduce the same at Kuno. *Amicus Curiae* filed I.A. No. 3452 of 2012. This Court granted a stay on 8.5.2012 of the decision o e

Cheetahs from Namibia to India for introducing them to Kuno. Serious objections have been raised by the *Amicus Curiae* Shri P.S. Narasimha against the introduction of foreign species at Kuno. Learned *Amicus Curiae* pointed out that the decision to introduce African Cheetahs into the same proposed habitat chosen for re-introduction of Asiatic lion has not been either placed before the Standing Committee of NBWL, nor has there been a consistent decision. Learned *Amicus Curiae* pointed out that IUCN Guidelines on translocation clearly differentiated between introduction and re-introduction. The guidelines critically warned against the introduction of African or imported species which never existed in India. It is not a case of international movement of organism into a part of its native range. Learned *Amicus Curiae* pointed that NWAP 2002-2016, which is a National Policy document, does not envisage re-introduction of a foreign species to India. The Police only mentioned re-introduction or finding an alternative home for species like Asiatic lion.

59. MoEF, in our view, has not conducted any detailed study before passing the order of introducing foreign cheetah to Kuno. Kuno is not a historical habitat for African cheetahs, no materials have been placed before us to establish that fact. A detailed scientific study has to be done before introducing a foreign species to India, which has not been done in the instant case. NBWL, which is Statutory Board established for the purpose under the Wildlife Protection Act was also not consulted.

60. We may indicate that our top priority is to protect Asiatic lions, an endangered species and to provide a second home. Various steps have been taken for the last few decades, but nothing transpired so far. Crores of rupees have been spent by the Government of India and the State of Madhya Pradesh for re-introduction of Asiatic lion to Kuno. At this stage, in our view, the decision taken by MoEF for introduction of African cheetahs first to Kuno and then Asiatic lion, is arbitrary an illegal and clear violation of the statutory requirements provided under

the Wildlife Protection Act. The order of MoEF to introduce African Cheetahs into Kuno cannot stand in the eye of Law and the same is quashed.

61. MoEF's decision for re-introduction of Asiatic lion from Gir to Kuno is that of utmost importance so as to preserve the Asiatic lion, an endangered species which cannot be delayed. Re-introduction of Asiatic lion, needless to say, should be in accordance with the guidelines issued by IUCN and with the active participation of experts in the field of re-introduction of endangered species. MoEF is therefore directed to take urgent steps for re-introduction of Asiatic lion from Gir forests to Kuno. MoEF has to constitute an Expert Committee consisting of senior officials of MoEF, Chief Wildlife Wardens of the States of Madhya Pradesh and Gujarat. Technical experts should also be the members of the Committee, which will include the Secretary General and Chief Executive Officer of WWF. Dr. Y.S. Jhala, senior scientist with Wildlife Institute of India, Dr. Ravi Chellam, senior scientist, Dr. A.J.T. Johnsingh, since all of them had done lot of research in that area and have national and international exposure. Any other expert can also be co-opted as the members of the Committee. Needless to say, the number of lions to be re-introduced would depend upon the density of prey base and other related factors, which the Committee will assess.

62. I.A. is allowed as mentioned above. The order be carried out in its letter and spirit and within a period of 6 months from today. We record our deep appreciation for the assistance rendered by all the senior counsel and learned *amicus curiae* Shri P.S. Narasimha and also Dr. Ravi Chellam who was present in the Court throughout and made valuable suggestions with regard to the various environmental and scientific issues.

63. We are also inclined to highlight the necessity of an exclusive parliamentary legislation for the preservation and protection of endangered species so as to carry out the

recovery programmes before many of the species become extinct and to give the following directions:

(a) NWAP (2002-2016) has already identified species like the Great Indian Bustard, Bengal Florican, Dugong, the Manipur Brow Antlered Deer, over and above Asiatic Lion and Wild Buffalo as endangered species and hence we are, therefore, inclined to give a direction to the Government of India and the MoEF to take urgent steps for the preservation of those endangered species as well as to initiate recovery programmes.

(b) The Government of India and the MoEF are directed to identify, as already highlighted by NWAP, all endangered species of flora and fauna, study their needs and survey their environs and habitats to establish the current level of security and the nature of threats. They should also conduct periodic reviews of flora and fauna species status, and correlate the same with the IUCN Red Data List every three years.

(c) Courts and environmentalists should pay more attention for implementing the recovery programmes and the same be carried out with imagination and commitment.

K.K.T. IAs allowed.

SAMAJ PARIVARTANA SAMUDAYA & ORS.

v.

STATE OF KARANATAKA & ORS.

(Writ Petition (CIVIL) No. 562 of 2009 etc.)

APRIL 18, 2013

[AFTAB ALAM, K.S. RADHAKRISHNAN AND RANJAN GOGOI, JJ.]

Environment Protection and Pollution Control:

Forest – Illegal mining in forest area of Karnataka and Andhra Pradesh – PIL – Court appointed Central Powered Committee (CEC) in its report indicating illegal mining– Joint Team constituted by Court, determined boundaries of concerned 166 mining leases – CEC in its final report recommended categorization of mines into 3 categories viz. A, B and C on the basis of extent of encroachment of mining pits and overburden dumps – CEC recommended resumption of A and B category mines subject to certain conditions and closure of category C mines – The credibility of CEC, sanctity of the process of survey undertaken by Joint Team and acceptability of recommendations of CEC were questioned – Held: Credibility of CEC cannot be questioned – The body is performing its tasks as per the directions of the Court – The credibility of the survey conducted by the Joint Team under the orders of the Court, also cannot be questioned – The categorization of leases done by CEC, is reasonable and hence acceptable – Embargo placed by the Court on grant of fresh mining licences is lifted – Operation of the leases, located on or near the inter-State boundary of Karnataka and Andhra Pradesh, is suspended until the boundary issue is resolved – Investigations in respect of alleged criminal offences by lessees to be brought to its logical conclusion – Mines and Minerals Act, 1957 – Forest Conservation Act, 1980 – Environment (Protection) Act, 1986

Constitution of India, 1950 :

Articles 32 and 142 – Illegal mining – Causing large scale damage to forest wealth – Remedy u/Arts. 32 and 142 – Resort to – In view of availability of remedies under provisions of relevant statutes – Held: Court can resort to constitutional jurisdiction to remedy the enormous wrong – The relevant statutes would not be effective and efficacious to deal with extraordinary situations arisen on account of large scale illegalities in mining operations – The recommendations of CEC, accepted by the Court does not come in conflict with the statutory provisions – Mines and Minerals Act, 1957 – Forest (Conservation) Act, 1980 – Environment (Protection) Act, 1986.

Art.14 – Classification – Test of arbitrariness – Held: Arbitrariness in the adoption of a criteria for classification has to be tested on the anvil of Art.14 and not on the subjective notions of availability of a better basis of classification.

Article 21 – Right to life – Enforcement of – Held: In enforcing such rights affecting large number of citizens, supreme Court cannot be constrained by restraints of procedure.

Words and Phrases – 'Mining operations' – Meaning of – In he context of Mines and Minerals Act.

Justice U.L. Bhat Committee was appointed on the issue of indiscriminate mining in the State of Karnataka. Thereafter, the matter was referred to Lokayukta of the State, who in his report indicated indiscriminate mining in the Bellary District of the State.

The petitioner filed the present PIL u/Art. 32 of the Constitution, seeking Court's intervention in the matter. The Court asked the Central Empowered Committee (CEC) to submit its report on the allegations of illegal

mining in the Bellary region of the State of Karnataka. The CEC, in its reports indicated large scale illegal mining. The Court by order dated 29.7.2011 imposed complete ban on mining in the Bellary district, and further by order dated 28.8.2011 in the districts of Tumkur and Chitradurga. The Court constituted a Joint Team to determine the boundaries of initially 117 mining leases which subsequently extended to 166 mining leases. The survey conducted by the Joint Team was subjected to re-examination by the Special Team, at the behest of the lease-holders. CEC submitted its final report dated 3.2.2012 recommending for categorization of the mines into three categories i.e. 'A', 'B' and 'C' on the basis of the extent of encroachment in respect of he mining pits and over burden dumps determined in terms of percentage qua the total lease area. It also recommended conditions subject to which reopening of the mines and resumption of mining operations were to be considered by the Court. CEC also submitted modified recommendations alongwith detailed guidelines for preparation and implementation of Reclamation and Rehabilitation Plans (R and R Plans) on 13.3.2012. The guidelines were prepared after consultation with different stake-holders including the Federation of Indian Mineral Industries (FIMI) a representative body of the majority of the mining lessees in the present case.

In terms of the order of the Court dated 10.2.2012, CEC considered 66 representations of the lease-holders. CEC found 4 representations tenable and made corrections in respect of the 4 leases. CEC placed the cases of 2 lease-holders viz. 'V' and 'H' for consideration of the Court for their upgradation from category 'C' to 'B'.

The Court, by order dated 3.9.2012 permitted reopening of 18 category 'A' mines subject to certain conditions. The Court by order date

down certain conditions for resumption of mining operations by Category-'B' lease-holders. The 7 mines, located on the inter-State border (Karnataka-Andhra Pradesh) were placed in Special category (B1) out of the 72 category-B mines. The 7 category-B mines and the cases of 2 lessees i.e. 'S' and 'Sh' (which were tentatively placed by CEC in Category-B), were placed before the Court for their appropriate categorization.The CEC in its report dated 15.2.2013 recommended resumption of mining operation in the remaining category-A and category-B mines.

The Court directed investigation by CBI, in respect of criminal offences by lessees. The Court also ordered disposal of iron-ore accumulated on account of illegal mining, by the process of e-auction through a Monitory Committee. The court also constituted Special Purpose Vehicle (SPV) for taking of ameliorative and mitigative measures as per 'Comprehensive Environment Plans for the Mining Impact Zone' (CPMIZ) around mining leases in Bellary, Chitradurga and Tumkur.

Interlocutory applications were filed questioning the sanctity of the survey carried out by the Joint Team, the categorization of the lease-holders, on the grounds of lack of procedural fairness and inherent defects in the technical part of the exercise of survey. The credibility of CEC was also questioned.

It was contended by the lease-holders that the categorization of the allegedly offending leases on the basis of percentage of the alleged encroachment qua the total lease area was constitutionally fragile and environmentally self-defeating; that resort to the powers u/Art.32 r/w. Art. 142 of the Constitution for the issues in question, was uncalled for because the issue was covered under the statutory scheme under Mines and Minerals (Development and Regulation) Act, 1957; Forest

(Conservation) Act, 1980 and Environment (Protection) Act, 1986.

Disposing of the Writ Petition 562 of 2009 and detagging the other connected SLPs and Writ Petitions, the Court

HELD: 1. The Central Empowered Committee (CEC) was first constituted by the Court by its order dated 9.5.2002 as an interim body until creation of the statutory agency contemplated under the provisions of Section 3 (3) of the Environment (Protection) Act. Thereafter by a Notification dated 17.9.2002 published in the Gazette of India, the constitution of the CEC for a period of 5 years was notified indicating its composition together with the extent of its powers and duties. As the period of five years mentioned in the Notification dated 17.9.2002 had expired and the terms of reference to the body had been redetermined by this Court, perhaps, a fresh notification should have been issued which was not forthcoming. It is in such a situation that the CEC had continued to function under orders of the Court submitting its reports from time to time in various environmental issues pending before this Court. It is on consideration of such Reports that the Court has been passing its orders from time to time. In view of these circumstances, the questions concerning the credibility of the CEC are unfounded, particularly in the absence of any materials to substantiate the apprehensions, if not allegations, that have been leveled. The said body has been performing such tasks as had been assigned by this Court by its orders passed from time to time. The directions on the basis of which the CEC had proceeded and had submitted its Reports, are within the framework of the terms of reference of the CEC as determined by this Court by order dated 14.12.2007. [Paras 21 to 23] [851-E-F; 853-E-H; 854-A]

2. The mechanism provided by any of the statutes in question viz. Mines and Minerals (Development & Regulation) Act, 1957; Forest (Conservation) Act, 1980 and Environment (Protection) Act, 1986 would neither be effective nor efficacious to deal with the extraordinary situation that has arisen on account of the large scale illegalities committed in the operation of the mines in question resulting in grave and irreparable loss to the forest wealth of the country besides the colossal loss caused to the national exchequer. The situation being extraordinary, the remedy, indeed, must also be extraordinary. Considered against the backdrop of the statutory schemes in question, none of the recommendations of the CEC, if accepted, would come into conflict with any law enacted by the legislature. It is only in the above situation that the Court may consider the necessity of placing the recommendations made by the CEC on a finer balancing scale before accepting the same. Therefore, the Court would proceed to exercise its constitutional jurisdiction to remedy the enormous wrong that has happened and to provide adequate protection for the future, as may be required. [Para 33] [865-B-E]

Bandhua Mukti Morcha vs. Union of India and Ors. **(1984) 3 SCC 161: 1984 (2) SCR 67;** *M.C. Mehta vs. Union of India and Ors.* **(1987) 1 SCC 395: 1987 (1) SCR 819;** *M.C. Mehta vs. Union of India and Ors.* **(2009) 6 SCC 142 – relied on.**

Supreme Court Bar Association vs. Union of India and Anr. **(1998) 4 SCC 409: 1998 (2) SCR 795 – held not applicable.**

3.1. The participation of the lessee or his representative throughout the process of survey by the Joint Team; the manner of conduct of the actual process of survey; the use of the state of the art technology; the composition of the Joint Team entrusted with the

responsibility of the survey and the constitution of the 7 teams that conducted the field survey under the supervision of the Joint Team; the two stages of re-verification of the findings of the survey in the light of the objections raised by the lease holders under orders of this Court dated 26.9.2011 and 10.2.2012 and the corrections made on the basis thereof can leave no doubt as to the credibility of the findings of the survey conducted under the orders of the Court. Therefore, all complaints and grievances must fade away in the light of the survey undertaken by the Joint Team and the events subsequent thereto. [Para 38] [871-G-H; 872-A-B]

3.2. It is directed that in supersession of all orders either of the authorities of the State or Courts, as may be, the boundaries of leases fixed by the Joint Team will henceforth be the boundaries of each of the leases who will have the benefit of the lease area as determined by the Joint Team. All proceedings pending in any court with regard to boundaries of the leases involved in the present proceeding shall stand adjudicated by means of present order and no such question would be open for re-examination by any body or authority. [Para 39] [872-G-H; 873-A]

4. The wide terms of the definition contained in Section 2(d) of the Mines and Minerals Act encompasses all such activity within the meaning of expression "mining operations". Hence dumping of mining waste (overburden dumps) do not constitute operations under Section 2(d) of the Mines and Minerals Act. Use of forest land for such activity would require clearance under the Forest Conservation Act. In case the land used for such purpose is not forest land the mining lease must cover the land used for any such activity. [Para 40] [873-B-C]

5.1. Inter-generational equity and sustainable development have come to be firm[illegible]r

constitutional jurisprudence as an integral part of the fundamental rights conferred by Article 21 of the Constitution. In enforcing such rights of a large number of citizens who are bound to be adversely affected by environmental degradation, this Court cannot be constrained by the restraints of procedure. The CEC which has been assisting the Court in various environment related matters for over a decade now was assigned certain specified tasks which have been performed by the said body giving sufficient justification for the decisions arrived and the recommendations made. If the said recommendations can withstand the test of logic and reason, there is no reason not to accept the said recommendations and embody the same as a part of the order in the present case. [Para 41] [873-F-H; 874-A]

5.2. Arbitrariness in the adoption of a criteria for classification has to be tested on the anvil of Article 14 and not on the subjective notions of availability of a better basis of classification. The test, therefore, ought not to be what would be a 'better' basis for the categorization for that would introduce subjectivity in the process; the test is whether categorization on the basis adopted results in hostile discrimination and adoption of the criteria of percentage has no reasonable nexus with the object sought to be achieved, namely, to identify the lessees who have committed the maximum violations and damage to environment. Viewed from the aforesaid perspective, the categorization made does not fail the test of reasonableness and would commend acceptance of the Court. In the totality of the circumstances, the categorization suggested by the CEC in its Report dated 3.2.2012 should be accepted. [Para 42] [874-C-E; 875-B]

5.3. The conditions subject to which Category 'A' and 'B' mines are to be reopened and the R&R Plans that have been recommended as a precondition for reopening of Category 'B' mines are essentially steps to ensure

scientific and planned exploitation of the scarce mineral resources of the country. The recommendations are wholesome and in the interest not only of the environment and ecology but the mining industry as a whole so as to enable the industry to run in a more organized, planned and disciplined manner. FIMI was actively associated in the framing of the guidelines and the preparation of the R&R Plans. There is nothing in the preconditions or in the details of the R&R plans suggested which are contrary to or in conflict or inconsistent with any of the statutory provisions of the Mines and Minerals Act, Environment Protection Act and Forest Conservation Act. In such a situation, while accepting the preconditions subject to which the Category 'A' and 'B' mines are to be reopened and the R&R plans that must be put in place for Category 'B' mines the suggestions made by the CEC for reopening of Category 'A' and 'B' mines as well as the details of the R&R plans should be accepted. [Para 43] [875-C-F]

5.4. It is evident from the compilation submitted to the Court by the CEC that several of the Category 'C' mines were operating without requisite clearances under Forest Conservation Act or even in the absence of a mining lease for a part of the area used for mining operations. The satellite imageries placed before the Court with regard to environmental damage and destruction has shocked judicial conscience. It is in the light of the above facts and circumstances that the future course of action in respect of the maximum violators/polluters, i.e., Category 'C' mines has to be judged. While doing so, the Court also has to keep in mind the requirement of Iron Ore to ensure adequate supply of manufactured steel and other allied products. Once the result of the survey undertaken and the boundaries of the leases determined by the Joint Team has been accepted by the Court and the basis of categorization of the mines has been found to be rational and constitutionally p e

difficult for this Court to visualize as to how the Category 'C' mines can be allowed to reopen. There is no room for compassion; fervent pleas for clemency cannot have even a persuasive value. As against the individual interest of the 49 Category 'C' leaseholders, public interest at large would require the Court to lean in favour of demonstrating the efficacy and effectiveness of the long arm of the law. Therefore, the Court orders for the complete closure of the Category 'C' mines and for necessary follow up action in terms of the recommendations of the CEC in this regard. [Paras 44 and 45] [876-B-F]

6. By an order dated 2.11.2012 passed by this Court an embargo has been placed on grant of fresh mining licenses. In view of the developments that have taken place in the meantime and in view of the fact that the Court is inclined to accept the recommendations at Sl. Nos. VI and VII of the CEC's Report dated 3.2.2012 it is not necessary to continue with the order dated 2.11.2012 in so far as grant of fresh leases are concerned. [Para 46] [876-H; 877-A]

7. In so far as settlement of the inter-state boundaries between the States of Andhra Pradesh and Karnataka is concerned, both the States have agreed to have the boundaries fixed under the supervision of the Geological Survey of India. In view of the agreement between the States on the said issue the Court permits the States to finalize the issue in the above terms. The operation of the 7 leases (Category B1) located on or near the inter-State boundary is presently suspended. Until the boundary issue between the two States is resolved resumption of mining operations in the 7 leases cannot be allowed. [Para 47] [877-B-C]

8. The CEC has provisionally categorised ML No.2515 and ML No.2553 in Category "B" though the

encroached area under illegal mining pits has been found to be 24.44% and 23.62% respectively. According to the CEC, it is on account of "the complexities involved in finalizing the survey sketches and in the absence of inter-village boundary" that the said leases have been placed in Category "B" instead of Category "C". The Court cannot agree with the tentative decision of the CEC. On the basis of the findings of the survey and the categorization made, both of which have been accepted by the Court by the present order, the aforesaid two leases, are directed to be placed in Category "C". Necessary consequential action will naturally follow. [Para 48] [877-D-F]

9. The CEC in its Report dated 28.3.2012 has placed the cases of 'V.S.' and 'H' (placed in Category "C") for final determination by the Court. The CEC has reported that the encroachment by ' V.S.' is only in respect of the overburden dumps and exceeds the percentage (15%) marginally, i.e., by 0.17% which could very well be due to the least count error used by the Joint Team. In so far as 'H' is concerned, the CEC in its Report dated 28.3.2012 has recorded that according to the lessee it has carried on its mining operation for the last 50 years in the lease area allotted to it which may have been wrongly identified in the earlier surveys and demarcations by taking into account a wrong reference point. Having considered the facts on which the two lessees have sought upgradation from "C" to "B" Category, such upgradation cannot be allowed. Both the lessees, in fact, accept the results of the survey by the Joint Team which findings have already been accepted by this Court. [Para 49] [877-G-H; 878-A-B]

10. The investigations in respect of alleged criminal offences by lessees which have been ordered by this Court to be investigated by the CBI, would necessarily have to follow the procedure prescribed by law. Each of

such investigation shall be brought to its logical conclusion in accordance with law and any aggrieved party would be entitled to avail of all legal remedies as may be available. [Para 13] [847-D-E]

11. As per the CEC's Report dated 15.2.2013 sale of almost the entire quantity of illegally extracted Iron Ore has been effected through the Monitoring Committee and the sub-grade Iron Ore lying in dumps in and around several lease areas may not have adequate commercial potential. Besides removal thereof for sale, in many cases, may also give rise to environmental problems in as much as removal of such dumps may constitute a hazard to the stability of the dumps which have been in existence for many years. Permission for sale of sub-grade iron ore, only when the same is commercially viable and removal thereof from the dumps is an environmentally safe exercise, has been sought by the CEC in its last Report dated 15.2.2013. There is no impediment in accepting the recommendations of the CEC in the Report dated 15.2.2013 in respect of removal and sale of sub-grade Iron Ore. Similarly, there is no difficulty in continuing the previous orders of the Court, permitting sale of iron ore to be mined after resumption of operations through the Monitoring Committee on the same terms and conditions as presently in force. [Para 15] [848-D-G]

12. Court's order dated 02.11.2012 placing an embargo on grant of fresh mining leases need not be continued any further. Grant of fresh mining leases and consideration of pending applications be dealt with in accordance with law, the directions contained in the present order as well as the spirit thereof. [Para 50] [880-C]

Case Law Reference:

1984 (2) SCR 67	**relied on**	**Para 28**
1987 (1) SCR 819	**relied on**	**Para 30**

(2009) 6 SCC 142	**relied on**	**Para 31**
1998 (2) SCR 795	**held not applicable**	**Para 32**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 562 of 2009.

Under Article 32 of the Constitution of India.

SLP (C) No. 7366-7367, 32690 of 2010, W.P.(Crl.) No. 66 of 2010, SLP (C) Nos. 17064-17065 of 2010 SLP(C) Nos. (CC Nos. 16829 & 16830 of 2010, W.P. (C) No. 411 of 2010, SLP (C) No. 353 of 2011 and W.P.(C) No. 76 of 2012.

G.E. Vahanvati, Attorney General, H.P. Raval, P.P. Malhotra, A.S. Chandhiok, ASG, Shyam Divan (A.C.) (Assisted by Vasuman Khandelwal), Arvind Datar, C.A. Sundaram, V. Giri, D.L.N. Rao, Dushyant Dave, F.S. Nariman, Chander Uday Singh, Nalini Chidambaram, C.S. Vaidyanathan, K.K. Venugopal, P. Vishwanatha Shetty, Pallav Shishodia, Gurukrishna Kumar, Krishnan Venugopal, Raju Ramachandran, S. Ganesh, S.P. Singh, Jaideep Gupta, P.H. Parekh, Nirman Sharma, Abhinav Malhotra, A.D.N. Rao (Assisted by Mansha Monga), Neelam Jain, A. Venkatesh, Siddharth Chowdhury, Prashant Bhushan, Ramesh K. Mishra, Pranav Sachedva (A.C.), K. Raghavacharyulu, D. Julius Riamei, Sanjeev Kapur, Rajat Jariwal (for Khaitan & Co.), Vikas Mehta, Ravi Shankar, Shubham Tripathi, P.V. Dinesh, S.K. Kulkarni, Ankur S. Kulkarni, A. Raghunath, S. Udaya Kumar Sagar, Bina Madhavan, Anindita Pujari (for Lawyer's Knit & Co.), Devadat Kamat, Sunil Dogra (for Lawyer's Knit & Co.), Simar Suri, Chanchal Kr. Ganguli, K. Maruthi Rao, K. Radha, Anjani Aiyagari, K. Dheeraj Kumar, K. Subba Rao, G. Umapathi, R. Mekhala, Rakesh K. Sharma, Kiran Suri, K.N. Phanindra, S.J. Amith, Aparna Mattoo, Girish Ananthamurthy, Vaijayanthi Girish, Nabikur Rahman Barbhuiya, Dr. Vipin Gupta, Shashi Kiran Shetty, Sharan Thakur (For Dr. Sushil Balwada), Bhargava V. Desai, Shreyas Mehtrotra, Naveen R. Nath, Lalit Mohini Bhat, Amrita Sharma, Darpan K.M., Sanjay R[illegible]n,

S. Nithin, Anil K. Misra, Kashi Vishweshwar, A. Sumati, Madhu Singh Satya Siddiqui, S.K. Mishra, Asha G. Nair, A. Dev Kumar, D.S. Mahra, Ranjana Narayan, B.K. Prasad, Mahesh Agarwal, Aparna Singhal, E.C, Agrawala, Dr. Sumant Bharadwai, Manoj Kumar, Ajit Kumar Gupta, Mridula Ray Bharadwaj, A. Raghunath, Sidharth Singh, Ravindra Kolle, Anitha Shenoy, Syed Naqvi, N.K. Sharma, P.P. Kanwer, Kunal Verma, Rashmi Malhotra, Gunwant Dara, S.K. Bajwa (for S.N. Terdal), A.K. Vasanth, Shefali Malhotra, Balaji Srinivasan, Pukhrambam Ramesh Kumar, Ranvir Singh, Sumit Goel, Sarabjot Walia (for Parekh & Co.), Priya Hingorani, Syed Tanweer Ahmad (for B.V. Balramdas), S.K. Kulkarni, M. Gireesh Kumar, Ankur S. Kulkarni, Kuriakose Varghese, V. Shyamohan, Iram Hassan, Rayjith Mark, Abir Phukan, Pratap Parmal, Shaheen Parveen (for B.V. Balram Das) for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J.

W.P. (C) No.562 of 2009

1. What should be the appropriate contours of this Court's jurisdiction while dealing with allegations of systematic plunder of natural resources by a handful of opportunists seeking to achieve immediate gains? This is the core question that arises in the present proceeding in the context of mining of Iron Ore and allied minerals in the State of Karnataka.

2. Over exploitation, if not indiscriminate and rampant mining, in the State of Karnataka, particularly in the District of Bellary, had been purportedly engaging the attention of the State Government from time to time. In the year 2006, Justice U.L. Bhat Committee was appointed to go into the issues which exercise, however, did not yield any tangible result. Thereafter, the matter was referred to the Lokayukta of the State and a Report dated 18.12.2008 was submitted which, prima facie,

indicated indiscriminate mining of unbelievable proportions in the Bellary district of the State. It is in these circumstances, that the petitioner- Samaj Parivartana Samudaya had instituted the present writ petition under Article 32 of the Constitution complaining of little or no corrective action on the part of the State; seeking this Court's intervention in the matter and specifically praying for the reliefs noted hereinbelow.

"(A) To issue a Writ of mandamus or any other appropriate writ, order or direction, directing immediate steps be initiated by both the Respondent States and the Union of India to stop all mining and other related activities in forest areas of Andhra Pradesh and Karnataka which are in violation of the orders of this Hon'ble Court dated 12.12.1996 in W.P (C) No 202 of 1995 and the Forest (Conservation) Act, 1980.

(B) To issue a Writ of mandamus or any other appropriate writ, order or direction, directing as null and void retrospectively all 'raising contracts' / sub leasing because which are in violation of the Mines and Minerals (Development and Regulation) Act, 1957 and initiate penal action against the violators.

(C) To issue a Writ of mandamus or any other appropriate writ, order or direction, directing the stoppage of all mining along the border and in forest areas in the Bellary Reserve Forest till a systematic survey of both the interstate border and the mine lease areas along the entire border is completed by the Survey of India along with a representative of the Lokayukta of Karnataka.

(D) To issue a Writ of mandamus or any other appropriate writ, order or direction, directing action against all the violators involved either directly or indirectly in illegal mining in[illegible]n

the Report of the Lokayukta of Karnataka (Part-I).

(E) To issue a Writ of mandamus or any other appropriate writ, order or direction, directing the recovery of the illegal wealth accumulated through the illegal mining and related activities; and

(F) To issue a Writ of mandamus or any other appropriate writ, order or direction, directing null and void notification No. CI 33 MMM 1994 dated 15.3.2003 and other related notifications/orders dereserving lands for mining operations."

3. The writ petition was entertained and the Central Empowered Committee (hereinafter for short "the CEC") was asked to submit a report on the allegations of illegal mining in the Bellary region of the State of Karnataka. The very initial order of this Court is dated 19.11.2010 and was restricted to six mining leases granted in favour of M/s. Bellary Iron Ore Pvt. Ltd., M/s. Mahabaleswarapa & Sons, M/s. Ananthapur Mining Corporation and M/s. Obulapuram Mining Company Pvt. Ltd. What followed thereafter is unprecedented in the history of Indian environmental jurisprudence. It is neither necessary nor feasible to set out the series of Reports of the CEC and the various orders of the Court passed from time to time. Rather, a brief indication of the core Reports of the CEC and the main orders passed by the Court will suffice to understand what had happened so to enable the Court to unravel the course of action for the future.

4. The initial Reports submitted by the CEC in response to the orders of the Court having indicated large scale illegal mining at the cost and to the detriment of the environment, a stage came when by order dated 29.7.2011 a complete ban on mining in the district of Bellary was imposed. Extension of the said ban was made in respect of the mining operations in the districts of Tumkur and Chitradurga by order dated 26.8.2011. As the materials placed before the Court (including

the Report of the Lokayukta dated 18.12.2008) indicated large scale encroachment into forest areas by leaseholders and ongoing mining operations in such areas without requisite statutory approval and clearances, a Joint Team was constituted by this Court by order dated 6.5.2011 to determine the boundaries of initially 117 mining leases which number was subsequently extended to 166 by inclusion of the mines in Tumkur and Chitradurga districts. The result of the survey by the Joint Team revealed a shocking state of depredation of nature's bounty by human greed. Objections of the lease holders to the survey came early and were subjected to a re-examination by the special team itself under orders of the Court dated 23.9.2011 in the course of which 122 cases were re-examined and necessary corrections were effected in 33 cases. Thereafter, the CEC submitted its Report termed as the "Final Report" dated 3.2.2012 which is significant for two of its recommendations. The first was for categorization of the mines into three categories, i.e., 'A', 'B' and 'C' on the basis of the extent of encroachment in respect of the mining pits and over burden dumps determined in terms of percentage qua the total lease area. The second set of recommendations pertained to the conditions subject to which reopening of the mines and resumption of mining operations were to be considered by the Court. A set of modified recommendations along with a set of detailed guidelines for preparation and implementation of Reclamation and Rehabilitation Plans (R & R) were also submitted to the Court by the CEC on 13.3.2012. Before the relevant extracts from the Reports of the CEC dated 3.2.2012 and 13.3.2012 are noticed, to make the discussion on the Report of the Joint Team complete it will be necessary to note that in terms of the order dated 10.2.2012 of the Court, 66 representations were considered by the CEC out of which only 4 were found tenable. Accordingly, corrections were made in respect of the said four leases which corrections, however, did not involve any change of category. The CEC placed the cases of two lease holders i.e. M/s. V.S. Lad & Sons and M/s. Hothur Traders for consideration of the Court and

two leases placed in Category "C" needed upgradation to Category "B" in view of the minimal violation committed by them and the circumstances surrounding such violations.

5. We may now proceed to notice the relevant part of the two Reports of the CEC dated 3.2.2012 and 13.3.2012, as referred to hereinabove.

"**IV. CLASSIFICATION OF LEASES IN DIFFERENT CATEGORIES ON THE BASIS OF THE LEVEL OF ILLEGALITIES FOUND.**

27. The CEC, based on the extent of illegal mining found by the Joint Team and as appropriately modified by the CEC in its Proceeding dated 25th January, 2012 and after considering the other relevant information has classified the mining leases into three categories namely "Category-A", "Category-B" and "Category-C".

28. The "Category-A" comprises of (a) working leases wherein no illegality/marginal illegality have been found and (b) non working leases wherein no marginal/illegalities have been found. The number of such leases comes to 21 & 24 respectively.

29. "Category-B" comprises of (a) mining leases wherein illegal mining by way of (i) mining pits outside the sanctioned lease areas have been found to be up to 10% of the lease areas and/ or (ii) over burden/waste dumps outside the sanctioned lease areas have been found to be up to 15% of the lease areas and (b) leases falling on interstate boundary between Karnataka and Andhra Pradesh and for which survey sketches have not been finalized. For specific reasons as mentioned in the statement of "Category-B" leases, M/s. S.B. Minerals (ML No. 2515), M/s. Shantalaxmi Jayram (ML No. 2553), M/s. Gavisiddeshwar Enterprises (ML No. 80) and M/s. Vibhutigudda Mines (Pvt.) Ltd. (ML No. 2469) have been

assigned in "Category-B". The numbers of such leases in "Category-B" comes to 72.

30. The "Category-C" comprises of leases wherein (i) the illegal mining by way of (a) mining pits outside the sanctioned lease area have been found to be more than 10% of the lease area and/or (b) over burden/waste dumps outside the sanctioned lease areas have been found to be more than 15% of the lease areas and/or (ii) the leases found to be involved in flagrant violation of the Forest (Conservation) Act and/or found to be involved in illegal mining in other lease areas. The number of such leases comes to 49.

RECOMMENDATIONS (as modified by CEC by its Report dated 13.3.2012. Items 1 to IV of the Report dated 3.2.2012 stood replaced by Items A to I of the Report dated 13.3.2012 which are reproduced below along with Items V to XIV of the initial Report dated 3.2.2012).

(A) the findings of the Joint Team and as modified after careful examination by the CEC may be accepted and directed to be followed by the concerned authorities and the respective leases, notwithstanding anything to the contrary. The boundaries of the mining leases should accordingly be fixed on the ground.

(B) a ceiling of 25 Million Metric Tonnes (MMT) for total production of iron ore from all the mining leases in District Bellary may be prescribed. A ceiling of 5 MMT for production of iron ore from all the mining leases in Districts Chitradurga and Tumkur together may be prescribed;

(C) the proposed "guidelines for the preparation of the R&R Plans" may be approved by this Hon'ble Court and the prescriptions/provis s,

prepared as per these guidelines, may be directed to be followed by the respective lessees and the concerned authorities;

(D) the iron ore which becomes available should be used for meeting the iron ore requirement of the steel plants and associated industries located in Karnataka and also of those plants located in the adjoining States which have been using the iron ore from the mining leases located in these Districts. Exports, outside the country, should be permissible only in respect of the material which the steel plants and associated industries are not willing to purchase on or above the average price realized by the Monitoring Committee for the corresponding grades of fines/lumps during the sale of about 25 MMT of the existing stock of iron ore. Similarly, the iron ore produced by the beneficiation plants after processing should also not be permitted to be exported outside the country;

(E) the sale of the iron ore should continue to be through e-auction and the same should be conducted by the Monitoring Committee constituted by this Hon'ble Court. However, the quantity to be put up for e-auction, its grade, lot size, its base/floor price and the period of delivery will be decided/provided by the respective lease holders. The Monitoring Committee may permit the lease holders to put up for e-auction the quantities of the iron ore planned to be produced in subsequent months. The system of sale through the Monitoring Committee may be reviewed after say two year;

(F) 90% of the sale price (excluding the royalty and the applicable taxes) received during the e-auction may be paid by the buyer directly to the respective lease holders and the balance 10% may be

deposited with the Monitoring Committee alongwith the royalty, FDT and other applicable taxes/ charges;

(G) The responsibility of the Monitoring Committee will be (a) to monitor the implementation of the various provisions/prescriptions of the R&R Plans, (b) to ensure strict compliance of the conditions on which the environment clearance, the approval under the Forest (Conservation) Act, 1980 and the other statutory approvals/clearances have been accorded, (c) to ensure that the mining is undertaken as per the approved Mining Plan, (d) to ensure that the ceiling on annual production fixed for the lease does not exceed, (e) to ensure that the safety zone is maintained around the lease area and in respect of the clusters of mining leases around the outer boundary of such cluster of mining leases and (f) to ensure compliance of the other applicable condition/provisions. Any lease found to be operating in violation of the stipulated conditions/provisions should be liable for closure and/or termination of the lease;

(H) the present Members of the Monitoring Committee should continue for a period of next two years; and

(I) in the larger public interest the mining operations in the two leases of M/s. NMDC may be permitted to be continued. However, it will be liable to deposit penalty/compensation as payable for the mining leases falling in "Category-B"

(V) In respect of the mining leases falling in "CATEGORY-B" (details given at Annexure-R-10 to this Report) it is recommended that:

(i) the R&R Plan, under prepa E,

after incorporating the appropriate changes as per the directions of this Hon'ble Court, should be implemented in a time bound manner by the respective lessees at his cost. In the event of his failure to do so or if the quality and/or the progress of the implementation of the R&R Plan is found to be unsatisfactory by the Monitoring Committee or by the designated officer(s) of the State of Karnataka, the same should be implemented by the State of Karnataka through appropriate agency(ies) and at the cost of the lessee;

(ii) for carrying out the illegal mining outside the lease area, exemplary compensation/ penalty may be imposed on the lessee. It is recommended that:

(a) For illegal mining by way of mining pits outside the leases area, as found by the Joint Team, the compensation/ penalty may be imposed at the rate of Rs. 5.00 crore (Rs. Five Crore only) for per ha. of the area found by the Joint Team to be under illegal mining pit; and

(b) For illegal mining by way of over burden dump(s) road, office, etc. outside the sanctioned lease area, the compensation/ penalty may be imposed @ Rs. 1.00 crores (Rs. One Crores only) for per ha. of the area found to be under illegal over burden dump etc.

(iii) Mining operation may be allowed to be undertaken after (a) the implementation of the R& R Plan is physically undertaken and is found to be satisfactory based on the pre-determined parameters (b) penalty/ compensation as decided by this Hon'ble Court is deposited and (c) the conditions as

applicable in respect of "Category-A" leases are fulfilled/followed;

(iv) In respect of the seven mining leases located on/ nearby the interstate boundary, the mining operation should presently remain suspended. The survey sketches of these leases should be finalized after the interstate boundary is decided and thereafter the individual leases should be dealt with depending upon the level of the illegality found; and

(v) Out of the sale proceeds of the existing stock of the mining leases, after deducting :

(a) The penalty/compensation payable;

(b) Estimated cost of the implementation of the R& R Plan; and

(c) 10% of the sale proceeds to be retained by the Monitoring Committee for being transferred to the SPV

(d) The balance amount, if any, may be allowed to be disbursed to the respective lessees.

(VI) In respect of the mining leases falling in "CATEGORY-C" (details are given at annexure-R-11 to this Report) it is recommended that (a) such leases should be directed to be cancelled/ determined on account of these leases having been found to be involved in substantial illegal mining outside the sanctioned lease areas (b) the entire sale proceeds of the existing stock of the iron ore of these leases should be retained by the Monitoring Committee and (c) the implementation of the R&R Plan should be at the cost of the lessee;

(VII) the area of the mining l e

"Category-C", after cancellation of the mining leases may be directed to be allotted/assigned through a transparent process of bidding to the highest bidder (s) from amongst the end users. The floor price for this purpose should be fixed on the basis of the market value of the permissible annual production of the iron ore during the period of the agreements/lease period. The iron ore produced from such mines should be used for captive use only and no sale/export will be permissible. The detailed schemes in this regard should be prepared and implemented after obtaining the permission of this Hon'ble Court;

(VIII) the mining leases owned by the M/s. MML should be operated by it. Alternatively, the agreements for mining operations and supply of the iron ore should be entered into by it through a transparent process and on the basis of the market value of the mineral and without any hidden subsidy. The detailed scheme in this regard should be prepared and implemented after obtaining permission of this Hon'ble Court.

(IX) A Special Purpose Vehicle (SPV) under the Chairmanship of Chief Secretary, Government Karnataka and with the senior officers of the concerned Departments of the State Government as Members may be directed to be set up for the purpose of taking various ameliorative and mitigative measures in Districts Bellary, Chitradurga and Tumkur. The additional resources mobilized by (a) allotment/ assignment of the cancelled mining leases as well as the mining leases belonging to M/s. MML, (b) the amount of the penalty/ compensation received/ receivable from the defaulting lessee, (c) the amount received/ receivable by the Monitoring Committee from the

mining leases falling in "Category-A" and "Category-B", (d) amount received/ receivable from the sale proceeds of the confiscated material etc., may be directed to be transferred to the SPV and used exclusively for the socio-economic development of the area/local population, infrastructure development, conservation and protection of forest, developing common facilities for transportation of iron ore (such as maintenance and widening of existing road, construction of alternate road, conveyor belt, railway siding and improving communication system, etc.). A detailed scheme in this regard may be directed to be prepared and implemented after obtaining permission of this Hon'ble Court;

(X) Out of the 20% of sale proceeds retained by the Monitoring Committee in respect of the cleared mining leases falling in "Category-A", 10% of the sale proceeds may be transferred to the SPV while the balance 10% of the sale proceeds may be reimbursed to the respective lessees. In respect of the mining leases falling in "Category-B", after deducting the penalty/compensation, the estimated cost of the implementation of the R&R Plan, and 10% of the sale proceeds to be retained for being transferred to the SPV, the balance amount, if any, may be reimbursed to the respective lessees;

(XI) no new mining leases, including for which Notifications have already been issued, will be granted without obtaining permission of this Hon'ble Court;

(XII) the pending applications for grant of mining leases in Ramgad and Swamimalai Block in District Bellary and for which the NOC's were earlier issued will stand rejected;

(XIII) the confiscated iron ore pertaining to the cancelled stock yards will be sold by the Monitoring Committee and the sale proceeds will be retained by the Monitoring Committee;

(XIII) the Monitoring Committee may be authorized to sell low grade/sub grade iron ore to Cement Plants, Red Oxide and other similarly placed industries. It may also be authorized to supply iron ore required for construction of nuclear plants at the rates mutually agreed between the Monitoring Committee and the concerned authorities provided no middle man is involved; and

(XIV) the Monitoring Committee may be authorized to utilize up to 25% of the interest received by it for engaging reputed agencies for the monitoring of the various parameters relating to mining."

6. As previously noticed, the CEC in its Report dated 13.3.2012 had set out in detail the objectives of the Reclamation and Rehabilitation (R&R) plans and the guidelines for preparation of detailed R & R plans in respect of each mining lease. The origins of the idea (R & R plans) are to be found in an earlier Report of the CEC dated 28.7.2011. As the suggestions of the CEC with regard to preparations of R & R plans for each mine is crucial to scientific and planned exploitation of the mineral resources in question it will be necessary for us to notice the said objectives and the detailed guidelines which are set out below. In this connection it would be worthwhile to take note of the fact that the guidelines in question have been prepared after detailed consultation with different stakeholders including the Federation of Indian Mineral Industries (FIMI) which claims to be the representative body of the majority of the mining lessees of the present case.

"**II. BROAD OBJECTIVES/PARAMETERS OF R&R PLANS**

8. The broad objectives/parameters of the R&R Plans would be:

(i) to carry out time bound reclamation and rehabilitation of the areas found to be under illegal mining by way of mining pits, over burden/waste dumps etc. outside the sanctioned areas;

(ii) to ensure scientific and sustainable mining after taking into consideration the mining reserves assessed to be available within the lease area;

(iii) to ensure environmental friendly mining and related activities and complying with the standards stipulated under the various environmental/mining statutes e.g. air quality (SPM, RPM), noise/vibration level, water quality (surface as well as ground water), scientific over burden/waste dumping, stabilization of slopes and benches, proper stacking and preservation of top soil, sub grade mineral and saleable minerals, proper quality of internal roads, adequate protective measures such as dust suppression/control measures for screening and crushing plants, beneficiation plants, provision for retention walls, garland drains, check dams, siltation ponds, afforestation, safety zones, proper covering of truck, exploring possibility of back filling of part of over burden/waste dumps in the mining pits, sale/beneficiation of sub grade iron ore, water harvesting, etc.

(iv) for achieving (ii) and (iii) above, fixation of permissible annual production; and

(v) regular and effective monitoring and evaluation.

xxxx xxxx xxxx xxxx

VI. PROVISIONS/PRESCRIPTIONS OF THE LEASE WISE R&R PLANS

14. The leasewise R&R Plans will provide for the specific provisions/prescriptions as dealt with hereunder:

(A) REGARDING AREA FOUND BY THE JOINT TEAM TO BE UNDER ILLEGAL MINING

15. The area under illegal mining pits should be filled up with the existing over burden/waste dumps preferably the illegal dumps. Appropriate soil and moisture conservation measures will be provided and such areas will be afforested with indigenous species.

16. The reclamation and rehabilitation works will be carried out even if such areas are found to be having mineral reserves.

17. In respect of area under illegal over burden/waste dumps, wherever environmentally feasible the over burden/ waste dumps will be removed and disposed of scientifically within the lease area of the encroacher.

18. In other cases, the illegal over burden/waste dumps will be stabilized by:

(a) modifying the gradient of the lump

(b) construction of retaining walls,

(c) construction of gully plugs

(d) construction of garland drains

(e) geo-metric/geo-matting of dumps

(f) afforestation, and

(g) other soil and moisture conservation measures,

19. However, in respect of the mining pits falling within the area of the other sanctioned leases, specific lease-wise prescription/provision will be made depending upon the ground situation.

(B) REGARDING PERMISSIBLE ANNUAL PRODUCTION

20. The permissible annual production for the mining lease would be based on (a) the mineral reserves in the lease area; (b) area available for over burden/waste dumps, sub grade iron ore and other land uses (c) existing transport facilities in relation to the traffic load of the mining lease and (d) overall ceiling on the annual production from all the mining leases in the district (as dealt with earlier).

21. Presently the permissible annual production would be decided for the next five years subject to review/ modification in any of the following situation:

(a) change in the assessed mineral reserves/ resources because of subsequent exploration carried out and incorporated in the modified mining plan/scheme and approved by the IBM;

(b) identification of additional area for the disposal of the over burden/waste dumps and incorporated in the approved mining plan/scheme (preferably by way of back filling of mined out pits); and

(c) creation of additional physical infrastructure such as railway sidings, conveyors, wagon tipplers, wagon loaders (to remove/reduce transportation bottlenecks).

(C) STABILIZATION OF THE EXISTING OVER BURDEN/WASTE DUMPS AND SUB GRADE IRON ORE DUMPS AND PLAN FOR ACTIVE OVER BURDEN/WASTE

22. This will include the total area of the dump(s), present gradient, planned gradient, provision for retaining wall(s), benches, final gradient, volume of over burden/waste dump that may be stored, afforestation, use of geo-matting/geo-textile, garland drains and other soil and moisture conservation/protective measures;

23. The design will vary from mine to mine and within the mine from dump to dump. The prescription will also vary between old dumps and active dumps. The slope of 27 degree provided in the environment clearance may not be feasible for dumping on steep hill slopes.

24. The ultimate objective of the dump design/protective measure would be to ensure that the slopes are stable, are not vulnerable to erosion and to provide for adequate protective measures to capture/control run off:

(D) MINING PITS

25. In respect of the mining leases where the shape and design of the mining pits differ substantially from those provided in the approved mining plan and /or found to be in gross violation of the approved design, mining will be permissible based on rectification as required by the concerned statutory authority (viz. DGMS). Similarly, gross violations under other Acts/Rules, if any, will need to be rectified (as required by the relevant statutory authorities).

(E) SOIL AND MOISTURE CONSERVATIONS, AFFORESTATION AND OTHER MEASURES

26. The R&R plan would inter alia provide for:

(i) broad design/specification for

(a) garland drains

(b) retaining walls

(c) check dams

(d) gully plugs and/or culverts (if required)

(e) geo textile/geo matting of dumps

(f) afforestation in the safety zones

(g) afforestation in peripheral area, road side, over burden dumps and other areas

(ii) dust suppression measures at/for loading, unloading and transfer points, internal roads, mineral stacks etc.

(iii) covered conveyor belts (if feasible) – such as down hill conveyor, pipe conveyor etc.

(iv) specification of internal roads,

(v) details of existing transport system and proposed improvements

(vi) railways siding (if feasible)

(vii) capacity building of personnel involved in the mining and environmental management

(viii) rain water harvesting

(F) TIME SCHEDULE

27. Time schedule for implementation of various prescriptions will be provided.

(G) **MONITORING MECHANISM**

28. Monitoring mechanism, including predetermined parameters to assess the successful implementation of the various provision/prescriptions of the R&R Plan will be provided. The Monitoring Committ e

for monitoring the implementation of the prescription/ provisions of the R&R Plans."

7. The recommendations of the CEC dated 13.3.2012 in respect of Items A to I were accepted by the Court by its order dated 13.4.2012.

8. The next significant event that had occurred in the catalogue of relevant occurrences is the order of the Court dated 3.9.2012 permitting reopening of 18 category 'A' mines subject to the conditions spelt out in the said order which broadly were to the effect that mining shall be to the extent of the annual production as applicable to each mine determined by the CEC in its Report dated 29.8.2012 and further subject to the following conditions:

"(I) compliance with all the statutory requirements;

(II) the full satisfaction of the Monitoring Committee, expressed in writing, that steps for implementation of the R & R Plan in the leasehold areas are proceeding effectively and meaningfully, and

(III) a written undertaking by the leaseholders that they would fully abide by the Supplementary Environment Management Plan (SEMP) as applicable to the leasehold area and shall also abide by the Comprehensive Environment Plan for Mining Impact Zone (CEPMIZ) that may be formulated later on and comply with any liabilities, financial or otherwise, that may arise against them under the CEPMIZ.

(IV) The CEC shall, upon inspection, submit a report to this Court that any or all the stated 18 "Category A" mine owners have fully satisfied the above-mentioned conditions. Further, it shall be reported that the mining activity is being carried on strictly within the specified parameters and without any violation."

9. The order of the Court dated 28.9.2012, laying down certain conditions "as the absolute first step before consideration of any resumption of mining operations by Category–'B' leaseholders" would also be required to be specifically noticed at this stage.

"I. Compensatory Payment

(a) Each of the leaseholders must pay compensation for the areas under illegal mining pits outside the sanctioned area, as found by the Joint Team (and as finally held by the CEC) at the rate of Rs.5 crores per hectare, and (b) for the areas under illegal overburden dumps, roads, offices, etc. outside the sanctioned lease area, as found by the Joint Team (as might have been finally held by the CEC) at the rate of Rs.1 crore per hectare.

It is made clear that the payment at the rates aforesaid is the minimum payment and each leaseholder may be liable to pay additional amounts on the basis of the final determination of the national loss caused by the illegal mining and the illegal use of the land for overburden dumps, roads, offices, etc. Each leaseholder, besides making payment as directed above, must also give an undertaking to the CEC for payment of the additional amounts, if held liable on the basis of the final determination.

At the same time, we direct for the constitution of a Committee to determine the amount of compensatory payment to be made by each of the leaseholders having regard to the value of the ore illegally extracted from forest/ non-forest land falling within or outside the sanctioned lease area and the profit made from such illegal extraction and the resultant damage caused to the environment and the ecology of the area.

The Committee shall consist of experts/officers nominated each by the Ministry of Mines and the Ministry of Environment and Forests. The convener of the Committee will be the Member Secretary of the CEC. The two members nominated by the Ministry of Mines and the Ministry of Environment and Forests along with the Member Secretary, CEC shall co-opt two or three officers from the State Government. The Committee shall submit its report on the aforesaid issue through the CEC to this Court within three months from today.

The final determination so made, on being approved by the Court, shall be payable by each of the leaseholders.

II. Guarantee money for implementation of the R&R plan in the respective sanctioned lease areas.

The CEC shall make an estimate of the expenses required for the full implementation of the R&R plan in each of the 63 'Category B' mines and each of the leaseholders must pay the estimated amount as guarantee for implementation of the R&R plans in their respective sanctioned lease areas and in the areas where they carried on illegal mining activities or which were used for illegal overburden dumps, roads, offices, etc. beyond the sanctioned lease area. In case, any leaseholder defaults in implementation of the R&R plan, it will be open to the CEC to carry out the R&R plan for that leasehold through some other proper agency from the guarantee money deposited by the leaseholder. However, on the full implementation of the R&R plan to the complete satisfaction of the CEC and subject to the approval by the Court, the guarantee money would be refundable to the leaseholder.

III. In addition to the above, each leaseholder must pay a sum equivalent to 15% of the sale proceeds of its iron ore sold through the Monitoring Committee as per the earlier

orders of this Court. In this regard, it may be stated that though the amicus suggests the payment @ 10% of the sale proceeds, having regard to the overall facts and circumstances of the case, we have enhanced this payment to 15% of the sale proceeds.

Here it needs to be clarified that the CEC/Monitoring Committee is holding the sale proceeds of the iron ores of the leaseholders, including the 63 leaseholds being the subject of this order. In case, the money held by the CEC/ Monitoring Committee on the account of any leaseholder is sufficient to cover the payments under the aforesaid three heads, the leaseholder may, in writing, authorize the CEC to deduct from the sale proceeds on its account the amounts under the aforesaid three heads and an undertaking to make payment of any additional amount as compensatory payment. On submission of such authorization and undertaking, the CEC shall retain the amounts covering the aforesaid three heads and pay to the concerned leaseholder the balance amount, if any. It is expected that the balance amount, after making the adjustments as indicated here, would be paid to the concerned leaseholder within one month from the date of submission of the authorization and the undertaking.

In the case of any leaseholder, if the money held on his account is not sufficient to cover the aforesaid three heads, he must pay the deficit within two months from today.

IV. The R&R plans for the aforesaid 63 'Category B' mines may be prepared as early as possible, as directed by orders of this Court dated April 13, April 20 and May 05, 2012, and in case where the R&R plan is already prepared and ready, the leaseholder may take steps for its comprehensive implementation, both within and outside the sanctioned lease area, without any delay."

10. The number of "B" Category mines though mentioned as 72 in the CEC Report dated 3.2.2012, reference to the figure of 63 in the above extracted part of the Court's order dated 28.9.2012 is on account of placing of the 7 mines located on the inter-State border (Karnataka-Andhra Pradesh) in a special category (B1) and the cases of two leases i.e. M/s S.B. Minerals (ML No.2515) and M/s. Shanthalakshmi Jayaram (ML No.2553) [tentatively placed by CEC in Category 'B'] before the Court for orders as to their appropriate categorization. The issue of the seven (7) mines on the Karnataka – Andhra Pradesh border and the two (2) mines in respect of which appropriate categorization which is to be decided is being dealt with in another part of the present order.

11. The latest Report of the CEC dated 15.2.2013 indicating the present status of preparation and implementation of the lease wise R& R plans and resumption of mining operations by Category 'A' and Category 'B' mines and the compliance of the preconditions for opening of Category 'B' mines will also require specific notice, which recommendations are extracted below.

"**RECOMMENDATIONS**

15. In the above background the following recommendations are made for the consideration of this Hon'ble Court :

(i) This Hon'ble Court may consider extending its order dated 3rd September, 2012, by which mining operations were permitted to be resumed in 18 "Category-A" mining leases, to all "Category-A" mining leases;

(ii) This Hon'ble Court may consider permitting the resumption of the mining operations in "Category-B" mining leases subject to the conditions as applicable for the resumption of the mining

operations in the "Category-A" mining leases and compliance of the following additional conditions :

(a) In compliance of this Hon'ble Court's order dated 28th September, 2012 the lessees will be required to pay, if not already so done, compensation for the area under illegal mining pits, illegal over burden dumps, roads, offices etc. undertake to pay the additional compensatory amounts, if held liable, guarantee money for implementation of the R&R Plans and deposit of 15% of the sale proceeds of the existing iron ore sold by the Monitoring Committee; and

(b) Before starting the mining operations the implementation of the R& R Plans for the areas found under illegal mining pits, illegal over burden dumps, etc. will be completed/ nearing completion to the satisfaction of the Monitoring Committee; and

(iii) the CEC/Monitoring Committee may be authorized to remove and sell through e-auction the sub grade iron ore available in the existing over burden dumps in and around the lease areas subject to the condition that such removal and sale is not likely to have significant adverse impact on the existing tree growth/vegetation and/or stability of the over burden dumps. The Monitoring Committee may be authorized to retain the entire sale proceeds in respect of the dumps located outside the sanctioned and presently valid lease areas for the purpose of transfer to the SPV for the implementation of the Comprehensive Environment Plan for Mining Impact Zone (CEPMIZ)."

Thus the CEC in its Report d d

recommended resumption of mining operations in the remaining category 'A' mines subject to the conditions already imposed by this Court in its order dated 3.9.2012 and also for reopening of Category 'B' mines subject to the same conditions and additionally the preconditions recommended by the CEC and approved by this Court by its order dated 28.9.2012.

12. The above main features contained in the various Reports of the CEC and the orders of this Court apart, there are certain incidental and supplementary matters which may be conveniently noticed now.

13. The first is with regard to investigations in respect of alleged criminal offences by lessees which have been ordered by this Court to be investigated by the CBI. As investigations have already been ordered by this Court and such investigations would necessarily have to follow the procedure prescribed by law we do not wish to delve upon the same save and except to say that each of such investigation shall be brought to its logical conclusion in accordance with law and any aggrieved party would be entitled to avail of all legal remedies as may be available.

14. The second supplementary issue that can be conveniently dealt with at this stage is with regard to sale of the existing stock of Iron Ore which is mainly the yield of illegal mining. The Court had ordered disposal of such accumulated Iron Ore by the process of e-auction through a Monitoring Committee constituted by order of this Court dated 23.9.2011. From time to time this Court had directed certain payments to be made to the Monitoring Committee e.g. by way of 10% of sale proceeds; on account of compensatory payments etc. By order dated 28.9.2012, this Court had constituted a Special Purpose Vehicle (for short 'SPV') on the suggestion of the learned Amicus Curiae. The purpose of constitution of the SPV, it may be noticed, is for taking of ameliorative and mitigative measures as per the "Comprehensive Environment

Plans for the Mining Impact Zone" (CPEMIZ) around mining leases in Bellary, Chitradurga and Tumkur. By the order dated 28.9.2012, the Monitoring Committee was to make available the payments received by it under different heads of receivables to the SPV.

15. The above facts would have relevance to the future of the mining operations in the State as the continuance of this Court's orders for sale of the Iron Ore by the process of e-auction by the Monitoring Committee after recommencement of mining operations on the same terms and conditions and also the continuance of the SPV would be required to be considered by us. It would also be convenient to take note of the fact that as per the CEC's Report dated 15.2.2013 sale of almost the entire quantity of illegally extracted Iron Ore has been effected through the Monitoring Committee and the sub-grade Iron Ore lying in dumps in and around several lease areas may not have adequate commercial potential. Besides removal thereof for sale, in many cases, may also give rise to environmental problems in as much as removal of such dumps may constitute a hazard to the stability of the dumps which have been in existence for many years. Permission for sale of sub-grade iron ore, only when the same is commercially viable and removal thereof from the dumps is an environmentally safe exercise, has been sought by the CEC in its last Report dated 15.2.2013. We do not find any impediment in accepting the recommendations of the CEC in the Report dated 15.2.2013 in respect of removal and sale of sub-grade Iron Ore. Similarly, we do not find any difficulty in continuing our previous orders permitting sale of iron ore to be mined after resumption of operations through the Monitoring Committee on the same terms and conditions as presently in force.

16. The supplementary and the collateral issues, which we must emphasize are not to be understood to be low either in priority or importance because of the nomenclature used, having been dealt with by us in the man[illegible]e

may now come to what can be conveniently referred to as the central issues that confront the Court in the present case. In this regard notice must be had to the large number of interlocutory applications (IAs) filed basically questioning the sanctity of the survey carried out by the Joint Team constituted by this Court, the findings arrived at and the categorization of the leaseholders into the three different categories. Such objections in the main have come from leaseholders who have been put in Category 'C' (except in few isolated cases seeking a change from Category 'B' to 'A') for which Category of mines the recommendation of the CEC is one of closure. The challenge is on twin grounds of lack of procedural fairness and inherent defects in the technical part of the exercise of survey besides apparent legal fallacies in the process of determination of the allegedly encroached mining area. Denial of adequate opportunity to associate and coordinate with the survey process, notwithstanding the possible adverse effects of the findings of survey on the legal rights of the lease holders, is the backbone of the challenge on ground of procedural fairness. On the other hand, alteration of the lease area either by shifting or reducing the same; ignoring concluded judicial orders determining boundary disputes between adjacent lease holders; taking of land use for dumps as mining operations requiring a mining license for the land so used or forest clearances under the Forest Conservation Act, 1980 (in case of such use of forest land) and above all the change of boundaries demarcated decades back by adoption of the Total Station Method instead of a repeat survey by following the same Conventional Method (chain method) are the common threads in the arguments advanced to challenge the technical part of the survey.

17. The categorization of the allegedly offending leases on the basis of percentage of the alleged encroachment qua the total lease area is contended to be constitutionally fragile and environmentally self-defeating. A leaseholder with a more expansive lease area, inspite of committing a larger encroachment, may still fall below the percentage adopted as

the parameter so as to place him in a more favourable category, say Category 'B', as compared to a small lease where the area encroached, though small, falls in a less favourable category, say "C" because the percentage of encroachment exceeds the prescribed parameters. The recommendation of the CEC with regard to categorization and the actions proposed on that basis as well as the suggested parameters for drawing up the R& R plans and the preconditions to be fulfilled by Category 'A' and 'B' leaseholders for recommencement of mining operations has also been assailed by questioning the credibility of the CEC as an institution and the prolonged continuance of its members which, according to the leaseholders, have the tendency of effectuating unbridled powers.

18. Relying on the provisions of the Mines and Minerals (Development & Regulation) Act, 1957; Forest (Conservation) Act, 1980 and Environment (Protection) Act, 1986 (hereinafter referred to as "MMDR Act", "FC Act" and "EP Act" respectively) it is argued that each of the statutes contemplate a distinct and definite statutory scheme to deal with the situations that have allegedly arisen in the present case. To resolve the said issues it is the statutory scheme that should be directed to be followed and resort to the powers of this Court under Article 32 read with Article 142 of the Constitution, when a statutory scheme is in existence, would be wholly uncalled for. Specifically, it has been pointed out that none of the conditions that are required to be fulfilled by Category 'A' leaseholders and none of the compulsory payments contemplated for Category 'B' leaseholders for recommencement of operation are visualized in any of the statutory schemes. Insofar as Category 'C' leaseholders are concerned, it is contended that cancellation, if any, has to be in accordance with the statute which would provide the lease holder with different tiers of remedial forums as compared to the finality that would be attached if any order is to be passed by this Court. In this regard, several earlier opinions of this Court, details of which

discussions that follow, had been cited at the bar to persuade us to take the view that we should desist from exercising our powers under the Constitution and instead relegate the parties to the remedies provided by the statute.

19. We may now proceed to deal with the issues arising in proper sequential order.

ISSUE NO.1

Credibility of the CEC

20. A scathing attack has been made against the CEC on behalf of one of the lessees represented by Shri Dushyant A. Dave, learned senior counsel. It is contended that the said authority has virtually become a law unto itself making recommendations which is in defiance of both law and logic. Assumption of unguided, unbridled and absolute powers has been attributed to the CEC. The implicit trust of this Court in the said body has been misutilised requiring a review by this Court with regard to the continuance of the said body or at least in respect of a change in its present composition, it is argued.

21. The CEC was first constituted by the Court by its order dated 9.5.2002 as an interim body until creation of the statutory agency contemplated under the provisions of Section 3 (3) of the EP Act. Thereafter by a Notification dated 17.9.2002 published in the Gazette of India the constitution of the Central Empowered Committee (CEC) for a period of 5 years was notified indicating its composition together with the extent of its powers and duties. It transpires from the Court's order dated 7.9.2007 that an issue with regard to the correctness of the extent of empowerment of the said body made by Notification dated 17.9.2002 was raised on behalf of the Union of India, whereafter, on the suggestions of the Attorney General for India, this Court by its order dated 14.12.2007 had determined the extent of powers of the CEC in the following terms :

"1. In supersession of all the previous orders regarding

constitutions and functioning of the Central Empowered Committee (hereinafter called the "Empowered Committee") is constituted for the purpose of monitoring and ensuring compliance with the orders of this Court covering the subject matter of forest and wild life and related issues arising out of the said orders.

2. The Committee shall exercise the following powers and perform the following functions:

(i) to monitor the implementation of this Court's orders and place reports of non-compliance before the Court and Central Government for appropriate action.

(ii) to examine pending Interlocutary Applications in the said Writ petitions (as may be referred to it by the Court) as well as the reports and affidavits filed by the States in response to the orders passed by the Hon'ble Court and place its recommendations before the Court for orders

(iii) to deal with any applications made to it by any aggrieved person and wherever necessary, to make a report to this Court in that behalf;

(iv) for the purposes of effective discharge of powers conferred upon the Committee under this order; the Committee can:-

(a) call for any documents from any persons or the government of the Union or the State or any other official;

(b) undertake site inspection of forest area involved;

(c) seek assistance o y

person(s) or official(s) required by it in relation to its work;

(d) co-opt one or more persons as its members or as special invitees for dealing with specific issues;

(e) co-opt, wherever feasible, the Chief Secretary or his representative and Principal Chief Conservator of Forests of the State as special invitees while dealing with issues pertaining to a particular state;

(f) to suggest measures generally to the State, as well as Central Government, for the more effective implementation of the Act and other orders of this Court.

(v) to examine and advise/recommend on any issue referred to the Committee."

22. As the period of five years mentioned in the Notification dated 17.9.2002 had expired and the terms of reference to the body had been redetermined by this Court, perhaps, a fresh notification should have been issued which was not forthcoming. It is in such a situation that the CEC had continued to function under orders of the Court submitting its reports from time to time in various environmental issues pending before this Court. It is on consideration of such Reports that the Court has been passing its orders from time to time.

23. In the circumstances enumerated above, questions concerning the credibility of the CEC are absolutely unfounded, particularly in the absence of any materials to substantiate the apprehensions, if not allegations, that have been leveled. The said body has been performing such tasks as had been assigned by this Court by its orders passed from time to time. The directions on the basis of which the CEC had proceeded

and had submitted its Reports are within the framework of the terms of reference of the CEC as determined by this Court by order dated 14.12.2007. Needless to say, acceptance of the recommendations made by the CEC on the basis of which orders of the Court are formulated is upon the satisfaction of the Court. We, therefore, close the issue by holding the contentions made to be wholly untenable.

ISSUE NO.2

Exercise of jurisdiction under Article 32/142 of the Constitution on the basis of the facts revealed by Reports of the CEC i.e. large scale damage to the forest wealth of the country due to illegal mining on an unprecedented scale vis-à-vis resort to remedies under the provisions of Mines and Minerals (Development and Regulation) Act, 1957, Forest (Conservation) Act, 1980 and Environment (Protection) Act, 1986

24. On the above issue the short and precise argument on behalf of the leaseholders is that the provisions of each of the statutory enactments, i.e., the MMDR Act, FC Act and EP Act prescribe a distinct statutory scheme for regulation of mining activities and the corrective as well as punitive steps that may be taken in the event mining activities are carried out in a manner contrary to the terms of the lease or the provisions of any of the statutes, as may be. The argument advanced is that as the statutes in question contemplate a particular scheme to deal with instances of illegal mining or carrying on mining operations which is hazardous to the environment, the CEC could not have recommended the taking of any step or measure beyond what is contemplated by the statutory scheme(s) in force. It is argued that it will not be proper for this Court to act under Article 32 and to accept any of the said recommendations which are beyond the scheme(s) contemplated by the Statute(s). In other words, what is sought to be advanced on behalf of the leasel[illegible]p

should be taken or direction issued by this Court which will be contrary to or in conflict with the provisions of the relevant statutes. Several judgments of this Court, which are perceived to be precedents in support of the proposition advanced, have been cited in the course of the arguments made.

25. On the other hand, the learned Amicus Curiae, Shri Shyam Divan, has submitted that the present is a case of mass destruction of the forest wealth of this country resulting not only in a plunder of scarce natural resources but also causing irreparable ecological and environmental damage and degradation. The learned Amicus Curiae has submitted that the extent of illegal mining that had happened in the three districts of the State of Karnataka is unprecedented. The relevant data compiled by different bodies has been placed by the learned Amicus Curiae to indicate that in the Bellary-Hospet region the annual production of Iron Ore had increased from 12.4 MMT in the year 2001-02 to 44.39 MMT in the year 2008-09. The then Chief Minister of the State had made a statement on the floor of the legislative assembly on 9.7.2010 that 30.49 MMT of illegal Iron Ore has been exported from the State of Karnataka between 2003-04 to 2009-10 valued at approximately Rs. 15,245 crores. In the year 2009-10 alone the total quantity of illegal Iron Ore exported stood at 12.9 MMT. During the inspection carried out by the Indian Bureau of Mines in December, 2009 it was found that not a single mining lease was operating without violating the provisions of the MMDR Act and the FC Act. In an affidavit filed by the official Respondents in a writ petition registered and numbered as W.P. No. 14551/2010 before the Karnataka High Court it was stated that between November, 2009 and February, 2010 (i.e., within a period of four months) 35.319 lakh MT of illegal Iron Ore was received at Belekeri and Karwar ports, for movement of which for a period of about 4 months 2986 trucks were required to undertake the journey every day in both directions i.e., to the ports and thereafter back.

26. According to Shri Divan, the present is a case of mass tort resulting in the abridgment of the fundamental rights of a large number of citizens for enforcement of which the writ petition has been filed under Article 32. Shri Divan has submitted, by relying on several decisions of this Court, that in a situation where the Court is called upon to enforce the fundamental rights and that too of an indeterminate number of citizens there can be no limitations on the power of Court. It is the satisfaction of the Court that alone would be material. Once such satisfaction is reached, the Court will be free to devise its own procedure and issue whatever directions are considered necessary to effectuate the Fundamental Rights. The only restriction that the Court will bear in mind is that its orders or directions will not be in conflict with the provisions of any Statute. However, if the statute does not forbid a particular course of action it will be certainly open for the Court under Article 32 to issue appropriate directions. According to the learned Amicus Curiae in the present case none of the recommendations of the CEC is inconsistent or contrary to any statutory provision. They are at best supplemental to the existing provisions seeking to achieve the same end through a procedure which may be somewhat different. The justification for this, according to the learned Amicus Curiae, lies in the extraordinary situation that had occurred in the present case.

27. At this stage, very briefly, the statutory scheme under the three enactments in question may be taken note of. Under the provisions of the MMDR Act the State Government has been provided with the power of termination of licenses or mining leases in the interest of regulation of mines and minerals (Section 4A) whereas under Section 5, power has been conferred not to grant mining leases in certain specified situations. The Rule making power under Section 23C extends to framing of Rules by the State Government to prevent illegal mining, transportation and storage of minerals and to provide for checking and inspection of the mining lease area. The Karnataka (Prevention of Illegal Minin[illegible]d

Storage of Minerals) Rules, 2011 has been notified on 5th February, 2011. Under the Mineral Concession Rules, 1960, the expression "illegal mining" has been explained in Rule 2(iia). The aforesaid Rules also contemplate that while determining the extent of illegal mining the area granted under the lease will be deemed to have been held by the holder of the license under lawful authority. Under the provisions of the EP Act, closure, prohibition or regulation of industry, operation or process is contemplated, whereas under the provisions of the FC Act prior approval of the Central Government for use of forest land for non forest purpose is mandatory. The question that has been raised on behalf of the leaseholders is whether the aforesaid provisions under the different statutes should be resorted to and the recommendations made by the CEC including closure of Category-"C" mines should not commend for acceptance of this Court.

28. In *Bandhua Mukti Morcha Vs. Union of India & Ors.* (1984) 3 SCC 161, this Court had the occasion to consider the nature of a proceeding under Article 32 of the Constitution which is in the following terms :-

"**32. Remedies for enforcement of rights conferred by this Part**.

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local

limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

29. The issue before the Court was one of release/freedom of an indeterminate number of citizens from bonded labour and was taken up by the Court by registering a letter addressed to a Hon'ble Judge of this Court to the above effect as a writ petition under Article 32. In the above context this Court in para 13 of its order observed as follows :

"13. But the question then arises as to what is the power which may be exercised by the Supreme Court when it is moved by an "appropriate" proceeding for enforcement of a fundamental right. The only provision made by the Constitution-makers in this behalf is to be found in clause (2) of Article 32 which confers power on the Supreme Court "to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for enforcement of any of the fundamental rights". It will be seen that the power conferred by clause (2) of Article 32 is in the widest terms. It is not confined to issuing the high prerogative writs of habeas corpus, mandamus, prohibition, certiorari and quo warranto, which are hedged in by strict conditions differing from one writ to another and which to quote the words spoken by Lord Atkin in *United Australia Limited* v. *Barclays Bank Ltd. [(1941) A.C. 1]* in another context often "stand in the path of justice clanking their mediaeval chains". But it is much wider and includes within its matrix, power to issue any directions, orders or writs which may be appropriate for enforcement of the fundamental right in question and this is made amply clear by the inclusive clause which refers to *in the nature* of habeas corpus, r[illegible]n,

quo warranto and certiorari. It is not only the high prerogative writs of mandamus, habeas corpus, prohibition, quo warranto and certiorari which can be issued by the Supreme Court but also writs *in the nature* of these high prerogative writs and therefore even if the conditions for issue of any of these high prerogative writs are not fulfilled, the Supreme Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress, but would have power to issue any direction, order or writ including a writ in the nature of any high prerogative writ. This provision conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms shows the anxiety of the Constitution-makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights. The Constitution-makers clearly intended that the Supreme Court should have the amplest power to issue whatever direction, order or writ may be appropriate in a given case for enforcement of a fundamental right. But what procedure shall be followed by the Supreme Court in exercising the power to issue such direction, order or writ? That is a matter on which the Constitution is silent and advisedly so, because the Constitution-makers never intended to fetter the discretion of the Supreme Court to evolve a procedure appropriate in the circumstances of a given case for the purpose of enabling it to exercise its power of enforcing a fundamental right. Neither clause (2) of Article 32 nor any other provision of the Constitution requires that any particular procedure shall be followed by the Supreme Court in exercising its power to issue an appropriate direction, order or writ. The purpose for which the power to issue an appropriate direction, order or writ is conferred on the Supreme Court is to secure enforcement of a fundamental right and obviously therefore, whatever procedure is necessary for

fulfilment of that purpose must be permissible to the Supreme Court."

This Court also found that it would be justified to depart, in a proceeding under Article 32, from the strict adversarial procedure and the principles embodied in the Code of Civil Procedure and the Indian Evidence Act and in this regard observed as under:

> "...We do not think we would be justified in imposing any restriction on the power of the Supreme Court to adopt such procedure as it thinks fit in exercise of its jurisdiction, by engrafting adversarial procedure on it, when the Constitution-makers have deliberately chosen not to insist on any such requirement and instead, left it open to the Supreme Court to follow such procedure as it thinks appropriate for the purpose of securing the end for which the power is conferred, namely, enforcement of a fundamental right."

Insofar as the practice of appointing commissions for collection of basic facts to enable the Court to adjudicate the issues concerning violation of fundamental rights is concerned it would be necessary to extract the following observations recorded by this Court in para 14 in the case of *Bandhua Mukti Morcha* (supra).

> **"14**...It is for this reason that the Supreme Court has evolved the practice of appointing commissions for the purpose of gathering facts and data in regard to a complaint of breach of a fundamental right made on behalf of the weaker sections of the society. The report of the Commissioner would furnish prima facie evidence of the facts and data gathered by the Commissioner and that is why the Supreme Court is careful to appoint a responsible person as Commissioner to make an enquiry or investigation into the facts relating to the complaint. It is interesting to note that in the past t s

appointed sometimes a District Magistrate, sometimes a District Judge, sometimes a professor of law, sometimes a journalist, sometimes an officer of the Court and sometimes an advocate practising in the Court, for the purpose of carrying out an enquiry or investigation and making report to the Court because the Commissioner appointed by the Court must be a responsible person who enjoys the confidence of the Court and who is expected to carry out his assignment objectively and impartially without any predilection or prejudice. Once the report of the Commissioner is received, copies of it would be supplied to the parties so that either party, if it wants to dispute any of the facts or data stated in the report, may do so by filing an affidavit and the court then consider the report of the Commissioner and the affidavits which may have been filed and proceed to adjudicate upon the issue arising in the writ petition. It would be entirely for the Court to consider what weight to attach to the facts and data stated in the report of the Commissioner and to what extent to act upon such facts and data."

30. In *M.C. Mehta Vs. Union of India & Ors.* (1987) 1 SCC 395, this Court not only reiterated the view adopted in *Bandhua Mukti Morcha* (supra) but also held that the power under Article 32 would be both injunctive as well as remedial and the power to grant remedial relief, naturally, would extend to a wide range of situations and cannot be put in a straight jacket formula.

31. *M.C. Mehta Vs. Union of India & Ors.* (2009) 6 SCC 142 is a case which would disclose a very proximate connection with the case in hand. In the aforesaid case this Court was called upon to answer the question as to whether in view of the provisions of Section 4A of the MMDR Act (noticed earlier) it would be appropriate to exercise the power under Article 32 read with Article 142 in order to suspend mining operations in the Aravali Hills. The said question was required to be gone into by the Court in the context of the specific materials placed

before it to show that indiscriminate mining resulting in large scale environmental degradation had occurred. In the above context, the contents of the paragraphs 41 to 45 of the judgment in the case of *M.C. Mehta* (supra) would be relevant:-

"41. On the legal parameters, Shri Diwan and Shri Venugopal, learned Senior Counsel and Shri S.K. Dubey, learned counsel, submitted that where law requires a particular thing to be done in a particular manner, it must be done in that manner and other methods are strictly forbidden. In this connection, it was urged that when Section 4-A postulates formation of an opinion by the Central Government, after consultation of the State Government, in the matter of cancellation of mining leases in cases of environmental degradation, the power needs to be exercised by the State Government upon receipt of request from the Central Government. According to the learned counsel, therefore, this Court cannot cancel the mining leases if there is alleged environmental degradation as submitted by the learned amicus curiae.

42. It was further submitted that measures under Section 3(2)(*v*) of the EP Act, 1986 to restrict areas in which industries shall or shall not be carried out can only be undertaken by the Central Government where it deems expedient to protect and improve the quality of environment. In fact, according to the learned counsel, when Aravallis Notification was issued on 7-5-1992 it was issued under Section 3(2)(*v*) by the Central Government. At that time, the Central Government thought it fit not to place a complete ban but to permit the industries in the mining sector to carry on its business/operations subject to restrictions enumerated in the said notification.

43. It was lastly submitted that the recommendations of CEC to impose a complete ban on mining, particularly in cases where environmental clearances are obtained would amount to an exercise of p

Act and the Rules framed thereunder. That, this Court cannot exercise powers under Article 142 of the Constitution when specific provisions are made under various forest and environmental laws dealing with the manner and procedure for cancellation/termination of mining leases.

44. We find no merit in the above arguments. As stated above, in the past when mining leases were granted, requisite clearances for carrying out mining operations were not obtained which have resulted in land and environmental degradation. Despite such breaches, approvals had been granted for subsequent slots because in the past the authorities have not taken into account the macro effect of such wide-scale land and environmental degradation caused by the absence of remedial measures (including rehabilitation plan). Time has now come, therefore, to suspend mining in the above area till statutory provisions for restoration and reclamation are duly complied with, particularly in cases where pits/quarries have been left abandoned.

45. Environment and ecology are national assets. They are subject to intergenerational equity. Time has now come to suspend all mining in the above area on sustainable development principle which is part of Articles 21, 48-A and 51-A(*g*) of the Constitution of India. In fact, these articles have been extensively discussed in the judgment in [*M.C. Mehta case* (2004) 12 SCC 118] which keeps the option of imposing a ban in future open."

The issue is not one of application of the above principles to a case of cancellation as distinguished from one of suspension. The issue is more fundamental, namely, the wisdom of the exercise of the powers under Article 32 read with Article 142 to prevent environmental degradation and thereby effectuate the Fundamental Rights under Article 21.

32. We may now take up the decisions cited on behalf of the leaseholders to contend that the power under Articles 32 and 142 ought not to be exercised in the present case and instead remedies should be sought within the relevant statutes. The sheet anchor is the case of *Supreme Court Bar Association Vs. Union of India and Another* reported in (1998) 4 SCC 409. We do not see how or why we should lie entrapped within the confines of any of the relevant Statutes on the strength of the views expressed in *Supreme Court Bar Association* (supra). The observations made in para 48 of the judgment and the use of words "ordinarily" and "are directly in conflict" as appearing in the said paragraph (underlined by us) directly militates against the view that the lease holders would like us to adopt in the present case.

"48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is *necessary for doing complete justice* "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" *in a cause or matter before it.* Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a "problem-solver in the nebulous areas" [see *K. Veeraswami v. Union of India* (1991) 3 SCC 55)] but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be *controlled* by any statutory provisions but at the same time these powers are not meant to be exercised when the[i] [c]ase

directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

33. Even if the above observations is understood to be laying down a note of caution, the same would be a qualified one and can have no application in a case of mass tort as has been occasioned in the present case. The mechanism provided by any of the Statutes in question would neither be effective nor efficacious to deal with the extraordinary situation that has arisen on account of the large scale illegalities committed in the operation of the mines in question resulting in grave and irreparable loss to the forest wealth of the country besides the colossal loss caused to the national exchequer. The situation being extraordinary the remedy, indeed, must also be extraordinary. Considered against the backdrop of the Statutory schemes in question, we do not see how any of the recommendations of the CEC, if accepted, would come into conflict with any law enacted by the legislature. It is only in the above situation that the Court may consider the necessity of placing the recommendations made by the CEC on a finer balancing scale before accepting the same. We, therefore, feel uninhibited to proceed to exercise our constitutional jurisdiction to remedy the enormous wrong that has happened and to provide adequate protection for the future, as may be required.

ISSUE NO.3

Sanctity of the process of survey undertaken by the Joint Team constituted by this Court's order dated 6th May, 2011 and the determination of the boundaries of the leases on the basis of the said survey.

34. The above issue will require examination from two perspectives. The first is the fairness of the procedure adopted in carrying out the survey and the second is with regard to acceptability of the technical part of the survey process. In so far as the fairness of the procedure adopted is concerned it is on record that notice of the dates proposed for survey of a

particular lease was intimated to the lease holder well in advance to enable the lease holder or his representative to be present at the site while the survey is conducted. The field survey was done by 7 teams consisting of one surveyor each from the Karnataka Forest Department, Karnataka Mines and Geological Department, Karnataka Revenue Department and a representative of the National Institute of Technology, Surathkal. The field survey undertaken by each team was supervised by the Joint Team constituted by this Court. During the field survey, the representative of the concerned lessees were present and the Mahazars (Panchnamas) for each day's survey were prepared incorporating the details of the survey carried out. The said Panchnamas were signed by, apart from the Government representatives and the representative of the National Institute of Technology, Surathkal, also by the concerned lessee or their representatives. The readings recorded during the field survey were shared with the concerned lessees or their representatives and before finalizing the survey sketches the concerned lessees or their representatives were given a personal hearing. After the field survey was completed, in terms of the order of the Court dated 23.9.2011, the representations filed by the leaseholders against the findings of the Joint Team were reconsidered by the Joint Team and personal hearing was afforded to 122 lease holders. On the basis of the said hearings, necessary corrections were made in respect of 33 number of leases. Thereafter, the final Report of the CEC dated 3.2.2012 was submitted to the Court. In terms of the Court's order dated 10.2.2012, the CEC again considered the representations filed by as many as 66 lease holders. The findings of the Joint Team in respect of 4 leases were modified by the CEC though the said modification did not result into any change of categorization. Two representations, one filed by M/s. V.S. Lad & Sons and another by M/s. Hothur Traders have been placed before the Court for appropriate orders [issue is being dealt with separately] whereas the rest of the representations were rejected by the CEC. In the above facts, procedural fairness in the proces[illegible]t

by the Joint Team is writ large and there can be no room for any doubt so as to question the sanctity of the survey process on the above stated ground.

35. This will require the Court to go into the details of the technical aspect of the survey which was conducted by the Joint Team. The consideration of the details of the survey undertaken, naturally, has to be in the backdrop of the multifold complaints that have been raised on behalf of the leaseholders in the several IAs filed. As already noted, on a very broad plane, the complaints in this regard are that the Joint Team has ignored judicial orders passed in respect of boundaries between neighbouring/adjacent leases; reduction of the area of the lease provided in the lease deed/lease sketch; shifting of the lease area to a new location as a result of the survey. Specifically, objections have been raised to the effect that overburden dumps in different areas have been taken into account to come to the finding that mining had been carried out in such areas without necessary clearances under the FC Act (in case of forest areas) or in the absence of mining leases in respect of such areas (non forest areas) though the activity in question i.e. dumping does not amount to mining operations under the MMDR Act.

36. A consideration of the documents submitted by the learned Amicus Curiae and those submitted on behalf of the State of Karnataka would go to show that in carrying out the survey, the Joint Team had encountered some serious difficulties. The same may be enumerated below:-

(i) the sanctioned lease sketch did not have any reference point(s) and with reference to which the location of the lease can be decided;

(ii) there is mis-match between the location(s) of the reference point(s) on the ground vis-à-vis the details of such reference points(s) provided in the lease sketches;

(iii) the reference point(s) have been destroyed/altered on the ground;

(iv) the Survey and Demarcation sketch does not tally with the lease sketch; and

(v) there is inherent defect in the lease sketch."

37. To overcome the said difficulties, before the commencement of the actual survey, a pre-survey examination was undertaken to identify the boundary pillars, rock marks, revenue points etc. as shown in the lease sketch. This was done with the help of the government staff as well as the representative of the concerned lessee. Instead of measuring the length of each arm of the lease sketch by using the conventional engineering scale and instead of measuring the angle by using a protractor, the original lease sketch was scanned and the digitized so that the length of each arm and the angles could be precisely measured. Thereafter survey was undertaken by use of the Total Station Method, which, undoubtedly, is the state of the art technology with room for negligible error. A temporary control point was identified keeping in view the visibility of the maximum number of boundary points from the identified control point. Thereafter, the distance between the control point and the visible boundary points were measured and recorded in the instrument which uses an infra-red ray. The instrument was shifted to another temporary control point and in a similar manner the distance between the said control point and remaining boundary points were measured. After completing the reading of all the points the margin of error for the instrument was determined (which was virtually negligible). Thereafter the data from the total station was downloaded on a computer using the autocadd software for preparation of the survey sketch. The survey sketch so prepared was superimposed on the digitized lease sketch to ascertain the encroachment if any. Also, the details of the survey sketch was superimposed on the satellite imageries to further verify the correctness of the process of

manual calculation of the lease areas was also undertaken to compare with the calculation of the lease areas as per the digitized lease sketch. The difference between the two measurements in case of 34 number of 'C' category leases is less than +/- 05ha. The relevant details in this regard which are available in the compilation of documents submitted by the State of Karnataka would be illuminating and are, therefore, indicated below:

S. No.	Name of the Lessee	M.L. No.	Sanctioned area in Ha	Area as manual calculation in Ha	Area as per digitized sketch in Ha	Difference between Manually calculated area & Digitised
1	2	3	4	5	6	7
1	J.M. VRISHVENDRAYYA	2173	3.36	3.348	3.54	0.19
2	VEEYAM PVT. LTD	2615	20.23	20.196	20.04	-0.16
3	AMBIKA GHORPADE	2354	4.95	4.495	4.84	0.35
4	MYSORE MANGANESE COMPANY	2603	3.24	3.07	3.16	0.10
5	HOTHUR TRADERS	2313	21.11	22.117	21.61	-0.51
6	M. DASHARATHA RAMI REDDY	2560	19.95	19.59	19.46	-0.13
7	BHARAT MINES AND MINERALS	2245	26.20	23.3	24.47	1.17
8	ASSOCIATED MINING COMPANY	2434	10.12	10.03	10.14	0.11
9	B.R. YOGENDRANATH SINGH	2186	13.00	16.592	15.89	-0.70
10	LATHA MINING CO. (D. NARAYANA)	958	4.05	4	3.93	-0.07
11	CANARA MINERALS	2635	11.34	12.12	11.52	-0.60
12	THANGA VELU & OTHERS	2585	60.70	62.28	60.92	-1.36
13	TRADING MINING COMPANY	1732	5.26	5.31	5.45	0.14
14	SRI. N. MANZOOR AHMED	1324/ 2616	15.97	15.65	15.71	0.06
15	SMT KAMALA BAI	1442	13.45	13.02	13.44	0.42
16	SUDARSHAN SINGH (MAHALAKSHMI MINERALS)	2579	8.09	8.37	8.11	-0.26
17	RAMGAD MINERALS AND MINING PVT LTD	2451	24.28	24.23	24.04	-0.19
18	TRIDENT MINERALS	2315	32.27	31.606	32.43	0.82
19	ALLUM VEERABHADRAPPA	2436	28.07	23.553	24.53	0.98
20	KANHAYALAL DUDHERIA	2563	30.76	28.73	30.09	1.36
21	ADARSHA ENTERPRISES	2369	3.03	2.91	2.98	0.07
22	MATHA MINERALS	1975/ 2600	129.5	125.5	129.16	3.66
23	S.B. MINERALS	2393	40.47	40.67	40.38	-0.29
24	KARNATAKA LIMPO	2650	6.07	6.94	6.47	-0.47
25	ANJANA MINERALS	2519	4.55	4.5	4.53	0.03
26	DECCAN MINING SYNDICATE (P) LTD	2525	19.02	17.015	17.43	0.41
27	P. ABUBAKAR	2183	14.00	13.756	13.85	0.09
28	LAKSHMI NARAYANA MINING COMPANY	2487	105.22	103.06	86.18	-16.88
29	KAMALA BAI	2187	23.47	23.43	23.71	0.28
30	MYSORE STONEWARE PIPES AND POLTERIES (P)LTD.	2521	122.72	118.3	122.65	4.35
31	TEJA WORK	2353	4.85	4.74	4.83	0.09
32	RAJAPURA MINES	2190	93.74	89.62	91.7	2.13
33	H.G. RANGANGOWDA	2148	60.70	60.3	60.66	0.36
34	NIDHI MINING PVT. LTD.	2433	31.84	29.195	29.49	1.30
35	S.B. MINERALS	2550	44.52			

36	MILANA MINERALS (LAKSHMI & CO.)	1842	99.56	95.556	99.55	3.99
37	DEEP CHAND KISHANLAL	2348	125.45	128.546	124.92	-3.63
38	THUNGABHADRA MINERALS LTD.	2365	125.58	135.04		
39	THUNGABHADRA MINERALS LTD.	2366	33.97	33.16	163.74	-4.46
40	M SRINIVASULU	2631	74.86	78.565	75.14	-3.43
41	M. CHANNAKESHAVA REDDY (SRI LAKSHMI NARASHIMHA MINING CO.	2566	7.85	8	7.57	-0.43
42	SPARK LINE MINING CORPORATION	2567	4.86	4.93	4.86	-0.07
43	MINERAL MINERS AND TRADERS	2185A	46.13	44.11	44.42	0.31
44	MYSORE MINERALS LTD.	995	33.60	82.2	32.89	-49.31
45	V.S. LAD & SONS	2290	105.06	98.12	100.54	2.42
46	KARTHIKEYAS MANGANESE	2559	27.23	27.236	26.71	-0.53
47	G RAJSHEKAR	2229	129.49	127.83	127.42	-0.41
48	RAMA RAO PAOL	2621	28.34	26.33	33.80	7.47
49	SMT RAZIA KHANUM	2557/ 1575	12.58	12.0578	12.54	0.48

38. The participation of the lessee or his representative through out the process of survey by the Joint Team; the details of the manner of conduct of the actual process of survey delineated above; the use of the state of the art technology; the composition of the Joint Team entrusted with the responsibility of the survey and the constitution of the 7 teams that conducted the field survey under the supervision of the Joint Team; the two stages of re-verification of the findings of the survey in the light of the objections raised by the lease holders under orders of this Court dated 26.9.2011 and 10.2.2012 and the corrections

made on the basis thereof can leave no doubt as to the credibility of the findings of the survey conducted under the orders of the Court. True it is that we cannot claim to be experts; but we need not be to see what is *ex facie* evident. Therefore, notwithstanding the protracted arguments advanced on behalf of lease holders and the large scale reference to sketches, maps and drawings filed before this Court by the said lease holders, we are satisfied that all complaints and grievances must fade away in the light of the survey undertaken by the Joint Team and the events subsequent thereto. It would also be significant to take note of the fact that in the written submission on behalf of the Federation of Indian Mineral Industries (FIMI), in the opening paragraph it has been stated as under.

> "The applicant submits that FIMI has full faith in the integrity and fairness of the survey done by the Joint Team and recommended by CEC. FIMI is in full agreement with the recommendations made by CEC with regard to Categories A and B and the directions issued by this Hon'ble Court. FIMI is simultaneously of the view that instead of cancellation of Category 'C' mining leases, these may be directed to make appropriate compensatory afforestation payment, undertake R&R work as per R& R Plan prepared by ICFRE and approved by CEC and after successful completion and implementation of R&R Plan, they should be allowed to recommence mining operations in such leases."

39. We make it clear that we have not understood the above statement as an admission on the part of the Federation and it is on a consideration of the totality of the facts placed before us that we accept the findings of the survey conducted by the Joint Team constituted by the orders of this Court and the boundaries of each of the leases determined on that basis. We further direct that in supersession of all orders either of the authorities of the State or Courts, as may be, the boundaries of leases fixed by the Joint Team will henceforth be the boundaries of each of the leases who will have the benefit of the lease area as determined by the Joint Team. All proceedings pending in any court with r[illegible]f

the leases involved in the present proceeding shall stand adjudicated by means of present order and no such question would be open for re-examination by any body or authority.

40. Before proceeding to the next issue we would like to observe that the contention urged on behalf of some of the lessees that dumping of mining waste (overburden dumps) do not constitute operations under Section 2(d) of the MMDR Act is too naive for acceptance. The wide terms of the definition contained in Section 2(d) of the MMDR Act encompasses all such activity within the meaning of expression "mining operations". Use of forest land for such activity would require clearance under the FC Act. In case the land used for such purpose is not forest land the mining lease must cover the land used for any such activity.

ISSUE NO.4

Acceptability of the Recommendations of the CEC with regard to (i) categorization, (ii) Reclamation and Rehabilitation (R&R) Plans, (iii) Reopening of Category 'A' and 'B' mines subject to conditions, (iv) Closure/ reopening of Category 'C' mines and (v) future course of action in respect of Category 'C' mines if closure thereof is to be ordered by the Court

41. In the light of the discussions that have preceded sanctity of the procedure of laying information and materials before the Court with regard to the extent of illegal mining and other specific details in this regard by means of the Reports of the CEC cannot be in doubt. Inter-generational equity and sustainable development have come to be firmly embedded in our constitutional jurisprudence as an integral part of the fundamental rights conferred by Article 21 of the Constitution. In enforcing such rights of a large number of citizens who are bound to be adversely affected by environmental degradation, this Court cannot be constrained by the restraints of procedure. The CEC which has been assisting the Court in various environment related matters for over a decade now was assigned certain specified tasks which have been performed by the said body giving sufficient justification for the decisions

arrived and the recommendations made. If the said recommendations can withstand the test of logic and reason which issue is being examined hereinafter we will have no reason not to accept the said recommendations and embody the same as a part of the order that we will be required to make in the present case.

(i) Categorization

42. The issue is whether categorization on the basis of percentage of the encroached area qua the total lease area is an arbitrary decision. Arbitrariness in the adoption of a criteria for classification has to be tested on the anvil of Article 14 and not on the subjective notions of availability of a better basis of classification. The basis suggested i.e. total encroached area has the potential of raising questions similar to the ones now raised on behalf of the lease holders. This is on account of the lack of uniformity in the areas covered by the different leases in question. The test, therefore, ought not to be what would be a 'better' basis for the categorization for that would introduce subjectivity in the process; the test is whether categorization on the basis adopted results in hostile discrimination and adoption of the criteria of percentage has no reasonable nexus with the object sought to be achieved, namely, to identify the lessees who have committed the maximum violations and damage to environment. Viewed from the aforesaid perspective, the categorization made does not fail the test of reasonableness and would commend for our acceptance.

In this regard, we may take note of two IAs (IA.No.74 of 2012 and I.A.No.4 of 2012) filed by Federation of Indian Mineral Industries which body claims membership of a vast number of the lessees involved in the present proceedings. In the aforesaid IAs, as already noticed in a different context, the Federation has unequivocally accepted the findings of the survey conducted by the Joint Team and the recommendation of the CEC in so far as categorization of the leases and the actions suggested for reopening of Category 'A' and 'B' mines along with other pre-conditions stipulated including the preparation of the R & R plans. The only caveat in this regard is in respect of category

'C' mines. The Federation had suggested that the said mines be also allowed to reopen subject to similar or even more stringent conditions and, alternatively, for reopening of 39 total out of the total of 49 category 'C' mines by adoption of certain more liberal criteria than those recommended by the CEC. In the totality of the circumstances, we are of the view that the categorization suggested by the CEC in its Report dated 3.2.2012 should be accepted by us.

(ii) Conditions which have been suggested for opening of Category 'A' mines and additionally the R& R Plans for Category 'B' mines

43. The conditions subject to which Category 'A' and 'B' mines are to be reopened and the R&R Plans that have been recommended as a precondition for reopening of Category 'B' mines are essentially steps to ensure scientific and planned exploitation of the scarce mineral resources of the country. The details of the preconditions and the R&R plans have already been noticed and would not require a repetition. Suffice it would be to say that such recommendations are wholesome and in the interest not only of the environment and ecology but the mining industry as a whole so as to enable the industry to run in a more organized, planned and disciplined manner. FIMI was actively associated in the framing of the guidelines and the preparation of the R&R Plans. There is nothing in the preconditions or in the details of the R&R plans suggested which are contrary to or in conflict or inconsistent with any of the statutory provisions of the MMDR Act, EP Act and FC Act. In such a situation, while accepting the preconditions subject to which the Category 'A' and 'B' mines are to be reopened and the R&R plans that must be put in place for Category 'B' mines, we are of the view that the suggestions made by the CEC for reopening of Category 'A' and 'B' mines as well as the details of the R&R plans should be accepted by us, which we accordingly do. This will bring us to the most vital issue of the case, i.e., the future of the Category 'C' mines.

44. The precise extent of illegal mining that took place in the three districts of Karnataka have been noted in detail in an earlier part of this order (para 23). The same, therefore, will not

require any repetition. Illegal mining apart from playing havoc on the national economy had, in fact, cast an ominous cloud on the credibility of the system of governance by laws in force. It has had a chilling and crippling effect on ecology and environment. It is evident from the compilation submitted to the Court by the CEC that several of the Category 'C' mines were operating without requisite clearances under FC Act or even in the absence of a mining lease for a part of the area used for mining operations. The satellite imageries placed before the Court with regard to environmental damage and destruction has shocked judicial conscience. It is in the light of the above facts and circumstances that the future course of action in respect of the maximum violators/polluters, i.e., Category 'C' mines has to be judged. While doing so, the Court also has to keep in mind the requirement of Iron Ore to ensure adequate supply of manufactured steel and other allied products.

45. Once the result of the survey undertaken and the boundaries of the leases determined by the Joint Team has been accepted by the Court and the basis of categorization of the mines has been found to be rational and constitutionally permissible it will be difficult for this Court to visualize as to how the Category 'C' mines can be allowed to reopen. There is no room for compassion; fervent pleas for clemency cannot have even a persuasive value. As against the individual interest of the 49 Category 'C' leaseholders, public interest at large would require the Court to lean in favour of demonstrating the efficacy and effectiveness of the long arm of the law. We, therefore, order for the complete closure of the Category 'C' mines and for necessary follow up action in terms of the recommendations of the CEC in this regard, details of which have already been extracted in an earlier part of this order.

ISSUE NO.5

Other Miscellaneous/Connected Issues

46. We have noticed that by an order dated 2.11.2012 passed by this Court an embargo has been placed on grant of fresh mining licenses. In view of the developments that have taken place in the meantime and in view

inclined to accept the recommendations at Sl. Nos. VI and VII of the CEC's Report dated 3.2.2012 (Pg.56 of the Report), we do not consider it necessary to continue with the order dated 2.11.2012 in so far as grant of fresh leases are concerned.

47. In so far as settlement of the inter-state boundaries between the States of Andhra Pradesh and Karnataka is concerned, both the States have agreed to have the boundaries fixed under the supervision of the Geological Survey of India. In view of the agreement between the States on the said issue we permit the States to finalize the issue in the above terms. The operation of the 7 leases (Category B1) located on or near the inter-State boundary is presently suspended. Until the boundary issue between the two States is resolved resumption of mining operations in the 7 leases cannot be allowed.

48. The CEC has provisionally categorised M/s. S.B. Minerals (ML No.2515) and Shanthalakshmi Jayaram (ML No.2553) in Category "B" though the encroached area under illegal mining pits has been found to be 24.44% and 23.62% respectively. According to the CEC, it is on account of "the complexities involved in finalizing the survey sketches and in the absence of inter-village boundary" that the said leases have been placed in Category "B" instead of Category "C". We cannot agree with the tentative decision of the CEC. On the basis of the findings of the survey and the categorization made, both of which have been accepted by the Court by the present order, we direct that the aforesaid two leases, namely, M/s. S.B. Minerals and M/s. Shanthalakshmi Jayaram be placed in Category "C". Necessary consequential action will naturally follow.

49. The CEC in its Report dated 28.3.2012 has placed the cases of M/s. V.S. Lad & Sons and M/s. Hothur Traders (placed in Category "C") for final determination by the Court. The CEC has reported that the encroachment by M/s. V.S. Lad & Sons is only in respect of the overburden dumps and exceeds the percentage (15%) marginally, i.e., by 0.17% which could very well be due to the least count error used by the Joint Team. In so far as M/s. Hothur Traders is concerned the CEC in its Report dated 28.3.2012 has recorded that according to the

lessee it has carried on its mining operation for the last 50 years in the lease area allotted to it which may have been wrongly identified in the earlier surveys and demarcations by taking into account a wrong reference point.

Having considered the facts on which the two lessees have sought upgradation from "C" to "B" Category we are afraid that such upgradation cannot be allowed. Both the lessees, in fact, accept the results of the survey by the Joint Team which findings have already been accepted by us.

50. In the result, we summarize our conclusions in the matter as follows:-

(1) The findings of the survey conducted by the Joint Team constituted by this Court by order dated 6.5.2011 and boundaries of the leases in question as determined on the basis of the said survey is hereby approved and accepted.

(2) The categorization of the mines ("A", "B" and "C") on the basis of the parameters adopted by the CEC as indicated in its Report dated 3.2.2012 is approved and accepted.

(3) The order of the Court dated 13.4.2012 accepting the recommendations dated 13.3.2012 of the CEC (in modification of the recommendations of the CEC dated 3.2.2012) in respect of the items (A) to (I) is reiterated. Specifically, the earmarked role of the Monitoring Committee in the said order dated 13.4.2012 is also reiterated.

(4) The order of the Court dated 3.9.2012 in respect of reopening of 18 Category "A" mines subject to the conditions mentioned in the said order is reiterated.

(5) The order of the Court dated 28.9.2012 in all respects is reiterated.

(6) The recommendations of the CEC contained in the Report dated 15.2.2013 for

Category "A" mines and Category "B" mines (63 in number) and sale of sub-grade iron ore subject to the conditions mentioned in the said Report are approved.

(7) The recommendations contained in paragraphs VI and VII (Pg. 56 to 57) of the CEC Report dated 3.2.2012 are accepted, meaning thereby, the leases in respect of "C" Category mines will stand cancelled and the recommendations of the CEC (para VII Pg. 56) of Report dated 3.2.2012 with regard to the grant of fresh leases are accepted.

(8) The proceeds of the sales of the Iron Ore of the 'C' Category mines made through the Monitoring Committee will stand forfeited to the State. The Monitoring Committee will remit the amounts held by it on this account to the SPV for utilization in connection with the purposes for which it had been constituted.

(9) M/s. V.S. Lad & Sons, M/s. Hothur Traders, M/s. S.B. Minerals (ML No. 2515) and M/s. Shanthalakshmi Jayaram (ML No. 2553) will be treated as "C" Category mines and resultant consequences in respect of the said leases will follow.

(10) The operation of the 7 leases placed in "B" category situated on or nearby the Karnataka- Andhra Pradesh inter-State boundary will remain suspended until finalisation of the inter-State boundary dispute whereupon the question of commencement of operations in respect of the aforesaid 7 leases will be examined afresh by the CEC.

(11) The recommendations made in the paragraph VIII of the Report of the CEC dated 3.2.2012 (pertaining to M/s. MML, Pg.57) is accepted. The recommendations made in paragraphs IX, X, XII (in respect of confiscated iron-ore) XIII and XIV of the said Report dated 3.2.2012 (Pg. 57-60) will not require any specific direction as the same have already been dealt with or the same have otherwise become redundant, as may be.

(12) The recommendations made in paragraph XI (grant of fresh leases) and paragraph XII (in respect of pending applications for grant of mining leases) of the CEC's Report dated 3.2.2012 (Pg. 59) are not accepted. In view of the discussions and conclusions in para 44 of the present order, this Court's order dated 02.11.2012 placing an embargo on grant of fresh mining leases need not be continued any further. Grant of fresh mining leases and consideration of pending applications be dealt with in accordance with law, the directions contained in the present order as well as the spirit thereof.

(13) Determination of the inter-State boundary between Karnataka and Andhra Pradesh in so far as the same is relevant to the present proceedings, as agreed upon by the two States, be made through the intervention of the office of Surveyor General of India.

51. We also direct that all consequential action in terms of the present order be completed with the utmost expedition. The writ application filed by Samaj Parivartan Samudaya and IAs shall stand disposed of in terms of our abovestated conclusions.

SLP (C) Nos.7366-7367 of 2010, SLP (C) Nos.32690-32691 of 2010, WP (Crl.) No.66 of 2010, SLP (C) Nos.17064-17065 of 2010, SLP (C) No.…….(CC No. 16829 of 2010), SLP (C) No.....(CC No. 16830 of 2010), WP (C) No.411 of 2010, SLP (C) No.353 of 2011 and WP (C) No.76 of 2012

52. All these matters are de-tagged and directed to be listed separately.

K.K.T. Writ Petition No. 562/2009 disposed of & other SLPs & W d.