

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WRIT PETITION (CIVIL) NO. 388 OF 2009

% Reserved on : 21st April, 2009.
Date of Decision : 18th September, 2009.

BALACHANDRA BHIKAJI NALWADE Petitioner.
Through Mr. Sanjiv Parikh, Mr.Jitin Sahni,
Mr.Rahul Choudhary, advocates.

VERSUS

UNION OF INDIA & ORS. Respondents.
Through Mr. Dalip Mehra, Mr.Rajiv Ranjan
Mishra, Advocates for UOI.
Mr. Mukesh Verma, Mr.Vivek Vishnoi,
advocates for respondent no.2.
Mr.T.R.Andhiyarujina, Mr.R. Ramachandran,
Sr.Advocates with Mr.U.A.Rana, Mrs.Mrinal
Majumdar, Mr.Shoumik Ghoshal, advocate
for respondent no.3.

CORAM:

HON'BLE MR. JUSTICE AJIT PRAKASH SHAH, CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

1. Mr. B.B.Nalwade, the petitioner has filed the present Writ Petition for issue of Writ in the nature of Certiorari for quashing the Order dated 12th September, 2008 passed by the National Environment Appellate Authority (hereinafter referred to as NEAA,

for short) dismissing his appeal under Section 11(1) of the National Environment Appellate Authority Act, 1997 ((hereinafter referred to as Appellate Act, for short). The petitioner also seeks quashing of the Environment Clearance Order dated 17th May, 2007 granted by the Ministry of Environment and Forest (hereinafter referred to as MOEF, for short) permitting JSW Energy Ltd. (Ratnagiri) Ltd-respondent no.3 herein to set up and construct 1200 MW (4 x 300 MW) coal base Thermal Power Station (hereinafter referred to as TPP, for short) at Jaigarh, Maharashtra.

2. The petitioner states that he is a resident of Ganpatipule Taluka, Distt. Ratnagiri which is a project affected area and earns his livelihood mainly from mango business and he owns mango orchards. It is stated that Ratnagiri district produces *Alphonso* mangoes and the permission granted by the MOEF and upheld by NEAA is illegal, contrary to statutory provisions, precautionary principle and is otherwise on merits based upon unconfirmed data and assumptions. The following contentions have been raised by the petitioner :

(a) There is violation of Environment Impact Notification of 1994 (hereinafter referred to as 1994 Notification, for short) as amended upto 2002. The said contention has several sub-parts, which have been considered while dealing with the contention on merits.

(b) Both MOEF and NEAA have erred in relying upon the so called report of Konkan Krishi Vidyapeeth, Dapoli (hereinafter referred to as KKVD, for short) which is inconclusive and not a report certifying that the proposed project shall not have irreversible adverse impact on the environment.

(c) It is alleged that the Environment Clearance Order and the order of NEAA are based upon wrong assumptions and statements which are incorrect. There is an error in the decision making process as irrelevant have been considered and what are relevant and material have been ignored.

3. Relevant portion of the 1994 Notification as amended upto 2002 reads as under:-

“1) **S.O.60 (E)**- Whereas a notification under clause (a) of sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986 inviting objections from the public within sixty days from the date of publication of the said notification, against the intention of the Central Government to impose 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 that notification was published as SO No.80(E) dated 28th January, 1993;

x x x x x

2) Requirements and procedure for seeking environmental clearance of projects :

I.(a) Any person who desires to undertake any new project in any part of India or the expansion or modernization of any existing industry or project listed in the Schedule-I shall submit an application to the Secretary, Ministry of Environment and Forests, New Delhi.

The application shall be made in the proforma specified in Schedule-II of this notification and shall be accompanied by a project report which shall, inter alia, include an Environmental Impact Assessment Report, Environment Management Plan and details of public hearing as specified in Schedule-IV prepared in accordance with the guidelines issued by the Central Government in the Ministry of Environment and Forests from time to time. However, Public Hearing is not required in respect of (i) small scale industrial undertakings located in (a) notified/designated industrial areas/industrial estates or (b) areas earmarked for industries under the jurisdiction of industrial development authorities; (ii) widening and strengthening of highways; (iii) mining projects (major minerals) with lease area up to twenty five hectares, (iv) units located in Export Processing Zones, Special Economic Zones and (v) modernization of existing irrigation projects.

x x x x x x

(b) Cases rejected due to submission of insufficient or inadequate data and Plan may be reviewed as and when submitted with complete data and Plan. Submission of incomplete data or plans for the second time would itself be a sufficient reason for the Impact assessment Agency to reject the case summarily.

II. x x x x x x

III. (a) The reports submitted with the application shall be evaluated and assessed by the Impact Assessment Agency, and if deemed necessary it may consult a committee of Experts, having a composition as specified in Schedule-III of this Notification. The Impact Assessment Agency (IAA)

would be the Union Ministry of Environment and Forests. The Committee of Experts mentioned above shall be constituted by the Impact Assessment Agency or such other body under the Central Government authorized by the Impact Assessment Agency in this regard.

IV. x x x x x

V. x x x x x

3) x x x x x

4) Concealing factual data or submission of false, misleading data/reports, decisions or recommendations would lead to the project being rejected. Approval, if granted earlier on the basis of false data, would also be revoked. Misleading and wrong information will cover the following:

- False information
- False data
- Engineered reports
- Concealing of factual data
- False recommendation or decisions”

“(FORM A)
APPLICATION FORM

1. (a) x x x x
(b) x x x x x
(c) Alternate sites examined and the reasons for selecting the proposed site:”

“SCHEDULE-III

[See Sub.Para (2), Para 3 of Schedule-II]

**COMPOSITION OF THE EXPERT COMMITTEES
FOR ENVIRONMENTAL IMPACT ASSESSMENT**

1. The Committees will consist of experts in the following disciplines:

i. x x x x

ii. x x x x

iii. x x x x

iv. x x x x

v. x x x x

vi. Social Sciences/Rehabilitation

- vii. x x x x x
- viii. x x x x x
- ix. x x x x x
- x. x x x x x
- xi. Representatives of NGOs/persons concerned with environmental issues.

2. The Chairman will be an outstanding and experienced ecologist or environmentalist or technical professional with wide managerial experience in the relevant development sector.

3. The representative of Impact Assessment Agency will act as a Member-Secretary.

4. Chairman and Members will serve in their individual capacities except those specifically nominated as representatives.

5. The Membership of a Committee shall not exceed 15.”

“SCHEDULE IV

(See para 3, subparagraph (2) of Schedule-II)

PROCEDURE FOR PUBLIC HEARING

(1) **Process of Public Hearing:-** Whoever apply for environmental clearance of projects, shall submit to the concerned State Pollution Control Board twenty sets of the following documents namely:-

i. An executive summary containing the salient features of the project both in English as well as the local language along with Environmental Impact Assessment (EIA). However, for pipeline project, Environmental Impact Assessment report will not be required. But Environmental Management Plan including risk mitigation measures is required.

ii. Form XIII prescribed under Water (Prevention and Control of Pollution) Rules, 1975 where discharge of sewage, trade effluents, treatment of water in any form, is required.

iii. Form I prescribed under Air (Prevention and Control of Pollution) Union Territory Rules, 1983 where discharge of emissions are involved in any process, operation or industry.

iv. Any other information or document which is necessary in the opinion of the Board for their final disposal of the application.

(2) **Notice of Public Hearing:-** (i) The State Pollution Control Board shall cause a notice for environmental public hearing which shall be published in at least two newspapers widely circulated in the region around the project, one of which shall be in the vernacular language of the locality concerned. State Pollution Control Board shall mention the date, time and place of public hearing. Suggestions, views, comments and objections of the public shall be invited within thirty days from the date of publication of the notification.

(ii) All persons including bona fide residents, environmental groups and others located at the project site/sites of displacement/sites likely to be affected can participate in the public hearing. They can also make oral/written suggestions to the State Pollution Control Board.

Explanation:- For the purpose of the paragraph person means:-

a. any person who is likely to be affected by the grant of environmental clearance;

b. any person who owns or has control over the project with respect to which an application has been submitted for environmental clearance;

c. any association of persons whether incorporated or not like to be affected by the project and/or functioning in the field of environment;

d. any local authority within any part of whose local limits is within the neighbourhood wherein the project is proposed to be located.

(3) **Composition of public hearing panel:** - The composition of Public Hearing Panel may consist of the following, namely:-

- (i) Representative of State Pollution Control Board;
- (ii) District Collector or his nominee;
- (iii) Representative of State Government dealing with the subject;
- (iv) Representative of Department of the State Government dealing with Environment;
- (v) Not more than three representatives of the local bodies such as Municipalities or panchayats;
- (vi) Not more than three senior citizens of the area nominated by the District Collector.

(4) **Access to the Executive Summary and Environmental Impact Assessment report:-** The concerned persons shall be provided access to the Executive Summary and Environmental Impact Assessment report of the project at the following places, namely:-

- (i) District Collector Office;
- (ii) District Industry Centre;
- (iii) In the Office of the Chief Executive Officers of Zila Parishad or Commissioner of the Municipal Corporation/Local body as the case may be;
- (iv) In the head office of the concerned State Pollution Control Board and its concerned Regional Office;
- (v) In the concerned Department of the State Government dealing with the subject of environment.

5. Time period for completion of public hearing.

The public hearing shall be completed within a period of 60 days from the date of receipt of

complete documents as required under paragraph 1.”

4. As per the 1994 Notification, any person before undertaking a new project or extension or modernization of an existing industry or project listed in Schedule I to the said Notification was required to submit an application for clearance to the Secretary, MOEF. Thermal power plants are included in Schedule I and required clearance. Respondent no.3 therefore, required clearance for setting up TPP at Jaigarh, Distt. Ratnagiri.

5. The 1994 Notification prescribed the application form to be submitted. The application form was to be accompanied with the project reports including Environment Impact Assessment Report (hereinafter referred to as EIA Report, for short) and Environment Management Plan (hereinafter referred to as EMP, for short) prepared in accordance with guidelines issued by the Central Government. EIA Report was evaluated and assessed by an independent committee of experts constituted by the Impact Assessment Agency (hereinafter referred to as IAA, for short). The body or list of organisations authorised to submit EIA reports has been published by the MOEF, Government of India. MOEF has published EIA Manual which provides guidance for EIA appraisal and was/is mainly addressed to the EIA mitigation by the IAA. The intention is to ensure an objective report preparation by the IAA with

relevant data of consequences/impact, to enable the authorities to take an informed decision. The objective of EIA is to foresee the potential impact of the proposed project on the environment, vegetation and persons in the area. A mitigation plan is to be drawn up in the EMP to guide the applicant towards environment improvement. Both EIA Report and EMP are crucial for both clearance and monitoring the clearance conditions and require inclusion and coverage of all significant environmental impacts and their mitigation.

6. As per para 1.5 of EIA Manual there can be comprehensive or a rapid EIA (hereinafter referred to as REIA, for short). The difference lies in the time scale of the data on which the EIA report is prepared. REIA is prepared on data collected in one season, other than monsoon. REIA is acceptable if it does not compromise on the quality of the decision making. A comprehensive EIA report is based upon the data collected for a period of one year. A review of the REIA report is made, to decide whether comprehensive EIA is warranted or not.

7. The object of EIA rapid or comprehensive is to identify the consequences and the affect of the proposed project on the environment in the area, including vegetation, flora and fauna. The independent certifying agency-IAA is required to examine data

furnished by the project authorities and supplement it by collecting further data during site visits. This enables an objective and effective collection of data and analysis so that an informed decision can be taken on the consequences of the proposed project. In the present case, the respondent no.3 had engaged services of an independent agency-EQMS India Pvt. Ltd. an authorized investigative agency for the said proposed project. Copy of the said REIA was produced in Court and has been taken on record. It is a rather bulky document containing the data and impact the proposed TTP will have in the area due to discharge of gases, pollutants, particulate matter, existing pollution levels and expected rise in pollution parameters after the proposed project.

8. Schedule IV of the 1994 Notification, required public hearing in the area before an application was considered by MOEF. The project proponent was required to submit 20 sets of REIA Report along with Executive Summary and other documents to the concerned State Pollution Control Board. Executive summary was a condensed synopsis of the REIA/EIA and should contain salient feature of the project, pollution levels existing and expected. Executive summary should be both in English as well as in the local language. The State Pollution Control Board was thereafter required to cause and issue notice for public hearing. The said notice was to be published in two newspapers widely circulated in the region of

the project, one of which should be in vernacular language of the locality concerned. The notice should mention date, time and place of public hearing. Suggestions, views, comments and objections were invited from the public within 30 days of the notification. All bonafide residents, environment groups and other locals at the project site or were likely to be affected could participate in the hearing. They were entitled to make oral or written suggestions to the concerned Pollution Control Board.

9. In order to have a proper and informed public hearing “the public” was to be provided access to the executive summary and REIA/EIA report. Schedule IV provides that the public would have access to the executive summary and REIA/EIA report at five places as stipulated therein. Importance of public hearing has to be emphasized. It is based on the principle of participatory democracy, community participation and also ensures that the affected persons have a say and their voice is heard. People have been given right to meaningful participation in decisions affecting their lives.

10. Learned counsel for the petitioner referred to the public notices and submitted that only copy of the executive summary was made available and was submitted by the respondent no.3 to the Maharashtra Pollution Control Board (hereinafter referred to as MPCB, for short) and copy of REIA report was never furnished and

therefore the public did not have access to the same. In this connection, he has also relied upon a judgment of a Division Bench of the Karnataka High Court in the case of **A. Thiruppaly Gram Panchayat versus Union of India** dated 23rd March, 2006, a copy of which has been enclosed with the Writ Petition. Reference was also made to the pleadings filed by the respondent no.3 in a public interest litigation pending before the Bombay High Court.

11. We have examined the material placed before us and are not inclined to accept the said contention of the petitioner. The petitioner had not appeared or participated in the two public hearings and has no personal knowledge whether or not public had access to REIA Report at the five locations mentioned in Schedule IV. He did not make any request for inspection and access to REIA. Respondent no.3, on the other hand, has submitted that they had furnished 20 copies of the REIA Report in English and the Executive summary - in Marathi and in English to MPCB vide their letter/application dated 8th June, 2006. Reference was also drawn to the pleadings before the NEAA wherein specific averments to the said effect was made in para 18 of the reply affidavit. It was stated that the petitioner in his rejoinder filed to the said reply did not deny the said facts. It was submitted by the learned counsel for respondent no.3 that MPCB had made specific reference to the executive summary in their letters but this does not mean that they were not supplied the REIA

Report, and its availability and whether access to the same was denied to the public. Our attention was drawn to the letter dated 17th June, 2006 written by MPCB to the Collector, Ratnagiri enclosing therewith executive summary in English and Marathi and copies of “affect on environment” etc. It was stated that copy of “affect on environment” was a reference to the REIA report. Our attention was also drawn to the advertisements in English and Marathi which referred to the executive summary and other documents/information. It was stated that other documents/information referred to were the REIA report, EMP report etc.

12. Public hearing was held in the Collector’s office on 8th November, 2006. The said meeting, however, was inconclusive as the local inhabitants demanded that the proceedings should be conducted in Marathi and not in English or Hindi. The petitioner, as stated above, did not participate in this Meeting held on 11th August, 2006. Ratnagiri Bachao Sangharsh Samiti by their letter dated 8th November, 2006 had demanded furnishing of copy of all documents to enable them to seek opinion of experts. In this letter, they did not claim that the REIA report was not available and access was denied. It was stated by them that they were not entirely opposing the project but were raising points which they would take up at the public hearing. They demanded that a copy of the REIA report

prepared in respect of the project and other documents should be provided to them, so that their experts could study the proposed project. Respondent no.3 in reply to this letter had stated that MPCB had already distributed the said reports/documents as per rules. The said Samiti had also earlier written letter dated 8th June, 2006 seeking copy of the REIA and other documents regarding environment impact.

13. On 24th August, 2006 a fresh notice was published in the newspapers for public hearing to be conducted on 12th September, 2006.

14. On 12th September, 2006 public hearing was held at a location near the project site. The meeting was conducted in Marathi. The petitioner did not participate in the said meeting.

15. Ratnagiri Bachao Sangharsh Samiti did not file any writ petition or appeal under Section 11 of the Appellate Act. Another organisation, namely, Ratnagiri Zila Zagruk Manch has filed a public interest litigation, before the Bombay High Court against the public hearing. Petitioner relied upon the letter dated 2nd December, 2006 written by Ratnagiri Zila Zagruk Manch. This letter was written three months' after the public hearing was held on 12th September, 2006 and after respondent no.3 had already submitted their letter to the MOEF for clearance on 6th November, 2006. In this letter,

Ratnagiri Zila Zagruk Manch had claimed that they were denied opportunity to examine the complete REIA report before the public hearing and they could not raise genuine concerns in the meeting held on 12th September, 2006. Respondent no.3 disputes the contents of this letter and had stated that the letter was not addressed to any person. It was also pointed out that in the Writ Petition filed by Ratnagiri Zila Zagruk Manch before the Bombay High Court, no grievance has been made that the REIA report was not made available and public was denied access to REIA. It was claimed that the said Manch was not represented in the public hearing held on 12th September, 2006.

16. In the light of the aforesaid position, it is not possible to accept the contention of the petitioner that the REIA report was not available and copies of the said report were not submitted by the respondent no.3 to MPCB along with their application. The petitioner was not present in any of the meetings and has no personal knowledge whether the REIA report was supplied to MPCB (though this factor alone is not conclusive. The report must be assessable). On the other hand, there are documents to support the contention of the respondent no.3 that these were duly supplied. MPCB admits that they had received 20 copies of the REIA report and were available and assessable to public. Judgment of the Karnataka High Court in the case of ***A.Thiruppaly Gram Panchayat*** (supra) is

therefore distinguishable as in the said case the project proponent had not published the REIA report and there was also failure to hold public meeting in terms of 1994 Notification.

17. The contention of the petitioner that two separate REIA reports were prepared and the first REIA report was replaced by the second REIA report is also without merit. Respondent no.3 has drawn our attention to the corrections made in the REIA report, after the public hearing. The said corrections are minor amendments and are of inconsequential nature. The basic fabric of the REIA report continues to be the same. The minor corrections do not in any manner reflect upon the data, evaluation thereof and statements made in the REIA report. This aspect was explained by the respondent no.3 before NEAA in their affidavit dated 17th March, 2008. Similarly, the contention of the petitioner that the application form of respondent no.3 should have been rejected as it did not disclose alternative location to the proposed project site has to be rejected. Respondent no.3 had explained that the project site was identified as it was ideal due to accessibility to road, availability of table top barren land, availability of sea water for cooling, potential for unloading of imported coal and exporting fly ash and there was no rehabilitation and resettlement issues as the area was not inhabited. Respondent no.3 relied upon the advantages of the present location, which was purchased by them long back in 1992. It

is not the case of the petitioner that they or anyone else had identified a more suitable location or had proposed that the project should be located at a different place. Respondent no.3 had identified only one location and the application of respondent no.3 was required to be examined with reference to the said location. Alternative location could have been stated by the respondent no.3 as a second choice, if the first choice was not acceptable. However, lack of second choice/location did not prevent examination of the suitability of the suggested location. Alternative location could have been suggested/identified by third persons or IAA/MOEF and on consideration the consent/approval for the present location could have been rejected. No second location was suggested by any person in the public hearing or even thereafter.

18. All applications for clearance under the 1994 Notification were referred by MOEF to an Expert Appraisal Committee. On 6th November, 2006, the respondent no.3 submitted a detailed application for obtaining environment clearance to MOEF in respect of the proposed project. The same was taken up for consideration by the Expert Appraisal Committee in its 40th meeting held on 9-10th January, 2007. The Committee noticed the salient features of the project and the statements and undertakings given by the respondent no.3. It was noticed that a case was pending before the Bombay High Court in which the issue relating to impact of the

project on alphanso mango plantations had been raised. Representation received from Ratnagiri Zila Zagruk Manch alleging irregularities in the public hearings was also taken note of. Respondent no.3 informed the Committee about the proposed study to be undertaken by KKVD regarding impact of the project on the mango plantations. It was stated by the respondent no.3 that the study was to be completed in six months. The Committee sought information on as many as 16 points as recorded in the minutes of the meeting held on 9-10th January, 2007. Two points specifically raised in the meeting pertain to impact, if any, on alphanso mango plantations and control measures for sulphur dioxide gas discharge in view of the sensitivity of the area in terms of mango plantations. The last paragraph records "it was decided that the proposal may be considered further only after the study on the impact of the project on alphanso mango plantations has been completed and the report submitted in addition to the information as mentioned above. Till such time the proposal may be kept in abeyance."

19. However the matter did not wait for six months or for complete report from KKVD. The matter was taken up in the 42nd meeting of the Expert Appraisal Committee held on 12-14th March, 2007. The Expert Appraisal Committee specifically noted the information/clarification sought in the earlier meeting and recorded that the mangroves exist beyond 4 kms. of the proposed sea water

intake point and 8 kms from the output point. It was recorded that the proposed site did not fall within the coastal biosphere reserve. The minutes record that within the 7 kms. radius of the study area covering the total land area of 7543 hectares, mango plantations were limited to 48 hectares and in 10 km radius covering a land area of 13369 hectares, mango plantations was in 336 hectares. Reference was made to the report from KKVD regarding impact of the proposed TTP with special reference to plants and fisheries. The minutes incorporates the following conclusion of KKVD :

“The proposal was earlier considered by the Committee during its meeting held on January 9-10, 2007 wherein the Committee had sought additional information/clarifications. Based on the information/clarifications received from the proponent, the proposal was further considered by the Expert Committee. It was stated by the proponent that there are no mangroves in the proximity of the project area. The mangroves exists beyond 4 km from the proposed seawater intake point and about 8 km from the outfall point. The sulphur content in the coal to be used as coal will not exceed 0.6% and ash content 12%. The cooling water blow down design has been modified to discharge cold water from the cooling water as against hot water blow down proposed earlier. The proposed site does not fall within the coastal biosphere reserve. Based on the modeling, it was shown that the maximum 24 hourly average ground level concentration of SO₂ will be 12.22 ug/m³ at a distance of 3.2 km in the south east direction due to the plant. Space provision will be kept for FGD, if required.

The proponent also submitted a report from KKVD regarding the impact of the

proposed TPP with special reference to horticulture plants and fisheries. The report has concluded as under:-

“Based on the impact assessment studies conducted by the EQMS India Pvt. Ltd., New Delhi and prediction levels of pollutant mentioned by Maharashtra Pollution Control Board and Central Pollution Control Board, New Delhi, it appears that the activities to be undertaken by JSWERL for power generation at Jaigad are not likely to affect horticultural plantation and mango plantation in particular as well as marine life significantly provided JSWERL’s strictly maintains its adherence to its commitments made for preventing environmental pollution from time to time in long run. However, Alhonso mango being the choicest variety of mango and a premium quality, branded variety in national and international market is necessary to undertake detail study for a period of 4 years to evaluate impact. Similar type of research is also necessary for marine fisheries.”

(emphasis supplied)

20. After noticing the report of the KKVD and considering the recommendation made, the project was approved subject to conditions as under:-

“(i) No activities in CRZ area will be taken up without requisite clearance under the provisions of the CRZ Notification, 1991.

(ii) The detailed study regarding the impact on Alphonso mango and marine fisheries as recommended in the report of Dr.B.S. Konkan Krishi Vidyapith shall be undertaken. Based on the same, additional safeguard measures as may be required will be taken by the proponent. A copy of the report will be submitted to the Ministry. The cost towards undertaking the study and

implementation of safeguard measures, if any, will be borne by the project.

(iii) Space provision for FGD will be kept, if required at a later date.

(iv) Cooling water blow down will be discharge from the cold water side and not from the hot water.” (emphasis supplied)

21. There is contradiction between the minutes of the meeting of the Expert Appraisal Committee held on 9-10th January, 2007 and 12-14th March, 2007. On 9th-10th January, 2007, the application was decided to be kept in abeyance to await the report of KKVD which as per the said minutes would take six months. What was before the Committee on 12-14th March, 2007 was a preliminary report prepared within 2-3 months. The minutes dated 12-14th March, 2007 record that as per the report submitted by KKVD it would take about four years of detailed study to effectively evaluate the impact of the proposed plant. KKVD on the basis of the existing material, in form of assessment studies conducted by EQMS India Pvt. Ltd., and predictions on the level of pollutants made by MPCB and Central Pollution Control Board, Delhi, had stated that it was likely that there would not be any adverse impact on horticulture, mango plantations or marine life, subject to the condition that the respondent no.3 strictly maintained adherence to their commitments. The so called report submitted by KKVD is extremely guarded and cautious. It was not based on their data and studies. It

was not conclusive and does not give approval but qualified statements were made. Further KKVD in clear terms had stated that any final assessment would require a detailed study for a period of four years to evaluate the impact on mango plantations and the marine life/fisheries. This was noted by the expert committee themselves in their minutes dated 12-14th March, 2007 quoted above. Further the issue of provision of FGD has been left to be decided at a later stage. Position before NEAA remained the same.

22. Doctrine of sustainable development has come to be accepted as an answer to balance on one hand the various developmental regimes aimed at ensuring better living, social and economic conditions for human beings and on the other hand ensuring that the consequences of development do not exceed the carrying capacity of the ecosystem but are compatible with the need to protect and improve the environment. Sustainable development, simply put, is a process in which development can be sustained by nature with or without mitigation (Rio Conference of 1992). The doctrine accepts requirement to industrialise and develop, at the same time accepts that it is necessary to protect environment and ecosystems. The need is to harmonise development and nature but the pollution and damage to the ecosystem and environment must not exceed the carrying capacity of nature. The Supreme Court has accepted doctrine of sustainable development as Law referring to Articles

14,21,48-A and 51-A(g) of the Constitution of India. Said doctrine has been justified on “intra-generational equity or responsibility” and “public trust”. The Concept of ‘public trust’ accepts nature and ecosystems belong to the people and the State as a sovereign holds them in trust for public use and benefit. The doctrine does not prohibit alienation of the property held in public trust but requires that the alienation should be in a manner consistent with the nature of the said trust. Natural resources like air, water, forest, vegetation etc., are of great importance to the people as a whole and should not be subjected to private ownership or commercialisation, when public interest suffers a greater damage due to over exploitation of the nature. Lastly, Laws of Nature have to respected and for the benefit of people and human race require observation and compliance.

23. Doctrine of sustainable development and its application has resulted in development of concepts of the ‘Polluter Pays principle’, ‘Onus of Proof’ and the ‘Precautionary Principle’. The ‘polluter – pays’ principle makes the polluter *absolutely liable* for the harm caused and requires him to bear the financial costs of both preventing and remedying damage caused by pollution. Further, there is a positive obligation on the actor or the developer as the ‘onus of proof’ is on him to show that his action is environmentally benign.

24. The 'Precautionary Principle' is preferred to the assimilative capacity principle, which assumes that science would provide policy – makers with information and necessary means to avoid encroaching upon the capacity of nature to assimilate impacts and presumes that scientific advancement and expertise would be available in future to deal with the harm caused. Precautionary principle makes it mandatory for the Government to not only anticipate and prevent but also attack the causes of environment degradation. Where there is an indefinable risk of serious or irreversible harm, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment and that lack of scientific certainty should not be used as a reason for postponing measures to prevent such harm to the environment. (See report of Dr. Sreenivasa Rao Premmarju, Special Rapporteur, International Law Commission, quoted in ***A.P. pollution Control Board Vs. Prof. M.V.Nayadu***, (1999)2 SCC 718.) Precautionary principle has been adopted and applied requiring that when there are reasonable or irreversible chances of ecological damage, lack of full scientific certainty should not be used as reasons for postponing cost effective measures to prevent environment degradation (See, principle 50 of the Rio Conference,1992). The said principle highlights that scientific

uncertainty should not preclude preventive measures to protect the environment.

25. UN Framework Convention on Climate Change states :

“The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.”

26. The principle has been applied in India depending upon factual matrix, scientific data available and nature and extent of risk in each case. The ratio discernible from the decisions of the Supreme Court is that where environmental risks are in some way “uncertain but not negligible”, then regulatory action is justified. In such cases, burden of proof is on those attempting to alter the status quo. Risk of harm to the environment and human health or development is to be decided on the principle of greater public interest, according to a “reasonable persons” test. (See, para 11 of ***Vellore Citizens’ Welfare Forum Vs. Union of India***, (1996) 5

SCC 647, para 39 of the judgement in ***A.P.Pollution Control Board Vs. Prof.M.V.Nayudu***,(supra) and paras 77 to 79 of ***Karnataka Industrial Areas Development Board Vs. C.Kenchappa***, (2006) 6 SCC 371.) The precautionary principle makes it mandatory for the Government to not only anticipate and prevent but also attack the causes of environment degradation.

Further, “there is nothing to prevent decision-makers from assessing the record and concluding that there is inadequate information on which to reach a determination. If it is not possible to make a decision with ‘some’ confidence, then it makes sense to err on the side of caution and prevent activities that may cause serious or irreversible harm. An informed decision can be made at a later stage when additional data is available or resources permit further research.” (Again a quote from ***A.P.Pollution Control Board Vs. Prof. M.V.Nayudu***,(supra).)

27. The petitioner has filed before us information received from KKVD under the Right to Information Act, 2005 (hereinafter referred to as RTI Act, for short). Respondent no.3 had written letter dated 14th August, 2006 to KKVD to give their expert comments on the impact of TPP proposed to be set up by the said respondent on mango plantations in or around the project site. Respondent no.3 made a presentation and submitted copy of REIA to KKVD on 31st

August, 2006. The said request was politely declined by KKVD by their letter dated 7th September, 2006 stating that the said University had not generated data on the impact of thermal power plants or on emission of pollution in the ambient air on the mango or other vegetations. They further stated that the said University did not have expertise to undertake such studies which required collaborative/joint studies with government/semi government institutes. It was observed that KKVD would extend their help limited to their observations on yield, growth and quality parameters of mango and other vegetations under the mutually agreed terms and conditions which could be decided later on. Respondent no.3 by their letter dated 20th September, 2006 requested KKVD to conduct a detailed study on the impact of the proposed TPP on mango and cashew plants and that they were ready and willing to bear the expenses. It was stated that respondent no.3 would arrange to engage government/semi government institutions for completion of study on environment impact. A similar request was made to College of Fisheries, Ratnagiri, a part of KKVD, for impact on marine life.

28. Science and Technology Park, Pune was later on associated with KKVD for carrying out joint studies on the impact on the mango plantations. In response to an application under the RTI Act, KKVD has informed that two meetings had taken place between KKVD and

Science and Technology Park, Pune on 13th June, 2007 and 16th October, 2007. However, a survey to find out the impact and effect on the eco system had not started and even first samples had not been collected. The response to the RTI query states that list of equipments for study was furnished but no equipments had been received. This reply was given on 18th December, 2007, which is after the date on which clearance had already been granted by the Expert Appraisal Committee appointed by MOEF on 13th March, 2007.

29. During the course of arguments, it was accepted that KKVD has started the said survey to collect data, conduct tests and analyse results on the impact of the proposed project on the eco system, flora and fauna in the said area and especially on the alphanso plantations. The said tests are being conducted and data collected by setting up fumigation chambers around the mango trees as well as plotted plants and subjecting the said plants to predicated levels of SO₂, NO_X and SPM and then monitoring the affect of the predicated levels on the said plants. Similar chambers are constructed around trees and plotted plants without exposure to higher pollution level of gases or SPM to have comparative statements on the affects. Natural plants in the region are also being examined and observed at 15 days intervals. The big trees are being examined for flowering, fruiting and growth. KKVD is therefore

conducting a survey to file a report, which requires extensive research, data collection and study, to reach any firm conclusion.

30. In the public interest litigation filed by the Ratnagiri Zila Zagrak Manch and others, the Bombay High Court has passed orders and directions to MPCB to conduct environmental study on the impact of establishment of a coal base TPP. Pursuant to the said orders MPCB had carried out survey in association with National Environment Engineering Research Institute, Nagpur. On further directions of the Bombay High Court a joint working group has been constituted to comply with the directions of the Court. Thus it is clear that the full impact and affect of the TPP on the alphanso mango plantations and eco system of the area is yet to be fully understood. Even the Expert Appraisal Committee was aware and conscious of the fact that no scientific study with certainty was available on the basis of which it could be stated that the increase in the pollution levels and release of gases as a result of TPP would not cause any damage to the eco system in the area and the mango plantations. This is apparent from the minutes dated 9-10th January, 2007. KKVD has given a preliminary report which is largely based upon the data furnished in REIA and is not based upon their own test and observations which have started subsequently after they had furnished their first preliminary report. The language and “value” aspect of the preliminary report and the comments of the Expert

Appraisal Committee in the meeting dated 12-14th March, 2007 has been commented upon above (see paras 18 to 21 above). Even on the question of the discharge and increase in pollution levels, there are doubts. The Expert Appraisal Committee has for the time being granted permission subject to the condition that space provision for providing/installation of FGD of requisite efficiency for removal of SO₂, if required, at a later stage would be provided for.

31. Learned counsel for the respondent no.3 had stated before us that the thermal power project is likely to be commissioned within next 3-4 months. It was stated that after clearance was granted, the work commenced and no stay order was passed by the Bombay High Court, which has been regularly monitoring and examining the environmental issues. It was highlighted that various aspects with regard to gaseous discharge, SPM etc., have been dealt with in detail in the REIA Report, EPM and have been subject matter of discussion both by the Expert Appraisal Committee and NEAA. It was further stated that the mango plantations within the 10 kms. radius constitute 1.07% of the area consisting of 31,381 hectares. It was stated that within 10 kms. radius mango plantation exist in 36 hectares. Similarly, within 7 kms radius consisting of 15,400 hectares only 48 hectares are under mango plantations and they constitute .31% of the total area. Our attention was also drawn to the numerous safeguards and conditions which have been imposed

by the Expert Appraisal Committee. The need and requirement and the shortfall in electricity in the State of Maharashtra and in the region have also been brought to our notice.

32. Balancing economic growth with environment protection is a fine balancing act. Individual perceptions vary and we are yet to create a device or formulate a formula/table which can be applied to balance economic development and environment protection. Public interest requires protection and care of the environment. Public interest also requires economic growth which is badly needed to secure equality and opportunity to earn livelihood to the ever-growing population. It has been accepted that ecological damage and prevention thereof for the sake of life and future generations should take preference over other public interest, in case there is reasonable apprehension and danger of the damage being caused as a result of a proposed project. Keeping these aspects in mind we direct that the Expert Appraisal Committee will re-examine the approval already granted after considering the reports of KKVD on the basis of the data collected and analysed by them. The Expert Appraisal Committee will not be prejudiced and influenced by their earlier clearance or the order passed by NEAA. Re-examination exercise will be completed expeditiously and preferably within a period of three months from today. While re-considering the matter the Expert Appraisal Committee will keep in mind the principle of

sustainable development as explained and propounded by the Supreme Court. Till specific approval is granted by the Expert Appraisal Committee, TPP will not be made operational and integrated with the power grid. However, respondent no.3 will be entitled to undertake tests and operational trials. Order passed by the Expert Appraisal Committee will be appealable before NEAA under the Appellate Act.

In the facts and circumstances of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(AJIT PRAKASH SHAH)
CHIEF JUSTICE

SEPTEMBER 18, 2009.
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