

**BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**Appeal No. 87/2018
(M.A. No. 1741/2018 & M.A. No. 1747/2018)**

Vedanta Limited

Appellant(s)

Versus

State of Tamil Nadu & Ors.
Respondent(s)

**CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL, CHAIRPERSON
HON'BLE MR. JUSTICE RAGHUVENDRA S. RATHORE, JUDICIAL
MEMBER
HON'BLE MR. JUSTICE K. RAMAKRISHNAN, JUDICIAL MEMBER
HON'BLE DR. SATYAWAN SINGH GARBYAL, EXPERT MEMBER
HON'BLE DR. NAGIN NANDA, EXPERT MEMBER**

For Appellant(s): Mr. C.A. Sundaram, Senior Advocate, Ms. Rohini Musa, Advocate

For Respondents(s): Mr. C.S. Vaidhyanathan, Senior Advocate, M. Yogeshkanna, Advocate and Mr. Abdul Saleem, Advocate for R-1 & 2
Mr. R. Rakesh Sharma and Mr. V. Mowli, Advocates for R-2 & 3 machine
Mr. Vaiko, party in person
Mr. B. Vinodh Kanna, Advocate for Tamil Nadu Pollution Control Board, R-4
Mr. E. Subbu Muthuramalingam, Advocate for R-5
Mr. Satish Kumar, Advocate for CPCB
Mr. Ritwick Dutta and Ms. Kanika Sood, Advocates for applicant Fatima

**Hearing Concluded on: 10.12.2018
Order Uploaded on: 15.12.2018**

ORDER

1. This appeal under Section 16 of the National Green Tribunal Act, 2010 (hereinafter referred to as "NGT Act") has been preferred against the orders dated 09.04.2018, 12.04.2018 and 23.05.2018 passed by the Tamil Nadu Pollution Control Board (hereinafter referred to as "TNPCB") and order dated 28.05.2018 of Government of Tamil Nadu under the provisions of the Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred to as "Water Act") and the Air (Prevention and Control

of Pollution) Act, 1981 (hereinafter referred to as "Air Act"). The appeal was originally filed before this Tribunal on 22.06.2018. Subsequently, order dated 28.05.2018 passed by the TNPCB to permanently seal the appellant's unit was filed with an affidavit on 17.07.2018 to bring on record and challenge to the said order.

FACTS

2. Case of the appellant is that it is engaged in extracting and processing minerals, including copper. It has a copper smelter plant at State Industries Promotion Corporation of Tamil Nadu Limited (SIPCOT), Industrial Complex, Thoothukudi, Tamil Nadu. In the said plant, the appellant manufactures copper cathodes, copper rods, sulphuric acid, phosphoric acid and other by-products in the process of smelting copper concentrate. The project was approved by the Government of Tamil Nadu on 13.05.1987 at 1083 acres, in Thoothukudi, Tamil Nadu, at an estimated cost of Rs. 938 lacs. SIPCOT allotted the land in 1994. Environmental Clearance was granted on 16.01.1995 by the Ministry of Environment, Forest & Climate Change (hereinafter referred to as "MoEF&CC"). The TNPCB granted Consent to Establish under Section 21 of the Air Act and Section 25 of the Water Act on 22.05.1995. Consent to Operate was granted by the TNPCB on 14.10.1996. Production commenced on 01.01.1997. Increased capacity was subsequently approved by the MoEF&CC and the TNPCB.
3. Vide judgment dated 28.09.2010 in W.P. Nos. 15501-03 of 1996, 5769 of 1997 and 16861 of 1998, Environmental Clearance granted to the appellant was quashed by the Madras High Court and the unit was directed to be closed down in a petition filed by the MDMK a political party and CITU, a trade

union organization. The order of the High Court was stayed and later set aside and reversed by the Hon'ble Supreme Court on 02.04.2013 in *Sterlite Industries (India) Limited and Others versus Union of India and Others*¹.

4. On 29.03.2013, the TNPCB directed closure of the unit under Section 31A of the Air Act on the ground of air pollution resulting from an incident dated 23.03.2013. The said order was quashed by this Tribunal vide judgment dated 08.08.2013 in *Appeal Nos. 57 – 58 of 2013, M/s. Sterlite Industries (India) Ltd. Vs. Tamil Nadu Pollution control board & Ors*². We are informed that challenge to the said judgment is pending before the Hon'ble Supreme Court being Civil Appeal Nos. 8773 – 74 of 2013. Since no stay was granted, the appellant commenced its operations. The Consent to Operate granted to the appellant's company was valid till 31.03.2018 under the Air Act and the Water Act. The appellant applied for renewal on 31.01.2018 under the Air Act and the Water Act i.e. 60 days before expiry of the Consent to Operate. On 27.02.2018, inspection was carried out by a team of the TNPCB and the TNPCB found the appellant to be compliant of requisite standards.
5. On 24.03.2018, a protest was organized by certain persons against proposed expansion, which had been sought by the appellant. The appellant filed W.P. (MD) No. 7313/2018 seeking police protection. The Madurai Bench of the Madras High Court disposed of the petition on 04.04.2018 with a direction to consider the representation of the appellant.
6. On 09.04.2018, the impugned order was passed by the TNPCB. On 12.04.2018, the appellant filed an appeal before the

¹ 2013 (4) SCC 575

² (2013) SCC OnLine NGT 68

Appellate Authority against the order dated 09.04.2018. The appellant also represented to the TNPCB to reconsider the consent renewal application on 13.04.2018.

7. In the meanwhile, on 12.04.2018, the TNPCB passed further order under Sections 33A of the Water Act and 31A of the Air Act directing that the unit shall not resume its production/operation without prior approval/renewal from the TNPCB.
8. Since the agitation against the unit of the appellant was continuing, the appellant filed W.P. (MD) No. 11190/2018 before the Madras High Court, seeking imposition of 144 of the Cr. P.C. to handle the agitation. The petition was disposed of on 18.05.2018 with the observation that the matter be considered by the authorities. Accordingly, order under Section 144 of the Cr. P.C. was issued but the agitation continued. On 22.05.2018, there was a police firing on the agitators, resulting in death of 13 persons.
9. Further order dated 23.05.2018 was passed by the TNPCB, directing closure and disconnection of power supply on the ground that during the inspection on 18.05.2018 and 19.05.2018, the unit was found to be carrying out its activities to resume production. According to the appellant, the unit was not functioning but only shut down operations were in progress.
10. On 25.05.2018, the appellant represented to the TNPCB to permit the operation of emergency support services and restoration of minimum power supply to avoid any hazardous situation, as sulphuric acids storage tank was prone to corrosiveness. Technical procedure was required to shut down Chemical cum metallurgical plant. The appellant also filed W.P.

(MD) No. 13144/2018 on 19.06.2018 before the High Court of Madras which was subsequently withdrawn, to approach this Tribunal. Since there was leakage of Sulphuric acid storage tank on 16.06.2018, the appellant had approached the High Court of Madras on 19.06.2018 seeking direction for taking steps for ensuring safety in handling the situation. Stand of the appellant is that the Writ Petition was filed before the High Court as this Tribunal was on vacation.

11. On 28.05.2018, the State of Tamil Nadu endorsed the order of the TNPCB and directed TNPCB under Section 18(1)(b) of the Water Act to seal the unit and close it permanently.

12. The appeal was taken up on 06.06.2018 before the Appellate Authority which was opposed by the TNPCB with the plea that the same had become infructuous in view of order of the Government of Tamil Nadu dated 28.05.2018. The Appellate Authority upheld the said plea. It observed that it will not be appropriate to hear the appeal in view of order of the Government of Tamil Nadu dated 28.05.2018. The matter has, thus, been referred on that ground. The present appeal was preferred on 22.06.2018 with a statement that the appellant will withdraw the appeal pending before the Appellate Authority in the event this Tribunal entertaining this 'Composite Appeal'. It is also stated that the writ petition filed before the High Court will also be withdrawn.

PROCEEDINGS BEFORE THE TRIBUNAL AND THE HON'BLE SUPREME COURT

13. On 09.08.2018, when the matter came up for hearing a preliminary objection was raised on behalf of the State of Tamil Nadu and TNPCB that the appeal was not maintainable against the order of the State Government. The Tribunal observed that the

objection had no merit as the appeal in substance was against the order of the TNPCB under Section 33A of the Water Act. However, the matter was adjourned as the learned Counsel for the TNPCB wanted time to furnish the baseline value of the Total Dissolved Solids (TDS) in the ground water in and around the area and the date of photograph produced during the hearing with regard to copper slag. The Central Pollution Control Board (CPCB) was directed to give a report as to how the material lying on the spot could be disposed of or maintained. The Tribunal allowed the appellant to access the Administrative Section only and directed the District Magistrate to ensure that the appellant does not access the production unit. C.A. No. 8250 of 2018, *The State of Tamil Nadu & Ors. v. Vedanta Limited* was filed before the Hon'ble Supreme Court against the order of this Tribunal dated 09.04.2008. The Hon'ble Supreme Court disposed of the appeal on 17.08.2018 and observed that:

“the National Green Tribunal may continue to hear the matter on merits and finally decide the matter both on maintainability as well as on merits.”

14. On 20.08.2018, the matter was again considered. It was observed that there was no sufficient material to show any serious violation of environmental norms to justify closure of the unit, but in the facts and circumstances of the case, the TNPCB should be given further opportunity. Viewpoint of the inhabitants could also be considered. An independent Committee could visit the site to have first-hand assessment and to consider further material fairly and impartially after giving hearing to the inhabitants. The Committee was to be headed by a former Chief Justice of the High Court with the representatives of CPCB and the MoEF&CC. The Committee was to give a report to this Tribunal for further consideration of the matter. In the meanwhile, the appellant was directed to carry

out recommendations of CPCB under the supervision of a Committee of representatives of MoEF&CC and CPCB to prevent any untoward incidents. The recommendation of the CPCB was as follows:

2. Recommendations about the materials stored in Unit's Premises:

To prevent any incident of fires and also to safe guard the environment from storage of chemicals and waste material within the premises, following measures are recommended:

- a) *Residual fuel oil in any of the storage tanks is a fire risk; therefore it is necessary to have live firefighting system in the plant to prevent any possible fires in fuel areas.*
- b) *In case of non-operation of plant for long period, it is required to safely evacuate all electrolyte material stored in cell house and to ensure required safety measures in the area till completion of evacuation.*
- c) *It is necessary to ensure proper safety measures in warehouse storing copper concentrate till its removal.*
- d) *In case the plant is not going to operate in near future, it is required to remove all raw chemicals, intermediates material by-products and waste material from the plants premises as it may cause environmental impacts.*
- e) *It is necessary to ensure maintenance of the storage structures/equipments and pipelines of 3 Item No. 05 August 20, 2018 dv hazardous/flammable chemicals/substances, timber coolants etc., under experts supervision to prevent any disaster due to fire/collapse/damages of any structure.*
- f) *The entire acidic effluent stored in gypsum pond required to be treated and disposed after treating it to allowable discharge limit.*
- g) *To take steps to cap the gypsum storage stacks, in case of no demand. Also, the copper slag may be utilized or disposed in environmentally safer manner.*
- h) *Leachate generated from existing secured landfill (SLF) should be treated and the SLF is required be capped in due course.*
- i) *To ensure regular monitoring of ground water around SLFs to check the soundness of SLFs as well as to detect any seepages due to damaging of linings.*

15. C.A. No. 9098 of 2018, *The State of Tamil Nadu & Ors. v. Vedanta Limited* was preferred against the order of this Tribunal dated 20.08.2018 before the Hon'ble Supreme Court, which was disposed of on 10.09.2018 with the observation that the Tribunal may decide the matter after receipt of the report of the Committee in accordance with the observations in the earlier order of the Hon'ble Supreme Court dated 17.08.2018.

16. It may be mentioned that in view of inability of the proposed Chairman of the Committee (Justice S. J. Vajifdar) to take up the matter, the proposed Chairman was substituted by Justice Tarun Agarwal, former Chief Justice, Meghalaya High Court.

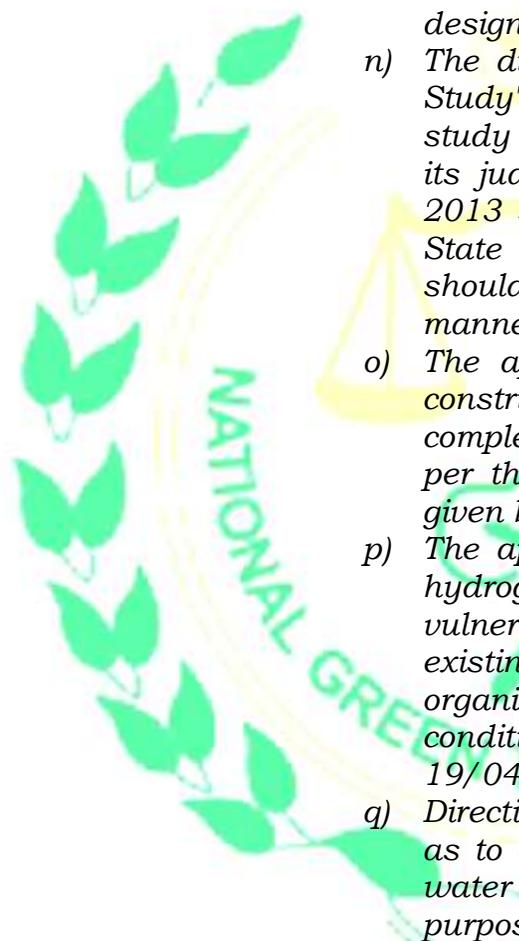
17. The Committee accordingly furnished its report dated 20.11.2018 which was put up for consideration before the Tribunal on 28.11.2018. A copy of the report was directed to be furnished to the learned Counsel for the appellant, the State of Tamil Nadu, the TNPCB and the CPCB. Interveners were allowed to assist the State Counsel and not to individual hearing. The parties were given liberty to file submissions with regard to the report or otherwise.

18. Accordingly, comments on the report have been filed on behalf of the appellant, the State of Tamil Nadu and the TNPCB and Shri Vaiko, Intervener, General Secretary of the Marumalarchi Dravida Munnetra Kazhagam (MDMK) Party who was also given a personal hearing as he claimed to be a representative of the inhabitants.

19. Broadly, the contents of the report are that the order of closure is not justified but the appellant should be required to follow 25 specific conditions summed in para 4 of its concluding part. The said 25 conditions relate to better monitoring of environment parameters and also certain improvements in the set up of the appellant as well as its functioning. For ready reference, the conclusions of the Committee are reproduced hereinbelow:

- “1. The impugned orders cannot be sustained as it is against the principles of natural justice. No notice or opportunity of hearing was given to the appellant.*
- 2. The grounds mentioned in the impugned orders are not that grievous to justify permanent closure of the factory.*
- 3. Other issues raised also does not justify the closure of the factory even if the appellant was found to be violating the conditions/ norms/ directions.*

4. In the event the Hon'ble Tribunal is of the opinion that the factory should commence production, the committee is of the opinion that the following directions may be issued:
- a) As per condition no. 44 of the Consent Order dated 19-04-2005, the appellant should be directed to monitor ground water quality including heavy metals such as Arsenic, Cadmium, Silver, Copper, Fluoride, etc. in and around the factory premises and nearby villages once a month and such report should be furnished to the TNPCB.
 - b) The sampling of the above should be taken in the presence of an official from TNPCB.
 - c) In addition to the above, the sampling of effluent/emission and solid waste should also be done by a monitoring group to be constituted by TNPCB comprising a representative of the District Collector, an official of TNPCB, NGOs and academicians as per condition no. 43 of Consent Order dated 19-04-2005.
 - d) Both the reports should be sent by TNPCB to CPCB for analysis. Recommendations made by CPCB should be followed.
 - e) Copper slag dumped at all the eleven sites including the Uppar River should be removed. If copper slag has been used for landfill purposes, then the excess amount of the slag over and above the level of ground would be removed and thereafter the landfill should be compacted with one feet of soil, so that the copper slag is not blown away by the strong winds.
 - f) The dead stock of copper slag lying in the dump yard inside the factory premises which has solidified should be removed in a time bound manner. Thereafter, the bottom of the dump yard and the side walls should be covered with HDPE liner. Further, the Company should ensure that the generation and disposal of copper slag is maintained in the ratio of 1:1 and that the Company at best, can retain 10 days generation of copper slag in its dump yard.
 - g) The dead stock of gypsum lying in the dump yard inside the factory premises which has solidified should be removed in a time bound manner. Thereafter, the bottom of the dump yard and the side walls should be covered with HDPE liner. Further, the Company should ensure that the generation and disposal of gypsum is maintained in the ratio of 1:1 and that the Company at best, can retain 10 days generation of gypsum in its dump yard.
 - h) The Company before disposing copper slag, gypsum (or) any other waste product will seek previous permission from the TNPCB.
 - i) Application of the Company for obtaining valid authorization for disposal of hazardous waste under Hazardous & Other Wastes (Management. & Transboundary Movement) Rules, 2016 should be disposed of by the TNPCB in a time bound manner.

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- The logo of the National Green Tribunal (NGT) is located on the left side of the page. It features a circular emblem with a green laurel wreath. Inside the wreath, there is a yellow scale of justice. The text 'NATIONAL GREEN TRIBUNAL' is written in green capital letters around the perimeter of the emblem.
- j) *Even though there is no requirement of analyzing the air samples through an accredited laboratory nonetheless a direction should be issued to the appellant that they will conduct a periodical survey for ambient air quality/ noise level/ stack emission through accredited laboratories of MoEF&CC/NABL and furnish such report to the TNPCB.*
 - k) *The appellant company should be directed that they shall develop a green belt of 25 metres width around the battery limits of its factory by planting native and high foliage tree and also in and around the factory.*
 - l) *The State of Tamil Nadu/ TNPCB should collect data from their primary health centres and Govt. Hospitals to monitor the various ailments that are being complaint of by the inhabitants living in and around the factory premises.*
 - m) *The State Government should specify the module to the appellant for conducting the proper and designed health monitoring study.*
 - n) *The direction no. (iii) on "Source Apportionment Study" and direction no. (ix) on "conducting a study on health hazards" passed by the NGT in its judgement dated 8.8.2013 in Appeal 58 of 2013 should be carried out by the Tamil Nadu State Government and TNPCB. Such reports should be furnished to NGT in a time-bound manner.*
 - o) *The appellant should be directed to start the construction of gypsum pond immediately and complete the same in a time bound manner as per the conditions laid down in the guidelines given by CPCB in October, 2014.*
 - p) *The appellant shall undertake a fresh detailed hydrogeological study for determining aquifer vulnerability and migration of leachate from the existing phosphogypsum pond through a reputed organization approved by the TNPCB as per condition no. 15 of the Consent Order dated 19/04/2005.*
 - q) *Direction should be given to the TNPCB as well as to the appellant to take independent ground water samples from the same points for the purpose of finding out groundwater pollution if any. Such reports should then be compared by the CPCB. Recommendations made by CPCB should be followed.*
 - r) *Directions/regulation may be framed for import of high grade copper ore.*
 - s) *Irrespective of the norms, stack height in any case be increased in order to remove the ambiguity and the grievance of inhabitants of the people of the Tuticorin with regard to emission of SO₂.*
 - t) *Till such time, the stack height is not increased, the production of copper as well as sulfuric acid should be restricted/reduced to match the existing stack height.*
 - u) *The transportation of copper ore concentrate from the port to the factory premises should be done*

in a closed conveyance or through a pipe conveyor system.

- v) Self-monitoring mechanism needs to be prepared by the appellant for the periodic monitoring of Ambient Air Quality/Stack emissions/ Fugitive emissions/ground water quality/ surface water quality/ soil quality/slag analysis through third party and report shall be furnished to the concerned regulatory agencies.*
- w) All the monitoring data, compliance reports of CTE/CTO/EC and environmental statement shall be uploaded on the website of the Company.*
- x) TNPCB should be directed to commission "Regional Environmental Impact Assessment Study" in and around Tuticorin District by engaging a reputed national agency.*
- y) CPCB recommendations as contained in the order of NGT. dated 20.08.2018 to be complied with."*

20. We have heard the learned Counsel for the parties and with their assistance perused the records.

CONTENTIONS OF THE APPELLANT

21. Main contention on behalf of the appellant is that the appeal is competent against the order of closure passed by the TNPCB dated 12.04.2018, 23.05.2018 and 28.05.2018 under Sections 31B of the Air Act and 33B of the Water Act as well as under Section 16(c) and (f) of the NGT Act, 2010. No doubt, the appeal against the order dated 09.04.2018 lies and was preferred to the Appellate Authority under Sections 31 of the Air Act and 28 of the Water Act, the Appellate Authority declined to consider the same and held it to be infructuous on objection to that effect by the TNPCB in the light of the order of the State Government dated 28.05.2018. It was also submitted that if there are two remedies on the same issue, the higher forum cannot be prohibited from proceeding with the matter particularly when the lower forum declines to proceed with the same. Moreover, if neither the Appellate Authority nor this Tribunal consider the matter, the appellant will be without remedy against serious violations of its

rights i.e. closure of its unit which is said to be arbitrary and without any valid basis.

22. On merits, it was submitted that grounds for refusal to renew Consent to Operate are unfounded. No opportunity of hearing was given. The order was in disregard to the earlier judgment of this Tribunal dated 08.08.2013 in the case of the appellant to the effect that the Chairman could exercise power to issue direction for closure against the industry which was causing pollution and only if delay in taking action will frustrate the object of the act and will be prejudicial to the environment. It was submitted that closure is contemplated only as measure of last resort when even by imposing suitable conditions, continuing of the unit was not viable. Closure was described as civil death of the unit in the judgment of this Tribunal dated 08.08.2013 (supra). Reference has also been made to the judgment of the Orissa High Court in *Animal Feeds Diaries and Chemicals Limited v. Orissa State (PCB) Board*³ to the effect that evidence of pollution and not mere suspicion was a condition precedent for order of closure. The impugned order is a reaction to motivated protests which started on 24.03.2018 leading to order dated 09.04.2018. Order dated 23.05.2018 was on account of protest dated 22.05.2018 wherein 13 persons lost their lives. Order of permanent closure was also reaction to the said incident which was evident from the public announcement made by the high-ranking officials of the State, including the Chief Minister. Sudden closure and sealing of such a huge metallurgical and/or chemical industry without even permitting requisite power supply to run its emergency support systems and /or without allowing access of trained manpower for the safety and upkeep of the plant and equipment has

³ 1994 SCC OnLine Ori 81

unreasonably exposed the appellant's plant and machineries, other assets and people living in the vicinity to grave risk and danger.

23. With regard to particular grounds in the impugned order, the stand of the appellant is as follows:

A. Ground water analysis report

- i. Samples are collected and analyzed through the laboratory of the TNPCB itself and the reports are available with the TNPCB. The activity of the appellant has no adverse impact on the groundwater quality. Thus, this ground does not justify closure.

B. Removal of Copper Slag

- ii. Copper slag is non-hazardous as per CPCB and can be used for filling up of low lying area and for road construction and also for use in cement applications and as fine aggregates in the concrete. Ferro sand has been declared 'high volume low effect waste' under the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 & 2016. Extracts from the reports of the Indian Toxicology Research Centre (ITRC), Central Road Research Institute ('CRRI'), National Council for Cement and Building Materials, National Environmental Engineering Research Institute (NEERI), etc. have been produced. Reference has also been made to the orders of the Collector requiring the land owner to whom the slag had been sold to remove the same. This ground does not justify closure.

C. Hazardous Waste Management

- iii. The appellant has filed an application under the Hazardous Wastes (Management, Handling and

Transboundary Movement) Rules, 2008 & 2016 which is pending with the TNPCB. The appellant has been taking all necessary steps in the matter as per rules. This ground does not justify closure. In view of the closure of the appellant unit, the appellant needs authorization to take further steps.

D. Ambient Air Quality

- iv. The appellant has furnished Environment Impact Assessment Report. The air quality has been analysed by the appellant and monthly reports have been submitted to the TNPCB. The unit has been audited by the NEERI. Concentration of metal was found to be as per standards.

E. Gypsum Pond

- v. As per the CPCB guidelines, the appellant can continue its operations upto September 2019 by following the existing practice of stacking the phospho gypsum. The pond can be constructed as per the revised guidelines upto September 2019. Thickness of liners is required to be of 1.5 mm HDPE as per new guidelines. Construction process as per revised guidelines has been initiated.

24. Learned Senior Counsel for appellant stated that the appellant has invested around 3000 Crores for establishing the plant, out of which around 500 Cores have been invested on environment protection measures and the said unit single handedly caters to 35- 40% of copper demand in India and 60% of the copper produced by the plant of the appellants is consumed in the domestic market and the balance 40% is exported. As a result of closure of the unit, price of Copper in the country has risen by 10-20%. The prices of Sulphuric acid has risen by more than 6 times in Indian market from Rs. 2,500/- to Rs. 16,000/- per MT.

The appellant has employed about 3500-4000 direct employees, including contract employees. A number of ancillary industries, like stevedores, freight forwarders, transporters, etc., are also dependent on the Plant, indirectly providing employment to more than 20,000 persons through these ancillary and support industries. Through its various transactions, the Plant generates huge revenue to Central and State Governments in terms of excise, custom duties, income tax and VAT to the tune of Rs.2000 Crores, annually. It also contributes to 30% of the total cargo volume and 12% of revenue of the Thoothukudi Port. The appellant is suffering a daily loss of about Rs. 5 crores on account of closure.

25. During the hearing, Shri C. A. Sundaram, learned Senior Counsel for the appellant made a statement that apart from CSR activities on which the appellant is spending about Rs. 10 Crores p.a., the appellant is being advised to straightway spend an amount of Rs. 100 Crores for welfare activities of the inhabitants of the area as a goodwill measure. The amount will be spent on projects like water supply, health services, and skill development. It was also submitted that the entire State of Tamil Nadu, specially the coastal areas, are having high TDS in the groundwater. It was also submitted that gypsum disposal was more than its production and 1:1 ratio was maintained except the dead stock which had already solidified and was no longer hazardous. The green belt was being maintained as per conditions for clearance as held by the Hon'ble Supreme Court. The stack height was sufficient because the appellant had two columns of stack and was as per conditions laid down by the TNPCB.

26. Responding to the report of the Committee, learned Senior Counsel for the appellant submitted that the grounds for refusing renewal of Consent to Operate, which are common for the closure order, have not been found to be sustainable by the Committee. With regard to water analysis report, the Committee observed that the appellant was not given any notice for making non furnishing groundwater analysis report as the basis of the order. The Committee has itself found the copper slag to be non-hazardous, non-leachable and storage did not cause any damage to the underground water (Para 113, 116, 121, 123 of the report of the Committee). As regards disposal of hazardous waste, the Committee found that the TNPCB was blowing hot and cold at the same time. On the one hand, it was not disposing of the application for permission to dispose of the hazardous waste for more than 58 months, and on the other hand, it was blaming the appellant (Para 121). With regard to analysis of parameters of heavy metals in ambient air quality, it was found that the TNPCB never required the appellant to do such analysis. The appellant submitting ambient air analysis reports to TNPCB (Para 133). As regards construction of gypsum pond as per CPCB guidelines, the company had time till October 2019 and there was no contamination of groundwater (Para 143).

27. It is submitted that even though no basis has been found for the grounds on which the impugned order is based, the Committee has taken up some of the points raised by the interveners which rightly were not in the impugned order. The Committee found that issues of alleged gas leak in 1997 and 2013 were covered by judgment of the Hon'ble Supreme Court

in *Sterlite Industries (supra)*⁴ and judgment of this Tribunal dated 08.08.2013 (supra). As regards health study, it was observed that there is no evidence to indicate that the employees or the villagers were suffering from any ailment on account of activity of the appellant. Regarding air pollution and stack height, it was observed that air quality was within permissible limits as per inspection report of the Committee dated 27.02.2018. With regard to water pollution, it was found that marker pollutants were within permissible limit except TDS which is higher.

28. Learned Senior Counsel for the appellant submitted that high TDS value could not be taken against the appellant. He made reference to the latest study conducted by the Central Ground Water Board in respect of South East Coastal Region⁵ to the effect that even in the upstream of the location of appellant unit, the TDS level was high. It was submitted that the stack height was within the permissible limit as per TNPCB consent orders. Learned Senior Counsel for the appellant submitted that recommendation of the Committee that the stack height should be increased or the production should be reduced is not sound. In any case, if the impugned orders are quashed, this issue can be dealt with by the TNPCB. He did not object to the other suggestions of the Committee.

CONTENTIONS OF THE RESPONDENTS

29. Learned Senior Counsel for the State of Tamil Nadu and TNPCB opposed the appeal on the issue of maintainability as well as on merits. It was submitted that the appeal against the order dated 09.04.2018 can be heard only by the Appellate Authority. The

⁴ (2013) 4 SCC 575

⁵ Ground Water Board Sampling and Analysis conducted by CGWB, SECR, Chennai in and around SIPCOT Industrial Complex, July 2018

appellant itself has filed such an appeal which is pending. At best, the Appellate Authority can be directed to hear the same.

30. Subsequent order dated 12.04.2018 has no existence of its own and was consequential to the rejection of prayer for renewal of consent. Unless order dated 09.04.2018 is set aside by the Appellate Authority, order dated 12.04.2018 or 23.05.2018 could not be questioned. In any case, order of the State Government dated 28.05.2018 under Section 18(1)(b) of the Water Act could not be challenged before this Tribunal being a policy matter not covered by the appellate jurisdiction of this Tribunal. The order of closure by the TNPCB being consequential to the said order, the same could also not be challenged. In support of this submission, reliance has been placed on *Edukanti Kistamma vs. Venkatarreddy*⁶.

31. Learned Senior Counsel for the State of Tamil Nadu also submitted that report of the Committee was vitiated as the Committee assumed adjudicatory functions which is not permissible as held in *Jamal Uddin Ahmad vs. Abu Saleh Najmuddin and Ors.*,⁷ and in *State of West Bengal vs. Subhas Kumar Chatterjee and Ors.*⁸ Reliance has also been placed on *Padam Sen & Anr. vs. State of UP*⁹ and *Amiya Bala Paul vs. Commissioner of Income Tax, Shillong*¹⁰.

32. On merits, it was submitted that copper slag was on the bed of Uppar river and could contaminate river water. Gypsum pond could produce leachate particularly during rain and pollute the ground water. It was also submitted that even if the appellant was ZLD unit and there was no discharge in the process, it is

⁶ 2010 (1) SCC 756, Para 22

⁷ (2003) 4 SCC 257, Para 14

⁸ (2010) 11 SCC 694, Para 9, 20, 21, 25 and 27

⁹ (1961) 1 SCR 884

¹⁰ (2003) 6 SCC 342, Para 15

responsible for discharge during stack storage also. It was submitted that even if the marker pollutants were within limits, the potential for leachate and water contamination from secured landfill sites could not be ignored. Gypsum is soluble in water. TDS has been found to be beyond the prescribed standards.

33. In support of the grounds for the impugned order, it was submitted that requirement of furnishing monitoring data in respect of water quality was a condition for the consent. The said condition having been breached, no further notice was required. The renewal could be validly declined on that ground. The said condition was in the knowledge of the company. Thus, the view of the Committee in favour of the appellant was without any legal basis, apart from being beyond the authority of the Committee. Contention of the appellant on this point is without any basis.

34. As regards copper slag, the same is obstructing the flow of the river. Physical barrier between the river and the slag landfill area to prevent the slag from reaching the river, has not been constructed in the entire area. The Committee has also found that the retaining wall was not constructed around the entire area. Observation of the Committee that opportunity should have been given to the industry to do so is uncalled for. Notice had been issued on various occasions earlier. Observation that the closure was harsh on this ground was untenable. The company was required to take permission for disposal of the slag which had not been done. Dumping of the slag was in violation of the consent order.

35. With regard to the third ground that authorization for generation and disposal of the hazardous waste had expired, it was submitted that the same also justified the impugned order. Merely because the application was pending with the Board could not justify the action of the appellant in generating and disposal of the hazardous waste till the application was decided. Merely because the activity of the industry was not earlier halted could not be a bar to the closure order now passed.

36. It was submitted that the fourth ground for closure was also made out as the appellant failed to analyze the parameters of the heavy metals in the ambient air from the Board's Laboratory. Even if Board did not have a laboratory, services of MoEF&CC/NABL accredited laboratories could have been used. The observation of the Committee that TNPCB should have notified laboratories could not furnish any valid defence.

37. Further submission is that non-construction of gypsum pond, which was the fifth ground for the closure, was also made out. Claim that the storage of gypsum may not lead to ground water contamination cannot be accepted. Leachate from the gypsum pond is reflected in the samples. Plea that there was dead stock of stored gypsum which had resulted in solidification cannot lead to inference that there could be no ground water contamination. Further plea that dead stock could now be removed is not enough. The leachate is acidic and can reach the surrounding area and cause pollution.

38. It was also submitted that the Committee has expressed displeasure with regard to poor green belt, even though this was not one of the reasons for refusal of renewal of the consent. The Committee erred in observing that the earlier directions of this

Tribunal dated 08.08.2013 required the TNPCB and the State Government to conduct source apportionment study or the health monitoring study. This should be the responsibility of the company. The Committee has found that poor grade dusty copper was being used resulting in more emissions, more generation of copper slag and hazardous waste, ground water contamination and health hazard during transport. The Committee has found the need for increase of stack height. The Committee observed that samples of air ambient quality should not have been taken in absence of the appellant, ignoring the fact that TNPCB was entitled to do so in exercise of its statutory powers.

39. The observation that pollution from gypsum pond is only a possibility is erroneous. Report submitted by the TNPCB before the Committee on 27.10.2018 shows pollutants in the form of heavy metals, high TDS, chloride and sulphates, total hardness, calcium present in the sludge generated from the treatment of trade effluent generated from the manufacturing process. The TNPCB also mentioned before the Committee that there was ground water contamination but this has not been reflected in the report of the Committee.

40. Mr. Vaiko, intervener submitted that the height of chimney was required to be increased or the production was required to be reduced. The protests were on account of adverse impact on the health of the inhabitants in terms of air quality and water quality. He further submitted that the fact that copper slag being non-hazardous cannot be a ground for storing huge quantities and prevent free flow of river, that there was always a possibility of leachate seeping in the ground water from gypsum pond and that the Committee brushed aside the stand of

TNPCB about the water analysis report having not being furnished and application submitted by the appellant for authorization under the Hazardous Wastes (Management, Handling and Trans boundary Movement) Rules, 2008 & 2016 having not been granted.

FINDINGS

41. Having reproduced the pleadings, the substance of the report of the Committee and the rival contentions, we proceed to consider the following questions:

- (i). Whether the appeals are maintainable.
- (ii). Whether the impugned orders are sustainable on merits.

MAINTAINABILITY:

42. To determine the maintainability, it will be worthwhile to reproduce the impugned orders:

Order dated 09.04.2018

“It is, observed that the unit has not complied with the following previous renewal of consent order conditions:

1. *Ground water analysis report taken from bore wells within the unit premises as well as surrounding areas have not been furnished to ascertain the impact on ground water quality.*
2. *The unit has not removed the Copper slag dumped/stored along the river Uppar and patta land, thereby obstructing the flow. It has also not constructed any physical barrier between river Uppar and slag land fill area of patta land so as to prevent slag from reaching the river.*
3. *Authorization issued to the unit on 10.07.2008, got expired on 09.07.2013 but the unit continues to generate & dispose the Hazardous waste without valid Authorization under Hazardous and Other Waste (Management & Transboundary Movement) Rules, 2016. The application submitted by the unit was returned for want of additional details and the unit has not resubmitted the same.*
4. *As per renewal condition, the unit should have analyzed the parameters of heavy metals such as Arsenic in the ambient Air through Board's laboratory as done for the other parameters*

such as NO_x, PM₁₀ and SO₂. As the Board Laboratory does not have this facility, the unit should have engaged the services of MoEF &CC/NABL accredited laboratories and furnished report to Board. The unit has not complied with the same and as such there is no authenticated reporting on the presence of Arsenic in the ambient air,

5. During the inspection on 22.2.2018, the unit has been directed to construct a Gypsum pond as per CPCB guidelines. But the unit has not complied till 31.3.2018.

Hence, it is informed that the unit's application for consent of the Board is hereby rejected. As such no further representation can be entertained by the Board. The Board also cannot review its own decision.”

Order dated 12.04.2018:

“Whereas, on scrutinizing the application and inspection report along with enclosures, it has been observed that the unit has not complied with the following conditions imposed in the previous renewal of consent order issued vide reference first cited under Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 as amended in 1988 and Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 as amended in 1987:

1. Ground water analysis report taken from bore wells within the unit premises as well as surrounding areas has not been furnished to ascertain the impact on ground water quality.
2. The unit has not removed the Copper slag dumped/stored along the river Uppar and patta land, thereby obstructing the flow. It has also not constructed any physical barrier between river Uppar and slag land fill area of patta land so as to prevent slag from reaching the river.
3. Authorization issued to the unit on 10.07.2008, got expired on 09.07.2013 but the unit continues to generate & dispose the Hazardous waste without valid Authorization under Hazardous and Other Waste (Management & Transboundary Movement) Rules, 2016. The application submitted by the unit was returned for want of additional details and the unit has not resubmitted the same.
4. As per renewal condition, the unit should have analyzed the parameters of heavy metals such as Arsenic in the ambient Air through Board's laboratory as done for the other parameters such as NO_x, PM₁₀ and SO₂. As the Board Laboratory does not have this facility, the unit should have engaged the services of MoEF &CC/NABL accredited laboratories and furnished report to Board. The unit has not complied with the same and as such there is no authenticated reporting on the presence of Arsenic in the ambient air.
5. During the inspection on 22.2.2018, the unit has been directed to construct a Gypsum pond as per CPCB guidelines. But the unit has not complied till 31.3.2018.

Whereas, the Board has rejected the application No, 11986018 vide reference fourth cited, submitted by the unit for issue of renewal of consent.

In the light of the above said facts it is decided, that in exercise of the powers conferred under Section 33A of Water (Prevention and Control of Pollution) Act, 1974 as amended and under Section 31A of Air (Prevention and Control of Pollution) Act, 1981 as amended, to issue Directions to the unit to stop its production operation. Therefore, in exercise of the powers conferred under 33 (A) of Water (Prevention and Control of Pollution) Act and section 31 (A) of Air (Prevention and Control of Pollution) Act, 1981 as amended in 1987, the Board issues the following direction to the unit of M/s. Vedanta Limited -Copper Smelter, S.F. No. 1 to 7, 1220 to 1225, etc, Meelavittan Part 1 village, Thoothukkudi Taluk and Thoothukkudi District:

1. **The unit shall not resume its production operation without obtaining prior approval/renewal of consent from the Board."**

Order dated 23.05.2018:

"Whereas, the application submitted by the unit of M/s. Vedanta Limited- Copper Smelter Plant, S.F.No. 1 to 7, 1220 to 1225, etc .of Meelavittan Part-1 Village, SIPCOT Industrial Complex, Thoothukudi Taluk and District vide reference second cited for the issue of renewal of consent for the year 2018-2023 has been rejected vide reference third cited due to non compliance of the certain conditions imposed in the previous renewal of consent order issued to the unit vide reference first cited.

Whereas, Board vide reference fourth cited has directed the unit under Section 33A of Water (Prevention and Control of Pollution) Act and Section 31A of Air (Prevention and Control of Pollution) Act that "The unit shall not resume its production operation without obtaining prior approval / renewal of consent from the Board".

Whereas, Joint Chief Environmental Engineer (M)/Tirunelveli vide reference fifth cited has reported that during the inspection of the unit on 18.05.2018 and 19.05.2018, it has been found that the unit was carrying out activities to resume its production operation and recommended for the issue of direction for closure and disconnection of power supply to the unit.

In the light of the above said facts it is decided, that in exercise of the powers conferred under Section 33A of Water (Prevention and Control of Pollution) Act, 1974 as amended and under Section 31A of Air (Prevention and Control of Pollution) Act, 1981 as amended, to issue Directions for closure and disconnection of power supply to the unit.

Now, therefore, in exercise of the powers conferred under Section 33A of Water (Prevention and Control of Pollution) Act, 1974 as amended and under Section 31A of Air (Prevention and Control of Pollution) Act, 1981 as amended, it is hereby directed that the unit Mis Vedanta

Limited -Copper Smelter S,F.No, 1 to 7, 1220 to 1225, etc, Meelavittan Part 1 village, Thoothukkudi Taluk and Thoothukkudi District shall be disconnected with power supply and closed with immediate effect.

This order of closure and disconnection of power supply is issued by the Chairman as per the delegation of powers issued by the Board vide BP.Ms.No.9 dated 11.03.1994.”

Order dated 28.05.2018:

“It is brought to the notice of the Government that Tamil Nadu, Pollution Control Board did not renew the Consent to Operate M/s. Vedanta Limited, Copper Smelter Plant, SIPCOT Industrial Complex, Thoothukudi District in its order dated 9.4.2018. Subsequently, 23.5.2018, Tamil Nadu Pollution Control Board has also issued directions for closure and disconnection of power supply to the Unit. The power supply has been disconnected on 24.5.2018.

2. Under Article 48-A of the Constitution, "the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country".
3. Under sections, 18(1)(b) of the Water Act, 1974 in the larger public interest, the Government endorse the closure direction of the Tamil Nadu Pollution Control Board and also direct the Tamil Nadu Pollution Control Board to seal the unit and close the plant permanently.”

The order of the TNPCB dated 28.05.2018

“Whereas, the unit of M/s. Vedanta Limited – Copper Smelter Plant, S.F. No. 1 to 7, 1220 to 1225, etc. of Meelavittan Part-1, Village, SIPCOT Industrial Complex, Thoothukudi Taluk and District has been issued with Closure and disconnection of EB power supply vide reference first cited subject to the violations as stated therein.

Now the Government vide reference second cited has endorsed the above said closure direction issued by the Tamil Nadu Pollution Control Board and directed the TNPCB to seal the unit and close the plant permanently. In the light of the above said facts it is stated that in exercise of the powers conferred under Section 33A of the Water (Prevention and Control of Pollution) Act, 1974 as amended and under Section 31A of the Air (Prevention and Control of Pollution) Act, 1981 as amended, to issue directions to seal the premises of the unit M/s. Vedanta Limited– Copper Smelter Plant, S.F. No. 1 to 7, 1220 to 1225, etc. of Meelavittan Part-1, Village, SIPCOT Industrial Complex, Thoothukudi Taluk and Thoothukudi District.

Now, therefore, in exercise of the powers conferred under 33A of the Water (Prevention and Control of Pollution) Act, 1974 as amended and under Section 31A of the Air (Prevention and Control of Pollution) Act, 1981

as amended, it is hereby directed to seal the premises of the unit M/s. Vedanta Limited– Copper Smelter Plant, S.F. No. 1 to 7, 1220 to 1225, etc. of Meelavittan Part-1, Village, SIPCOT Industrial Complex, Thoothukudi Taluk and Thoothukudi District with immediate effect.”

The order of the Appellate Authority dated 06.06.2018

“In view of the Government Order passed by the Government of Tamil Nadu in G.O. Ms. No. 72, Environment & Forests (EC-3) Department dated 28.05.2018, directing the Tamil Nadu Pollution Control Board to close the plant permanently, we feel it is not appropriate to hear the Appeals and decide the issue at this juncture.”

43. Sections 31B of the Air Act and 33B of the Water Act and 16(c) and 16(f) of the NGT Act, 2010 are as follows:

Air Act:

“31B Appeal to National Green Tribunal. —Any person aggrieved by an order or decision of the Appellate Authority under section 31, made on or after the commencement of the National Green Tribunal Act, 2010, may file an appeal to the National Green Tribunal established under section 3 of the National Green Tribunal Act, 2010, in accordance with the provisions of that Act.”

Water Act:

“33B Appeal to National Green Tribunal. —Any person aggrieved by,—

- (a) an order or decision of the Appellate Authority under section 28, made on or after the commencement of the National Green Tribunal Act, 2010; or*
- (b) an order passed by the State Government under section 29, on or after the commencement of the National Green Tribunal Act, 2010; or*
- (c) directions issued under section 33A by a Board, on or after the commencement of the National Green Tribunal Act, 2010, may file an appeal to the National Green Tribunal established under section 3 of the National Green Tribunal Act, 2010, in accordance with the provisions of that Act.”*

National Green Tribunal Act:

“16. Tribunal to have appellate jurisdiction. -Any person aggrieved by,-

- (c) directions issued, on or after the commencement of the National Green Tribunal Act, 2010, by a Board, under section 33A of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);*
- (f) an order or decision, made, on or after the commencement of the National Green Tribunal Act, 2010, by the Appellate Authority under section 31 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981);*

may, within a period of thirty days from the date on which the order or decision or direction or determination is communicated to him, prefer an appeal to the Tribunal.”

44. It is undisputed that this Tribunal is an Appellate Authority as far as orders of closure under the Air Act and the Water Act are concerned. The impugned orders dated 12.04.2018, 23.05.2018 and 28.05.2018 are such orders. Mere fact that an appeal against the order declining renewal of Consent to Operate is provided for and was filed cannot be in the facts and circumstances of the present case, be a bar to exercise of powers of the Appellate Authority by this Tribunal. As already noted, the Appellate Authority has declined to proceed with the matter. The grounds in the impugned orders dated 09.04.2018, 12.04.2018, 23.05.2018 and 28.05.2018 are identical. If the appeals are held to be not maintainable, the appellant will be without any remedy against the order of closure. Order of the Appellate Authority is also appealable before this Tribunal under Section 16(f) of the NGT Act, 2010. We, thus, do not find any merit in this case in the objections of the respondent.

45. Mere fact that the State of Tamil Nadu also endorsed the order of the TNPCB and that order of the State is not appealable to this Tribunal, does not deviate from the legal position that order of TNPCB is appealable to this Tribunal. Moreover, order of the State of Tamil Nadu is not a policy matter but mere endorsement of order of the TNPCB.

46. The judgments relied upon by the respondents are distinguishable. Unlike *Educanti Kistamma v. Deokar's Distillery*¹¹, this is not a case where the first order has not been

¹¹ (2003) 5 SCC 669

challenged. Challenge before us is to the first order as well as subsequent orders. Basis for all the orders is common.

47. In the earlier round of litigation when the matter was considered by this Tribunal in its judgment dated 08.08.2013, dealing with the objection of maintainability of the appeal, the Tribunal observed as follows:

“62. Another aspect that would support the view that we are taking is the doctrine of necessity. Wherever in the facts and circumstances of the case, it is absolutely inevitable for a person to exercise another right available to it under the statute and where it is unable to exercise the preliminary right of appeal because of nonexistence or non-proper constitution of the Appellate Authority and for its effective and efficacious exercise of right, it becomes necessary for the appellant-company to invoke another remedy, then the same would be permitted unless it was so specifically barred by law governing the subject and the rights of the parties. It was upon the appellant-company, particularly keeping in view the emergent situation created by issuance of the order dated 29th March, 2013, to avail of its right to appeal without any undue delay and as was rightly done by it within two days of the passing of the order. The unit of the appellant-company had been directed to be shut down and the appellant-company obviously could not have taken recourse to the remedy under Section 31 of the Air Act as the authority itself was not properly constituted and was not functional. Besides the aid of the doctrine of necessity, the appellant-company has also placed its reliance on Section 31B of the Air Act. An appeal against the order passed by the Appellate Authority in exercise of its powers under Section 31 of the Air Act lies to the NGT in terms of Section 31B of the Air Act. In other words, the appellate order passed by the proper authority under Section 31 of the Air Act is appealable to the NGT in terms of Section 31B. Thus, the NGT is the Appellate Authority of the Appellate Authority constituted under Section 31 of the Air Act by the State Government. The appellant-company has itself given up its right of first appeal before the Appellate Authority in view of the peculiar facts and circumstances of the case. The respondents have placed reliance upon the judgment of the Supreme Court in 2010 (11) SCC 557 where the Court had taken the view that no higher authority in the hierarchy or an appellate or revisional authority can exercise the power of the statutory authority nor the superior authority can mortgage its wisdom and direct the statutory authority to act in a particular manner. Firstly this judgment on facts and law has no application to the present case. Secondly, the non-constitution of the authority itself would bring the present case outside the application of the judgment of the Supreme Court in the case of Manohar Lal (supra).”

48. The order of the Government of Tamil Nadu issued under Section 18(1)(b) of the Water Act also cannot be said to be an

independent order but relied on and endorsing the views of the TNPCB which is under challenge and that are not sufficient for ordering closure or refusal to grant even consent. If there are no other materials for the Government of Tamil Nadu to arrive at conclusion of closure on the ground of irreversible pollution being caused to the environment allowing the unit to function, then it cannot be said to be a policy decision to close down the industry permanently and if any order was passed based on the order by the Pollution Control Board, without independent application of mind and arbitrarily, then that can also be incidentally considered by the Tribunal for the purpose of deciding the question of legality of that order. So, under the present circumstances, it is not a case of this Tribunal entertaining the appeals where there is inherent lack of jurisdiction to entertain the same.

49. In the present proceedings, as already noted, the Appellate Authority having declined to proceed with the matter and the order of closure being appealable before this Tribunal, there is no ground to reject the appeal on the ground of maintainability so as to deprive the appellant any judicial remedy in the matter.

ON MERITS

50. As already noted, the reasons for refusal to grant consent and thereafter to close the unit of the appellant are:
- i. Not furnishing groundwater analysis report;
 - ii. Not removing copper slag stored along the River Uppar and not constructing physical barrier between the river and the slag.
 - iii. The unit did not have authorization to generate and dispose hazardous waste;

- iv. The unit has not analyzed parameters of heavy metals in the ambient air quality;
- v. The unit has failed to construct gypsum pond as per CPCB guidelines.

51. The grounds in the impugned orders can hardly be sustainable to justify the impugned orders. With regard to (i), we find that the ground water analysis reports are available with the TNPCB. If anything was still required to be done in that regard by the appellant, this could not be a ground for rejecting consent for renewal or for closing the unit without opportunity of hearing to the appellant. Even if there is a technical breach as contended on behalf of the respondents, the breach is trivial in nature causing no prejudice to anyone.

52. With regard to (ii), copper slag is not found to be hazardous nor has been found to be obstructing the flow even on visit of the site by the Committee. Physical barrier could be directed to be constructed for the entire area. The fact remains that there was no opportunity given in this regard to the appellant to comply with any such requirement. On this ground, refusal of consent to a running unit and its closure could not be justified.

53. With regard to (iii), expiry of authorization under the Hazardous Wastes (Management, Handling and Trans boundary Movement) Rules, 2016 could not be a plea against the appellant as it had already submitted the requisite application. It was TNPCB itself which was sitting over the matter. Moreover, no harm has been caused by such technical breach.

54. As regards the fourth ground of failure to analyse parameters in the ambient air quality, there is nothing to show that the appellant caused any violation of air quality norms. The

appellant had conducted analysis and there was no requirement of analysis to be done in a particular laboratory in absence of TNPCB not having its own lab as stated in the impugned order itself.

55. The fifth ground, of not constructing gypsum pond as per the CPCB revised guidelines, is unfounded as time to do so is still available and pond had been earlier constructed as per guidelines then applicable.

56. Once it is so, the impugned orders are liable to be quashed.

57. We may note that power conferred on the Pollution Control Board under the Water Act and the Air Act is meant to subserve the object for which the Pollution Control Boards have been set up. The Water Act has been enacted to provide for prevention and control of water pollution. The Pollution Control Boards are machinery for the purpose. Similarly, Air Act has been enacted to provide for prevention, control and abatement of air pollution and the Pollution Control Boards are machinery for the said purpose. The statutory requirements of Consent to Establish and Consent to Operate are for the purpose of ensuring control of pollution. In the present case, the TNPCB has adopted hyper technical approach unmindful of object of law. So long as establishment is complying with the Pollution Control norms and is willing to take further precautionary steps, the Pollution Control Boards cannot arbitrarily close such establishments on hyper technicalities, as has been done in the present case. We expect TNPCB to have more focused and professional approach in performing its regulatory functions.

58. As already noted, the allegations against the appellant unit have been subject matter of earlier proceedings. The Madras High

Court had directed closure of the appellant unit which was set aside by the Hon'ble Supreme Court in (2013) 4 SCC 575. The approach adopted was that the closure should be ordered only if it is necessary for protection of environment and the unit cannot be made compliant even after taking steps. In this context, reference may be made to the following observations:

“42.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.”

“48.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.”

“50.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.”

59. Again, in the judgment of this Tribunal dated 08.08.2013 (supra), it was observed that cogent evidence is required as against mere suspicion for ordering closure of unit. Setting aside the order of closure on the ground of alleged air pollution, this Tribunal observed:

“47. There are no medical records to show that the people had actually suffered eye irritation, throat irritation and suffocation on 23rd March, 2013 in the morning hours, as a result of release of SO₂. It is a mere assumption on the part of the doctors. Even if we assume for the sake of arguments that people had suffered as a result of release of obnoxious gases in the air, then also, there has to be a definite link between the plant of the appellant company at that relevant time and emission of excessive gases from the said plant during that hour. This had to be established by ocular, documentary and scientific data by collecting samples of the stack and Ambient Air Quality at the relevant time, which again has not been done in the present case. In fact, the Special Expert Committee has observed in its report 'the cross wind levels having an impact on ambient SO₂ levels contributed by nearby industries.’”

“49. On the cumulative analysis of the above facts, circumstances and evidence, we are of the considered view that the alleged incident of leak or excessive emission of SO₂ from the premises of the appellant-company's plant is founded on a mere suspicion and the allegation that it resulted in a health hazard is based upon a mere apprehension or unfounded suspicion and is certainly not supported by any cogent evidence. The Respondent Board has certainly not placed before the Tribunal any study in consonance with the scientific methodologies for the entire period from 23rd March, 2013 to 29th March, 2013 to substantiate their plea of excessive emission released by the appellant-company resulting in serious health hazards to the residents.’”

“140. Shutting down an industry amounts to 'civil death' of the company. A direction of closure in relation to a running unit not only results in stoppage of production but has far reaching economic, social, and labour consequences. Before directing the civil death of a company, the decision making authority is expected to have before it some reliable and cogent evidence. An inquiry into the incident or accident of breach by the industrial company should be relatable to some reasonable scientific data. There should be a direct nexus between the leakage of gas, the source of leakage and its effect/impact on ambient air quality and public health. These are the sine qua non and not conditions to be satisfied post-order.’”

“141. We have also held above that there is no direct or even indirect evidence to show that there was no possibility of leakage of gas or excessive emission from any other industry

except the appellant-company. The Respondent-Board in fact has not even brought its case with reasonable probability in contradistinction to the above beyond reasonable doubt.”

“142. The action taken by the Board on 29th March, 2013 directing closure of the appellant-company's unit was not as much of a preventive direction with reference to precautionary principle as it was a punitive measure, recourse to which was taken on the premise that there was excessive emission on 23rd March, 2013 and it had caused health hazards to the people residing 6-8 kms. away from the appellant company's unit. It could not be prevented as according to the Respondent-Board itself, the event had already happened and it was not an anticipated action. At best, it was partially preventive and primarily punitive so that firstly, the people do not suffer eye irritation, throat irritation or suffocation in future and secondly, because complaints in that regard had already been received. The parameters for taking punitive action are entirely different to the ones that may be required for passing directions as per precautionary principle. Since there was no reasonable scientific data and the Respondent-Board itself did not even care to collect stack and ambient air quality samples post-23rd March, 2013, we fail to understand as to how such an order could be passed, particularly in view of the admitted position that there are large number of industries in SIPCOT and out of which quite a few industries are heavy and 'red' category industries in relation to causing pollution. They were admittedly discharging gases. It is also equally true that the alleged health problems could result from discharge of other gases besides SO₂. The order passed by the Respondent-Board is not based on precautionary principle but is a punitive direction in terms of Section 5 of the Environment (Protection) Act, 1986. As a condition precedent to punitive action, it ought to have been established that there had been excessive emission from the stack of the appellant-company's unit and that the ambient air quality analysis showed presence of SO₂ primarily attributable to the appellant-company's plant and then it had travelled to the villages 6-8 kms away and had affected the health of its' residents. Once this was established as a ground for punitive action, that itself could form a valid basis for passing the preventive order in relation to future. In the case of punitive action, it should be tested on the touchstone of validly proved action while in a preventive order, it could be done as per a reasonable apprehension of a prudent person. Stringent proof and specific scientific data is the very crux for passing such direction and absence thereof would vitiate the action taken.”

60. Though the learned Senior Counsel appearing for the Government of Tamil Nadu and for the TNPCB relied on certain opinions made by certain experts in their articles regarding the possible pollution being caused by gypsum waste as well as copper slag, there is no scientific evidence to accept that as such. Further these opinions were formed by the authors of

those articles based on the technology available in dealing with those factories during 1950 and prior to that. Technology has changed, and the reduction of the impact of by products on environment could be reduced to a larger extent on account of the new scientific methods available in manufacturing the main project by the industry. Further it is seen from the documents produced by both the parties that the base value of TDS level in and around Tuticorin is more than 4000 (Four Thousand) i.e., far higher than the standard prescribed by the authorities. Further even as per the reports of CPCB and TNPCB is clear that copper slag as well as gypsum waste are not leachable and non-hazardous. It was recommended for even land filling, road formation, manufacture of cement, etc. If it is a material causing pollution, then this would not have been recommended by the authorities for these purposes as well. Further there is no evidence to show that even assuming that certain components in the water are higher than the standard provided, it has caused any health hazards in the locality and the pollution caused on account of the same to the environment is irreversible and irremediable. Unless such things are satisfied by the authorities by scientific data, it cannot be a ground for refusal to grant consent or permanently close an industry. There is a duty cast on the SPCB as well as CPCB to provide remedial measures to prevent environmental pollution by the industries in such circumstances and without adopting those remedial measures refusing the consent and direct closure on that ground is illegal and not sustainable in law.

61. The documents produced by the appellant shows that there was no possibility of Joint Inspection being conducted on 18.05.2018 and 19.05.2018 as claimed by the Board authorities to pass the order of closure and seal the unit. There is no

evidence produced on the side of the respondents to prove that any notice of such inspection was given and copy of the report has been furnished to the appellant to remedy the shortcoming if any noticed at the time of inspection as contemplated under Section 26 of the Air Act and Section 27 of the Water Act, and by virtue of Section 26 (2) of the Air Act, such report if violates Section 26 (3) and (4) of that Act is not admissible in evidence. So, relying on such inadmissible document by the authority without giving an opportunity to the appellant to meet the same is arbitrary and order based on that is illegal and liable to be set aside.

FURTHER ISSUES ARISING FROM REPORT OF THE COMMITTEE

62. As already noted, the Committee was constituted by this Tribunal to ensure that even though the grounds in the impugned orders were not sustainable, the TNPCB and the interveners could be given further opportunity before an independent forum. The Committee could ascertain whether operation of the appellant unit would have adverse impact on the environment.

63. In the course of its working, the Tribunal is guided by the principles statutorily laid down under Section 20 of the NGT Act including the Precautionary Principle. We do not see any merit in the objection raised on behalf of the State of Tamil Nadu/TNPCB that appointing of such a Committee amounted to delegation of judicial functions. This Tribunal is certainly entitled to ascertain facts on the ground by a fair and credible expert mechanism. Section 19 of the NGT Act is to the effect that the Tribunal is not bound by procedure laid down by the

C.P.C. but is to be guided by the principles of Natural Justice. The Tribunal can regulate its own procedure. It is not bound by rules of evidence under the Evidence Act. In certain matters specified under Section 19(4), the Tribunal has the powers of Civil Court. We do not see any bar to the procedure followed by the Tribunal in the present case in appointing a Committee to ascertain facts, to be gathered by spot visit and by hearing all concerned. In doing so, the adjudicatory powers of the Tribunal have not been in any manner delegated. It is the Tribunal which has to adjudicate on the appeal and also to decide what weight is to be attached to the facts and data or even opinion in the report of the Committee. The Committee was headed by a former Chief Justice of High Court with other technical experts nominated by the CPCB and the MoEF. We do not see any reason not to look into the report of the Committee.

64. Moreover, order of the Tribunal was assailed before the Hon'ble Supreme Court and the Hon'ble Supreme Court directed the Tribunal to decide the matter on maintainability as well as on merits, after receiving the report of the Committee.

65. We make it clear that even without the report of the Committee, the appellant had made out a case for interfering with the impugned orders.

66. Thus, the judgments in *Jamal Uddin Ahmad vs. Abu Saleh Najmuddin and Ors.*,¹² and in *State of West Bengal vs. Subhas Kumar Chatterjee and Ors.*¹³, *Padam Sen & Anr. V. State of UP*¹⁴ and *Amiya Bala Paul Vs. Commissioner of Income Tax, Shillong*¹⁵ relied upon by the learned Counsel for the respondent, laying down that judicial functions cannot be delegated, have no

¹² (2003) 4 SCC 257, Para 14

¹³ (2010) 11 SCC 694, Para 9, 20, 21, 25 and 27

¹⁴ (1961) 1 SCR 884

¹⁵ (2003) 6 SCC 342, Para 15

relevance to the present context. In the present case, there is no delegation of judicial functions.

67. Even if the Committee appointed by this Tribunal has exceeded its power and recorded certain findings which ought to have been passed by the Tribunal on the Judicial side, there is no bar for the Tribunal to rely on the materials collected by the Committee for arriving at such a conclusion and that materials can be independently considered by the Tribunal for deciding the question as to whether impugned order passed by the Lower Authority was proper or not, as the observations and findings recorded by the Committee are not binding on the Tribunal. Even both the parties were relying on certain observations and materials collected by the Committee for the purpose of substantiating their cases. So, under such circumstances the submission made by the Counsel for the respondents and intervener that the report of the Committee has to be totally eschewed as such has no force.

68. The report of the Committee shows that the Committee conducted site visits, conducted inspection of the copper slag, copper smelter unit, gave a public hearing to the interveners as well as the parties on about seven days. It was found that the river near the copper slag was dry. A retaining wall had been built covering 1/3 of the entire area of the slag dump site. The site slag was non-hazardous but could cause air pollution on windy days or contaminate the water. The Committee also noticed leakage of Sulphuric acid which could not be handled on account of sudden closure. Copper concentrate was combustible. Copper slag had solidified in a hardened rock. We appreciate the efforts of the Committee.

69. Since we have independently held the impugned orders to be non-sustainable and closure to be unjustifiable, only further question for consideration is whether suggestions of the Committee in Para-4 should be accepted and, if so, to what extent.

70. Learned Senior Counsel for the appellant has not raised any objections against suggestions (a) to (j), (l), (q), (v), (w), (x) and (y). The same may be complied by the appellant.

71. As regards suggestion (k), the matter is covered by the judgment of the Hon'ble Supreme Court in *Sterlite Industries (supra)*¹⁶.

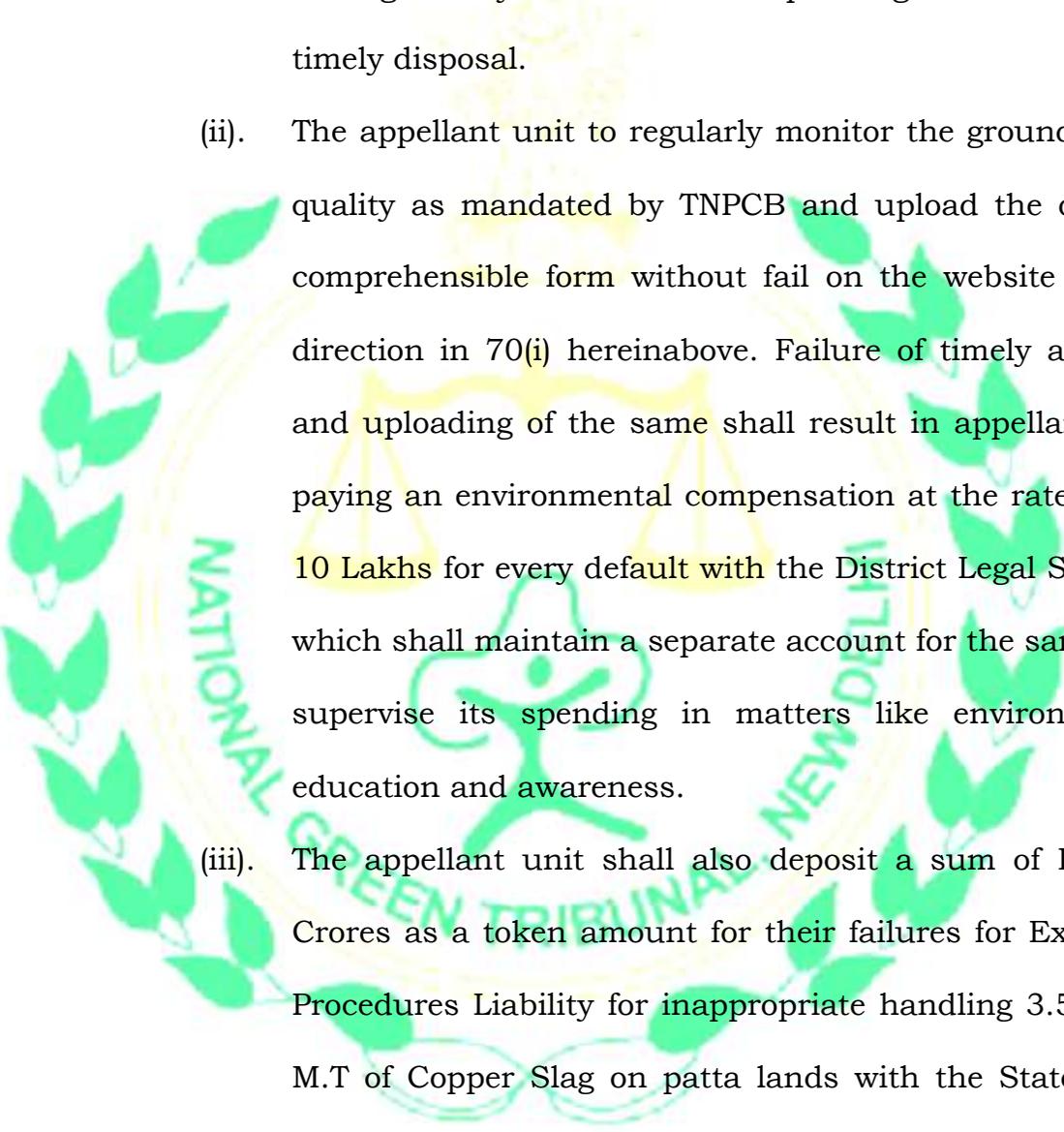
72. As regards suggestion (r), this is not a matter within the purview of this Tribunal.

73. As regards suggestions (s), (t) & (u) matter is to be considered by the joint committee of TNPCB and CPCB after giving due hearing to the appellant. The guiding principle for decision making need to be adherence to meeting the laid down standards/norms under the Environment (Protection) Act, 1986 and Rules framed thereunder irrespective of pathways adopted for pollution prevention, abatement and control.

74. The CPCB and TNPCB must jointly work on revised parameters of Total Dissolved Solids (TDS) etc. keeping in view the prevailing high TDS in the area for regulating the discharge of industrial effluents within two months.

75. Apart from the above directions, we are of the view that the appellant may, on 'Precautionary Principle', take following steps in the larger interest of safeguarding environment:

¹⁶ (2013) 4 SCC 575

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- (i). The appellant unit to create a dedicated and interactive website with participatory Public Forum wherein the affected stakeholders can lodge their environmental related grievance for the time bound redressal and disposal by unit. This website should be widely publicized and have links with the website of the District Administration, TNPCB and CPCB which shall be the oversight body to monitor such public grievances and its timely disposal.
- (ii). The appellant unit to regularly monitor the ground water quality as mandated by TNPCB and upload the data in comprehensible form without fail on the website as per direction in 70(i) hereinabove. Failure of timely analysis and uploading of the same shall result in appellant unit paying an environmental compensation at the rate of Rs. 10 Lakhs for every default with the District Legal Services which shall maintain a separate account for the same and supervise its spending in matters like environmental education and awareness.
- (iii). The appellant unit shall also deposit a sum of Rs. 2.5 Crores as a token amount for their failures for Extended Procedures Liability for inappropriate handling 3.5 lakhs M.T of Copper Slag on patta lands with the State Legal Services Authority for creating and maintaining the environmental awareness in the area through the District Legal Services Authority by preparing a comprehensive action plan.
- (iv). The appellant unit shall give timelines for effective compliance with respect to “Conclusions” in the report of Committee at Sr. No. 4(e), 4(f) and 4(g) and the same shall be uploaded on the said website. The progress thereof

shall be monitored not only by general public through Public Forum but also by the oversight body comprising of District Administration, TNPCB and CPCB. Any non-compliance with regard to non-adherence to timelines shall entail an environmental compensation of Rs. 10 lakhs per default.

(v). The appellant unit shall ensure effective and environmentally safe management of Copper Concentrate, Sulphuric Acid including its leakage, leachate management of Gypsum Pond leachate and stored Copper Sulphate electrolyte etc. The District Administration and appellant unit shall prepare off-site and on-site Emergency Plans respectively and upload these plans on said website and conduct regular mock drills towards meeting environmental emergency in case of any environmental accident/incident.

(vi). In addition to above, the safe handling of effluents and emissions including solid waste should be done by a monitoring group comprising of TNPCB, CPCB, and representative of District Administration at regular intervals and have the same uploaded on the said website in comprehensible form for creating awareness on functioning and environmental performance of appellant unit.

76. During the hearing, it was submitted on behalf of the appellant that recommendations of the CPCB could not be carried out for safety measures on account of non-cooperation of the District Administration. If it is so, the District Administration has, by not cooperating in complying with directions passed in this Tribunal's Orders dated 09.08.2018 and 20.08.2018 for

carrying out the recommendations of the CPCB to handle the hazardous situation, has virtually put the public safety at risk. The Collector, Thoothukudi District may now ensure compliance forthwith to ensure public safety. Any failure will invite coercive action.

77. During the hearing, learned Senior Counsel for the appellant made the statement that the appellant is willing to spend further amount of Rs. 100 Crores for welfare activities for the inhabitants of the area as a goodwill measure. The amount may be spent on projects like water supply, hospital and health services and skill development in the area. We take the statement on record and in view of the said statement, we direct the Appellant Unit to spend the amount of Rs. 100 Crores within a period of three year for welfare of the inhabitants in the area. The action plan prepared for utilization of the amount be got approved from MoEF&CC which may also oversee the compliance thereof. Such action plan and progress achieved in implementation of said plan may also be uploaded on the said website for the purpose of dissemination.

78. Accordingly, we allow this appeal, set aside the impugned orders and direct the TNPCB to pass fresh order of renewal of consent and authorization to handle hazardous substances, in the light of above finding, subject to appropriate conditions for protection of environment in accordance with law within three weeks from today. The appellant will also be entitled to restoration of electricity for its operations. This will be subject to the appellant complying with directions in paras 70, 75 and 77 above.

79. The appeal stands disposed of accordingly. All pending applications also stand disposed of.

Adarsh Kumar Goel, CP

Raghuvendra S. Rathore, JM

K. Ramakrishnan, JM

Dr. Satyawan Singh Garbyal, EM

Dr. Nagin Nanda, EM

December 15, 2018
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