

BEFORE THE NATIONAL GREEN TRIBUNAL
SOUTHERN ZONE, CHENNAI

Appeal No.30 of 2015 (SZ)

In the matter of

1. Bimal Gogoi,
P.O. Golaghat,
Assam.

2. Rohit Choudhury,
P.O.Lokhujan Village, Garmur,
Bokakhat 785 612
Golaghat, Assam.

.. Appellants

Vs.

1. State of Arunachal Pradesh
Thro' the Principal Secretary,
Environment & Forests,
Government of Arunachal Pradesh,
Itanagar 791 111.

2. Union of India,
Thro' the Secretary,
Ministry of Environment and Forests,
Paryavaran Bhawan, CGO Complex,
Lodhi Road, New Delhi 110 003.

3. Athena Demwe Power Pvt. Ltd. (ADPPL)
Thro' its Managing Director,
1st Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi 110 066

4. Forest Advisory Committee,
Thro' the Member Secretary,
Paryavaran Bhawan, CGO Complex,
Lodhi Road, New Delhi 110 003

5. National Board for Wildlife,
Thro' the Member Secretary,
Paryavaran Bhawan, CGO Complex,

Lodhi Road, New Delhi 110 003

6. State of Assam,
Thro' the Chief Secretary,
Government of Assam,
Dispur, Assam 781 006

.. Respondents

Counsel appearing for the appellants:

M/s.Rahul Choudhary & Mr.Ritwik Dutta

Counsel appearing for the respondents

Mr.ADN Rao and Mr.Sudipto Sircar for R1

Mrs.M.Sumathi for R2, R4 and R5

Mr.Tarun Johri for R3

ORDER

Present:

Hon'ble Shri Justice Dr.P.Jyothimani, Judicial Member

Hon'ble Shri P.S.Rao, Expert Member

Judgement delivered by Dr.P.Jyothimani

Judicial Member

24th October, 2017

Whether judgment is allowed to be published on the Internet .. Yes/No

Whether judgment is to be published in the All India NGT Reporter .. Yes/No

The issue involved in this appeal relates to Demwe Lower Hydroelectric Project (HEP) (1750 MW) in Lohit District of Arunachal Pradesh undertaken by M/s. Athena Demwe Power Ltd. The project envisages construction of a Concrete Gravity Dam of 163.12 m height above deepest foundation level (124.8 m above average river bed level) across river Lohit in Lohit District, Arunachal Pradesh by the 3rd respondent being the project proponent. The Ministry of Environment, Forest & Climate Change (MoEF & CC) has

granted Environmental Clearance (EC) for the said project on 12.2.2010. The appellant herein, has challenged the validity of the said EC before the Principal Bench of the NGT in Appeal No.8 of 2011. The Tribunal, in which one of us (Justice Dr. P. Jyothimani was a party), in its final judgment dated 13.1.2015, has dismissed the appeal, upholding the validity of the EC granted by the MoEF & CC.

2. The present appeal which was originally filed before the Principal Bench of NGT as Appeal No.92 of 2013 is directed against Stage I Forest Clearance and Stage II Forest Clearance dated 1.3.2012 and 3.5.2013 respectively granted by the MoEF & CC under Section 2 of the Forest (Conservation) Act, 1980 (FC Act) and the subsequent order of the Government of Arunachal Pradesh, Department of Environment and Forest, Itanagar dated 26.7.2013 granting permission for diversion of 1415.92 ha (1408.30 ha surface land + 7.62 ha underground land) of forest land for construction of HEP in favour of the 3rd respondent, was subsequently transferred to the Southern Zone Bench and re-numbered as Appeal No.30 of 2015.

3. The impugned orders, as stated above, are assailed by the appellants who are the environmental activists from the North East. In fact, when the Stage I clearance was granted on 1.3.2012 that was challenged before the Principal Bench and the said Appeal No.27 of 2012 came to be disposed on 21.11.2012 based on an earlier decision of the Tribunal rendered in VIMALBHAI & OTHERS VS. UNION OF INDIA (Dated 7.11.2012 in Appeal No.7 of 2012) holding that Stage I Forest Clearance cannot be assailed in appeal. The said appeal came to be disposed of

granting liberty to the appellant to pursue their remedy at the appropriate stage. The Principal Bench of NGT in **VIMALBHAI**'s case has also held that in the event of filing of such appeal it will be open to the persons aggrieved to assail the order/clearance granted by the Central Government under Section 2 of the FC Act which forms integral part and sole basis of the order passed by the State Government. Therefore, the appellant seeks to challenge in this appeal Stage I & II Forest Clearance and the consequential order passed by the State Government with various conditions.

4. The project in question and its ecological impact and other features have been elaborately dealt with, while upholding the EC. The challenge of the impugned order in this appeal is on the basis that the Forest Clearances have been obtained from the Government of India based on wrong and misleading and inadequate information submitted by the Government of Arunachal Pradesh. The appellant has cited some of the instances of challenge which include the contents of the proposal by the Principal Secretary, Department of Environment and Forest of the State of Arunachal Pradesh wherein the Government is stated to have informed that rare/endangered species of flora and fauna in the proposed site are not significant and the area does not form part of National Park/Sanctuary/Biosphere Reserve or Elephant Corridor etc, and that the area does not have importance from archaeological point of view.

5. The case of the appellants is that the location of the proposed project is in the midst of several ecologically and culturally important sites and there are a variety of common wild animals and birds and it is one of the 34

biodiversity hotspots identified globally and therefore the project would have impact on the flora and fauna. Further, the appellants refer to a scientific inspection conducted by the Deputy Conservator of Forests (Dy.CF) which according to them is a misleading information. To a question 'Whether forest area proposed for diversion is important from wildlife point of view or not?' the reply given by the Dy.CF is in the negative. On the other hand, it is the case of the appellants that there are several Schedule I species available in the area and by the proposed project of diversion of forest land natural migratory routes of species will be affected. In respect of vegetation, it is stated by the Dy.CF that effect of removal of trees will have little impact since the area proposed for diversion is along the river bank and it is a small area in the valley. This is also misleading. According to the appellants this is unscientific and arbitrary and in the case of 1400 ha of forest land deliberate suppression has been made as if only an insignificant portion of the forest land will be affected. Again in respect of a question that whether the proposed diversion is affecting socio cultural/religious values, the answer is given in the negative and according to the appellants the site is known as Tailung by the local Mishmis and it involves larger portions of community forest which are connected with social and cultural life of the community and therefore a simple word of 'No' is a clear case of suppression.

6. The appellants also state about an answer given by the Dy. CF to a question as to whether the project is situated in the area forming part of National Park, Wildlife Sanctuary, Biosphere Reserve, Tiger Reserve, Elephant Corridor and as to whether any rare/endangered/unique species of flora and fauna are available in the area and as to whether any protected

archaeological/heritage site/defence establishment or any other important monument is located in the area, the answer for all these questions is simple 'No'. The appellants find fault with the report of the Dy.CF that various species mentioned in Schedule I of the Wildlife (Protection) Act, 1972 have been wrongly recorded like Sloth Bear is called as *Belusus greinus* which is actually called *Melursus ursinus*. Likewise, the Himalayan Black Bear is described as *Selenarctos tibetanua* which is actually called as *Ursus thibetanus* and therefore even the scientific names are not properly given in respect of the species present in the area. In respect of a question regarding the requirement of forest and as proposed by the user agency is whether unavoidable or barest minimum for the project, the answer given is 'yes' and that is without any explanation which in fact requires detailed opinion and scientific recommendation. In cases of the National Park or Wildlife Sanctuary, Tiger Reserve etc., a description of all sites of ecological significance and rich in wildlife and bio diversity and which are going to be impacted by forest diversion, ought to have been described which has not been done.

7. The appellants also challenged the impugned orders on the ground of wrong and inadequate information of wildlife habitats, biodiversity rich areas and ecologically and culturally sensitive areas. It is the case of the appellants that while obstruction sought to be created on forest land which will destroy the natural migratory route of wild aquatic fauna, there is no mention about the same. The appellants also referred to the Important Bird Area (IBA) and Chapories of Lohit River which covers the entire riverbed of the Lohit from Brahmakund Bridge to the Assam – Arunachal Pradesh border which forms an area crisis crossed by numerous channels turning it

into a complex of waterbodies, riverine islands, grasslands and forests. Substantial portions of downstream stretches of the Lohit River are part of forest land. It is also referred about the absence of mentioning of a potential Ramsar site. A reference is also made about the statement of Dr. Anwaruddin Choudhury mentioning the area as a Wild Buffalo conservation site in Arunachal Pradesh whose population is shrinking in Upper Brahmaputra Valley. It is stated that even though Kamlang sanctuary is mentioned, it is not revealed that the area diverted falls within Ecologically Fragile Zone be declared around Kamlang sanctuary. A reference is also made about the Wildlife Conservation Strategy 2002 adopted by the Indian Board for Wildlife stating that areas within 10 KM of National Parks and Sanctuaries are to be declared as Ecologically Sensitive Area (ESA) under the Environment (Protection) Act, 1986. A reference is also made about Arunachal Pradesh State Biodiversity Strategy and Action Plan and the Demwe Lower project submergence extends 23 KM upstream including submergence along the Tidding river which is part of this identified Conservation Priority Site.

8. The appellants have also raised about the presence of medicinal plants particularly the project of the MoEF & CC and UNDP on Medicinal Plants Conservation Areas (MPCAs) in Arunachal Pradesh. Further, the site description of proposed Parashuram Kund is significant and by the proposed project it is likely to be affected. A reference is made about the Expert Opinion of Dr. Darshan Shankar of the Institute of Ayurveda and Integrative Medicine, Bangalore who has written to the leading national level environmental NGO Kalpavriksh. Further, Parashuram Kund being a cultural heritage site of great importance, will be affected by the project and

diversion of forest land and there is no reference about the same in the proposal given by the State Government. A reference has also been made about the Bengal Florican and the Wild Buffalo which are available in abundance and are likely to be affected by the project. The appellants have also referred to the cost benefit analysis provided in the diversion proposal wherein it is stated as a minimum impact on the environment which may be compensated in terms of Net Present Value (NPV) for diversion of forest land. In the absence of any explanation as to how the minimum impact will be caused particularly shifting agriculture which is a dominant traditional land use in the hills of North East India which forms the livelihood of the people living in the area maintaining bio diversity and food security and that was not considered in the Demwe Lower Project.

9. The appellants have also referred to certain anomalies in the process of compliance with regard to Scheduled Tribes and other Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Forest Rights Act, 2006 or FRA) stating that by diversion, at least 882.73 ha of the forest land will be affected being community land. The appellants have stated that the Forest Rights Act, 2006 requires 'consent' from each of the concerned Grama Sabhas for the proposed diversion and according to the appellants it includes those in whose jurisdiction the compensatory and ameliorative measures for the project are required to be done and such consent of Grama Sabhas have not been obtained by the State and therefore the provisions of the Act is impacted and without obtaining 'consent' from the Grama Sabhas if the project is allowed to be proceeded, it will result in *fait accompli* situation. Since the Forest Advisory Committee (FAC) is examining the ecological and social viability of stage I clearance,

compliance of FRA should have been done and it is only after such exercise is completed the decision making process will be completed. There cannot be FAC appraisal without compliance to FRA. Therefore, the FAC before appraisal, ought to have called for FRA compliance, which has not been done in this case. In spite of deficiency of FRA, the FAC has appraised the project as it is seen from the copy of the letter dated 19.11.2012 from Sri V. Kishore Chandra Deo, Tribal Affairs Minister addressed to Ms. Jayanthi Natarajan, Minister of Environment and Forest. The appellants have also referred to an objection raised by one, Soblam Malo, a resident of Lohit District that without the compliance of FRA, the FAC has proceeded for appraisal on 8.5.2013 bringing out a decision of the Hon'ble Supreme Court that non consideration of FRA 2016 at Stage I approval is of violation. The members of FRA 2016 were also informed about the impact of the project of religious, cultural and spiritual significance and therefore requested not to grant Stage II clearance for the project.

10. The appellants have also raised the issue of non application of mind by the FAC. FAC meeting of 7.5.2010 desired to have information of justification of large area required for permanent colony, area for temporary use, large temporary work force, the hydrological aspects of a number of dams at different heights of river and its impact on wildlife in the area. It is the case of the appellants that the present project is not the only first project of the private company and there are other projects like 1415 MW Kalai I project in the upstream of Lohit river which was granted scoping clearance under the EIA Notification, 2006. Further, on the same day viz., 6.8.2007 the scoping clearance was given to the original 3000 MW Demwe

project, apart from granting scoping clearance to 1250 MW Hutong II project. In the next meeting of the FAC dated 20.5.2010 the Demwe Lower HEP project which is stated to be the first of total five dams proposed on the Lohit river, was recommended by the committee with certain conditions and according to the appellants there is lack of application of mind since what was required by the FAC on 7.10.2010 was not discussed particularly relating to the impact on wildlife in the area and there is nothing to show that the issue has been discussed. According to the appellants one of the conditions of recommendation that the State Government will carry out a study on the impact of the project on wildlife and submit a report has no meaning after such recommendation has already been made. The finding of the FAC that the land which is a part of large area viz., jhum land and that the government has already issued acquisition notification and therefore it is not possible to reduce the extent of community jhum land, as part of forest land is irregular.

11. The applicants have also referred to the judgment of the Hon'ble Supreme Court rendered in KARNATAKA INDUSTRIAL AREA DEVELOPMENT BOARD VS. C. KENCHAPPA (2006) 6 SCC 371 wherein the Supreme Court has directed that before acquiring land, the consequences and adverse impact of development on the environment must be comprehended and therefore the acquisition cannot be a ground for setting aside the claim of community jhum land. According to the appellants, when a comparison of FAC decisions dated 7.5.2010 and 20.5.2010 recommending the project, is made, it is contradictory and therefore it is nothing but total non application of mind. The appellants have also referred to the hydrological aspect of a number of dams at

different heights stated in the minutes of the meeting 7.5.2010 which failed to record any of its reasons for the discussions relating to the said hydrological aspect. Such non discussion particularly relating to aquatic life, adjoining forest land, ecological character etc., impacts the recommendation redundant. The appellants have also raised about the non consideration by FAC on the Kamlang Sanctuary hydro ecological changes and their impact on downstream Assam in particular the Dibru Saikhowa National Park and Biosphere Reserve. According to the appellants the whole project affects the hydro dynamics of the Kaziranga National Park cumulatively which are the foot hill projects on the four major rivers in Brahmaputra river basin viz., Subansiri, Slang, Dibang and Lohit.

12. After the appraisal by the FAC, the Standing Committee of the National Board for Wildlife (NBWL) has not conducted any enquiry on the complaint of Akhil Gogoi as referred from the MoEF. The former Union Minister of State for Environment and Forests (independent charge) Sri Jairam Ramesh who is stated to have held a public consultation, has written a letter to the then Prime Minister of India on 10.9.2010 raising serious concern for drawing the attention of the Government of India and according to the appellants this concern has not been considered before the grant of Stage I and Stage II approval. The complaint of Akhil Gogoi which was also forwarded by the Government of Arunachal Pradesh has not been considered by the Standing Committee of NBWL. The complaint made by the said individual along with the reply of the Arunachal Pradesh Government was not placed before the Standing Committee. In the meeting of the Standing Committee held on 13.5.2011 wildlife clearance letter of February, 2012 has not mentioned about this.

13. It is the case of the appellants that Dr. Asad Rahmani, Director, Bombay Natural History Society who is one of the members of the Standing Committee constituted by NBWL was directed to make a site visit has endorsed by saying that the project will affect Wildlife and views of such non official members and objection stated to have been made by the representation of Akhil Gogoi which was supported by at least seven members of the Standing Committee of NBWL have been brushed aside. The appellants have also stated that Hoolock Gibbon ape is extremely rare and confined to only Arunachal Pradesh in India and construction of the Demwe Lower HEP is going to affect the habitat of Hoolock Gibbon. The appellants have also assailed several conditions given in the State Government order reproducing them from Stage I and Stage II forest clearances particularly referring to clause that the entire reservoir area shall be declared as a Reserved Forest complaining that it is not only irresponsible and that after making the ecologically sensitive forest areas to be submerged, there is no purpose to declare as Reserved Forest, particularly when Indian Forest Act, 1927 is not applicable to the State of Arunachal Pradesh and therefore the conditions become meaningless as per Assam Forest Regulation, 1891.

14. It is the case of the appellants that various conditions of Stage I clearance are opposed to the precautionary principle and conditions are imposed after FAC appraisal, rendering Stage I approval meaningless, particularly when the condition states that the State Government will carry out study on the impact on the wildlife. One of the conditions is a comprehensive study is to be conducted on ecological impact on the

environmental changes by the State Government in consultation with the Central Government and the study to be conducted involving Indian Institute of Technology (IIT), Roorkee. The appellants have also stated violations of the provisions of Wildlife (Protection) Act, 1972 that no prior permission from Chief Wildlife Warden of Assam was obtained. The prior permission from Chief Wildlife Warden of Assam as per the said Act cannot be dispensed with on the basis that clearance is sought for from the NBWL Standing Committee, since the project site is located within 10 KM radius of Kamlang Sanctuary. It is stated that the non official members of the Standing Committee had a overwhelmingly uniform view that prior approval of Chief Wildlife Warden of Assam must be obtained under Section 35(6) of the Wildlife (Protection) Act, 1972 but the then Minister for Environment Ms. Jayanthi Natarajan while ignoring the uniform recommendations of all the non official members, ordered granting of clearance without dealing with the issue relating to permission from Chief Wildlife Warden of Assam. The appellants have also stated that the Forest Clearance granted for the project is in violation of the order of the Hon'ble Supreme Court in LAFARGE UMIAM MINING PVT. LTD., VS. UNION OF INDIA (2011) 7 SCC 338 particularly with reference to non compliance of National Forest Policy, 1988. Therefore, raising all the said issues the appellants have chosen to challenge the impugned Forest Clearance.

15. The 1st respondent State of Arunachal Pradesh in the reply dated 28.1.2014 has raised a preliminary objection that the attitude of the appellants is not bonafide in challenging the consequential order of the Government of Arunachal Pradesh dated 26.7.2013 which was given in furtherance of Stage II Forest Clearance granted by MoEF & CC.

According to the 1st respondent, the FC granted by the State Government dated 26.7.2013 in earlier proceedings falls within the State of Arunachal Pradesh and both the appellants are not the people belonging to the State of Arunachal Pradesh and therefore filing of the appeal according to the 1st respondent, is an abuse of process of law and liable to be dismissed. It is further stated that the clearance given by the State Government is based on the recommendation granted by the FAC/MoEF & CC and the State Government has not done any independent activity. A reference is also made by the 1st respondent that even in the appeal filed against the EC granted for the project, impleadment application to implead State of Assam was rejected by the Tribunal in the order dated 18.3.2013 stating that State of Assam is neither a necessary nor a proper party for the determination of the issue and concealing the said fact the appellants have mischievously arrayed the State of Assam as 6th respondent. The diversion area is located 70 KM away from the nearest border of State of Assam and therefore the appellants cannot be a party to this appeal. Even though the point of maintainability is raised based on the period of limitation that the appeal has been filed nine days after the expiry of 30 days limit, the said issue is not pressed, since the 1st respondent has given detailed reply on merits of the appeal. The 1st respondent at the outset states that most of the apprehensions raised by the appellants in the present Forest Clearance case are related to the EC particularly relating to the public hearing process, appraisal of the project by EAC etc.

16. It is stated that some objections were raised by the NGOs M/s. Kalpavriksh Environment Action Group, M/s. Krishk Mukti Sangram Samiti and others during FAC and all the objections and representations were

placed before the respective committee or authority which has deliberated upon the issues and thereafter resolved by EAC, FAC and Standing Committee of NBWL before granting respective clearances. Therefore, raising of the same issues by the appellants which were already raised challenging the EC proceedings, is with an ulterior motive. Various grounds raised while challenging EC are again reiterated in this proceeding which is not permissible particularly when the scope of FC under Section 2 of FC Act is different from grant of EC under EIA Notification, 2006. The various issues raised against the EC proceedings in Appeal No.8 of 2011 which are repeated against the FC proceedings in this appeal, are narrated by the 1st respondent as follows:

- i. Impact on cultural sites like Parshuram Kund, Nimke etc
- ii. Impact on Kamlang Wildlife Sanctuary
- iii. Impact on IBA Site/Chapories/Beels/Dibru-Saikhowa National Park in the downstream areas of the project
- iv. Impact on downstream wildlife i.e., Wild Buffalos, Hog deer, Tiger, Fisheries and Dolphins etc.
- v. Downstream impacts due to flow variation
- vi. Impact on Biodiversity Conservation Priority Sites like “Demwe-Sewak-Tidding Pass”
- vii. Impact on Parashuram Kund Medicinal Plant Conservation Areas (MPCA)
- viii. Impact due to cumulative influx of labour
- ix. Cumulative impact of multiple projects in the Lohit basin

- x. Post clearance study contrary to Precautionary Principle
- xi. Impact of Catchment Area Treatment (CAT) Plan and Compensatory Afforestation and forest rights
- xii. Non consideration of complaint of Mr. K. Krong and Mr. Akhil Gogoi on forest violations etc.

17. It is the case of the State Government that State of Arunachal Pradesh is in the North Eastern most part of the country having immense Hydroelectric Power Potential and the State is drained by major river basins viz., Tawang, Kameng, Subansiri, Dikrong, Siang, Dibang, Lohit and Tirap and the Hydroelectric power potential in the State is assessed as 57,000 MW which is more than 1/3rd of the total Hydroelectric power potential in the country which is 1,48,700 MW. The average per capita power consumption in the State is only 503 KWH (2009 – 2010) which is far below the National average of 739 KWH particularly when the country is facing power deficit of 10.6% and the North East facing 14.1% shortage during 2012 – 2013 and the project in question is to narrow down the prevailing power deficit of the country as a whole. The State is unable to go for much needed industrial development till recent years except Hydro Electric Projects for which huge potential is available and therefore the 1st respondent has formulated and notified the State Hydro Power Policy which is in consequence of the Central Government policy by allotting certain projects to Independent Power Producers (IPP) for development under public private partnership. The project is being executed under joint sector with the Government of Arunachal Pradesh and the State Government is having a stake of 26% equity in the project and the State is going to be immensely benefited by the development of this project when

once it is implemented. The State would be benefited with free energy revenue of about Rs.30,705 Crores during 40 years of its operation and after 40 years the project will be transferred to the Government of Arunachal Pradesh. The 1st respondent has also stated about various developmental activities and benefits of the said project.

18. The Forest (Conservation) Act, 1980 permits unavoidable use of forest land for development purposes and balance the conservation of forests with sustainable development of the country contributing to the better environment, health and economy and therefore the feature of the Act is regulatory and not prohibitory in nature. While denying the allegation that the 1st respondent has concealed certain information and there is deliberate lack of application of mind, furnishing of misleading information, the 1st respondent has chosen to give chronology of events leading to grant of FC. It is stated that the FC has been granted after detailed scrutiny by various competent authorities at every stage from Part I to Part V, by making site visit by the officials of the Forest Department of the State Government, independent site visit of the project area by the Additional Principal Chief Conservator of Forest, MoEF & CC, Regional Office, Shillong, consideration by FAC, detailed scrutiny by MoEF and appraisal by the NBWL standing committee. Therefore, the project was reviewed at various stages spanning over a period of more than four years. Therefore, it cannot be said that FC was granted with non application of mind. It is stated that the Government of Arunachal Pradesh has granted permission to the 3rd respondent project proponent to carry out the field survey and investigation works for the project on 24.1.2008. It is further stated that as per the requirement of FC Act, the 3rd respondent has submitted forest

diversion proposal of the project in Form A to the Nodal Officer with all details. The said proposal was forwarded to the District Forest Officer, Lohit on 5.11.2008 for completing part II of the proposal which includes enumeration of trees etc. As the proposal for diversion falls in the territorial limits of Namsai Forest Division, Anjaw Forest Division and Lohit Forest Division, the Nodal Officer on 19.12.2008 has directed that DFO, Lohit shall be the coordinating officer for all the three divisions for submission of proposal. Afterwards, the DFO, Lohit on a perusal of the proposal on 21.2.2009 has raised queries relating to the identification of the land which was answered by the user agency on 25.3.2009. After the receipt of the approval from the EAC of MoEF & CC for change of installed capacity to 1750 MW, revised proposal in Form A of Part I was submitted by the user agency on 19.6.2009. The site inspection was carried out by the DFO including feasibility study of the proposal, preparation and certification of maps etc., including presence of any rare/endangered/unique species of flora and fauna/protected archaeological/heritage site/defence establishment etc.

19. Thereafter, the Conservator of Forests undertook site inspection in the proposed area for diversion on 4.11.2009 including dam complex, muck dumping area, construction of permanent colony, diversion tunnel outlets and proposed submergence area and found that there is no violation of FC Act noticed, project area falls partly in Denning RF and partly in Kamlang RF and the balance area falls in community land/community forest land, that the requirement of land and the proposal is barest minimum, that the river bank area is in open type forests, that the general composition of forests is eco class I viz., tropical semi evergreen forests, that most of the

species are below 61 CM girth, that in Kande area most of the species are of undergirth with no commercial value or local domestic uses, that the density of vegetation is 0.4 and that the user agency has been advised to take up infrastructural and socio economic developmental activities through Catchment Area Treatment Plan. The Chief Conservator of Forests, who is the Nodal Officer under FC Act, on receipt of Part III Spot Inspection Report of DFO and CCF, satisfied with the recommendation, forwarded his recommendation along with part IV to the Principal Secretary, Department of Environment and Forests, Itanagar on 8.12.2009.

20. The Principal Secretary, after going through the complete proposal, in the absence of any adverse comments, forwarded the State Government's recommendation along with the proposal to the Secretary, MoEF & CC, Government of India, on 23.12.2009 with a request to convey necessary approval under Section 2 of the FC Act, highlighting that the forest type of proposed area is eco class I open forest with varying density ranging from 0.1 to 0.4, that the rare/endangered species of flora and fauna in the proposed site is not significant, that the area does not form part of National Park/Biosphere Reserve or Elephant Corridor etc, that the area does not have importance from archaeological point of view and that the proposal does not involve any violations of FC Act. It is also stated that the proposal of the government contains all annexures viz, list of common plants, list of common animals and birds. The proposal of the State Government is not as if what was found in the area are deliberately suppressed as stated by the appellants. The enumeration of trees is in accordance with various guidelines and based on the details of site inspection by DFO and the area proposed for diversion excluding river bed

is only about 900 ha (9 sq.km) which is very small compared to the total area of Lohit valley which is more than 5,000 sq.km. As far as Archaeological importance particularly with reference to Parashuram Kund it is located 1,300 m along the river course (800 m aerial distance) downstream from the dam axis and Nimkey is located in the upstream and above the reservoir submergence level and both of them are not forming part of the areas proposed for diversion. Further, in so far as it relates to Parashuram Kund, the EAC has considered that adequate mitigation measures which form part of EC have been taken and Parashuram Kund Improvement Society has also given NOC.

21. With regard to National Park/Sanctuary/Biosphere Reserve/Elephant Corridor etc., Kamlang Wild Life Sanctuary (KWLS) is not located within the study area viz., within 10 KM radius of the project site i.e., the dam is located around 11.8 KM along the river and around 8.5 KM aerial distance from the nearest boundary of KWLS and is also not forming part of forest diversion proposal. In so far as it relates to MPCA, it is stated that it does not fall within the project area as its elevation is 576 M and the Full Reservoir Level (FRL) of Demwe Lower HEP is 424.8 m and therefore MPCA is also 150 M above FRL and no construction is envisaged at that level and that there was no adverse impact. The preservation of endangered species is adequately taken care of and the EAC and NBWL standing committee have considered all these issues.

22. The cost benefit analysis provided by the Forest Department is as per the guidelines published by the Government of India and the proposal is for diversion of 1415.92 ha of forest land and the cost benefit analysis

has been evaluated accordingly. The evaluation of loss of forests has been made and around Rs.9.01 Crores is estimated towards crop compensation, and no loss of animal husbandry and public facilities are found and there was no displacement or oustees in the project and therefore there is no resettlement and the environmental losses are compensated in terms of NPV of about Rs.103 Crores for the diversion of forest land. Again regarding evaluation of benefits various aspects have been stated in detail including various welfare measures like provision of free fuel to workers etc. Therefore, cost benefit analysis has been completely studied. In addition to that, it is stated that furtherance to the direction of the Inspector General of Forests, MoEF, New Delhi, the Additional PCCF, Regional Office, MoEF, Shillong inspected the project on 26.3.2010 which contains legal status wise break up of the land proposed for diversion, wildlife, vegetation, the study relating to any violation of the FC Act, rehabilitation of displaced persons if any, cost benefit ratio, recommendations of the Regional Chief Conservator of Forest, utility of the project and number of Scheduled Castes/Scheduled Tribes to be benefited by the project, effect on socio cultural, religious values by the proposed diversion, situation of the Protected Area and all other relevant informations have been referred in detail. The forest diversion proposal of Demwe Lower (1750 MW) HEP has been placed before the FAC, MoEF in the meeting held on 7.5.2010. The FAC has called for certain information, as elicited above. On the said query, the 3rd respondent in the communication dated 17.5.2010 submitted all the informations to the MoEF with a copy to CCF and Nodal Officer, Government of Arunachal Pradesh. Thereafter, the FC met on 20.5.2010 and considered the submissions of the user agency 3rd respondent and after having satisfied that the details are in accordance

with the proposal, has recommended the project, subject to various conditions. The FAC examined and noted that the present proposal is first HEP where highhydro electric potential has been recognised and the aspect of delinking of HEP's from basin study was advised in the report of the Inter Ministerial Group, Government of India which decided not to hold up EC and FC of individual projects for want of basin wise study. It is stated that the Task Force on Hydroelectric Projects Development, Government of India, comprising of Minister of Power and Minister of Environment and Forest, Minister of Water Resources, Minister of Rural Development, Minister of New and Renewable Energy, representative of Planning Commission in the meeting held in October, 2010 unanimously recommended that process of grant of EC and FC could be continued pending completion of sub basin wise impact assessment studies for major tributaries of Brahmaputra river. The cumulative impacts of multiple projects/basin study raised in the instant forest appeal are relating to EC which have already been dealt with by the Tribunal. The government of Arunachal Pradesh in the communication dated 6.8.2010 has furnished the legal status of the forest land to the MoEF.

23. On the objection raised by M/s. Kalpavriksh, the NGO, subsequent to the MoEF proceedings dated 25.6.2010, the user agency in the communication dated 4.1.2011 submitted a detailed reply on the apprehensions raised by the said NGO. In the mean time, for the compliance of the conditions of EC, the user agency has submitted necessary application on 3.12.2010 for wildlife clearance from the Eco Sensitive Zone angle to the State Government, due to the proximity of Kamlang Wildlife Sanctuary which is within 10 KM radius. Based on the

direction of the National Environmental Appellate Authority in the Appeal made against EC, PCCF cum Chief Wildlife Warden, Arunachal Pradesh, Itanagar has constituted a three member committee to study the downstream effects of the project on IBA/Chapories and Dolphins on 17.1.2011 for consideration by NBWL. On receipt of the complaint regarding violation of FC Act in respect of illegal tree felling by the user agency, CCF, Eastern Circle, DFO, Namsai and DFO, Lohit have undertaken field visit on 19.2.2011 on the direction of the Principal Chief Conservator of Forests to make enquiry regarding tree felling. A report was filed reporting that there was no tree felling in the area. In so far as it relates to the complaint of Mr. Akhil Gogoi, the FAC in the meeting held on 10.3.2011 considered the said representation, after getting clarification from the project developer. The FAC desired that the issues will be dealt with by the competent authority viz., State Government and NBWL Standing Committee. The FAC examined the proposal along with the issues raised by the screening agency and recommended for optimization of colony area and saving of trees. Therefore the allegation of non application of mind has no jurisdiction. The complaint of Mr Akhil Gogoi received by the MoEF was forwarded to the Standing Committee of State Board for Wildlife (SBWL), Government of Arunachal Pradesh which in its meeting held on 27.5.2011 has considered the same due to its proximity of KWLS and falling within 10 KM radius. After detailed examination, having satisfied that the finding of the report on river Dolphins and important bird habitats, the Standing Committee of SBWL concluded that there are no adverse down stream impacts foreseen on the river Dolphins . The 1st respondent has also reproduced the summary of the findings of the report regarding Important Bird Habitats and River Dolphins.

24. It is also stated that the Standing Committee of the State Board for Wild Life has examined the contents of the complaint of Mr Akhil Gogoi pertaining to the wildlife aspects relating to impact on wildlife and found that the concern raised by Mr. Akhil Gogoi is lacking merits. Thereafter, the government of Arunachal Pradesh by its communication dated 14.6.2011 has sent the proposal to the NBWL Standing Committee for its consideration. Therefore, at every level there has been detailed consideration of the concern raised by everybody and it cannot be said that the entire process is without application of mind. The complaint regarding forest violation has already been raised by the appellants in the EC proceedings which was considered by the Tribunal. In fact, the finding on the concern of the complainant Mr. Akhil Gogoi regarding various aspects, highlighting various issues was already raised by the private parties. It is stated that the Standing Committee on NBWL in the meeting held on 14.10.2011 examined the recommendations of the Standing Committee of State Board of Wildlife on KWLS and also considering the apprehensions raised in various representations including that of Mr. Akhil Gogoi, has constituted a sub committee, comprising two members to make a first hand assessment. Subsequently, the Standing Committee of NBWL in the meeting held on 13.12.2011 while appraising the project for wildlife clearance has carried out detailed scrutiny on various wildlife issues which includes the issue relating to downstream impact on Dibru-Saikhowa National Park and Biosphere Reserve Chapories of Lohit river, impact on grassland ecology and grassland dependent species such as Bengal Florican, Impact on Gangetic Dolphin, daily fluctuation of water and its adverse impact, impact on Asiatic wild buffalo along with impact on MPCA,

Parashuram Kund etc. After examination of the same, the project was granted NBWL clearance by its recommendation the MoEF & CC on 11.2.2012. The NBWL Standing Committee has imposed various conditions. In so far as it relates to downstream impact of Dibru Saikhowa National Park, Biosphere Reserve, Chapories of Lohit river, IBA, impact on grassland ecology and grassland dependent species etc., issues were raised by the appellants before the Tribunal in the appeal relating to EC and the same has been elaborately dealt with by this Tribunal.

25. After the receipt of NBWL clearance, the State Government in its letter dated 17.2.2012 addressed to the Secretary, MoEF, has requested grant of approval of the Central Government under Section 2 of FC Act and for diversion of 1415.92 ha of forest land for the project. The MoEF, after considering the NBWL clearance and the State Government report and after satisfied with the recommendations of the State Government and NBWL, granted Stage I Forest approval to the project on 1.3.2012 subject to certain conditions. Thereafter, the Government of Arunachal Pradesh on 22.3.2013 submitted detailed compliance report to the MoEF for the grant of Stage II Forest Clearance enclosing documents relating to FRA over the proposed diversion area, optimized layout plan of colony area, study report on wildlife impact on project area, details of forest payments i.e., NPV, CA etc paid by the user agency along with compliance of other conditions. The MoEF being satisfied with the compliance of Stage I FC dated 1.3.2012, has granted Stage II FC to the project on 3.5.2013 reiterating the conditions stipulated by the NBWL Standing Committee which also relates to the cumulative impact assessment study. After the receipt of the Stage II Clearance from the MoEF, the Government of Arunachal Pradesh issued

consequential order on 26.7.2013. Therefore, according to the 1st respondent, when such elaborate measures have already been taken for the sustainable development and all the authorities have dealt with every aspect of the project, there is nothing for the appellants to continue to complain that the impugned orders are passed without application of mind and therefore the appeal is liable to be rejected.

26. Respondent Nos.2,4 & 5 viz., MoEF & CC , FAC and NBWL respectively in their reply dated 16.1.2014 filed through the Senior Assistant Inspector General of Forests, Ministry of MoEF, New Delhi have raised the preliminary objection of limitation by calculating the date from the Stage I clearance on 1.3.2012 and Stage II clearance on 3.5.2013 while the appeal came to be filed on 10.9.2013. That apart, it is the case of the 2nd respondent that the 4th and 5th respondents are not necessary and proper parties. It is further stated by the said respondent that the Government of Arunachal Pradesh has submitted a proposal to obtain prior approval of the Central Government under Section 2 of the FC Act on 23.12.2009 for diversion of 1415.92 ha of forest land (1408.30 ha surface land + 7.62 underground land) for the construction of 1750 MW Demwe Lower Hydroelectric Project in Lohit District of Arunachal Pradesh in favour of the 3rd respondent. The total land involved for the construction of the said project is about 1589.97 ha out of which 174.05 ha land is non forest land and the balance 1415.92 ha is forest land. The Regional Office of MoEF, Shillong by its letter dated 26.3.2010 submitted the site inspection report, as requested by MoEF by letter dated 28.1.2010. The report covered various aspects which include component wise break up of the total forest land requirement, justification for diversion of forest land, legal

status of forest land, details of vegetation and wildlife aspects, compensatory afforestation scheme, catchment area treatment plan, reclamation plan, Parashuram Kund, Kamlang Wildlife Sanctuary, Cost benefit ratio etc.

27. The Chief Conservator of Forests, Regional Office of MoEF, Shillong in his report, while dealing about the impact on wildlife, has stated, after explaining in detail, that the impact on terrestrial fauna is not expected to be much significant. It was found to be not an area of migratory routes of animals. A detailed Wildlife Management Plan under the Bio Diversity Conservation Plan has been included in EMP which includes habitat improvement, improvement of footpaths, construction of watch towers, check dams, wildlife estimation, immunization, fire control, surveillance, eco development, anti poaching activities, awareness programmes, capacity building, conservation of vulnerable species etc. That apart, the socio cultural and heritage site has also been explained in detail and has stated that release of normal lean season flow for a period of 7 days during Makar Sankranti Mela in Parashuram Kund in the month of January may be ensured. It is also stated that during constructional phase better provision has been made to supply sufficient water by undertaking diversion through a 6 m dia pipeline so that water for bathing and taking a dip in the Kund is allowed at normal level by maintaining sufficient downstream water flow through a separate 40 MW installed unit of power generation. An additional amount of Rs.10 Crores has been earmarked for the maintenance of Parashuram Kund to be utilized for creating amenities, infrastructure and as a safeguard as decided by the local people. The water flow is directed to be maintained to avoid drying of Parashuram Kund at any time. Further,

various alternative routes and alignment were considered on the non forest land and it was stated that the Hydro Electric Project structures invariably have to be located across the river and in Arunachal Pradesh most part of the river course is legally declared forest land and therefore project components like submergence, construction of diversion structures, power house etc necessarily require diversion of forest land. Out of 1408.30 ha of surface forest land diversion sought for the project is 290.24 ha for temporary purpose and 1118.06 ha is to be diverted permanently which includes 502.92 ha of river bed. Therefore, excluding river bed the forest land under permanent diversion is 615.14 ha and this is the unavoidable minimum requirement of diversion of forest land for the project. Regarding the suggestion for alternative proposal, from techno-economic and environmental point of view, the present proposal was considered to be quite ideal. Even alternative proposal in respect of diversion has been considered at all levels viz., the State Forest Department, Government of Arunachal Pradesh and ultimately after considering all the aspects the present diversion of forest land with the required conditions was found to be essential. About 290.94 ha of surface land of forest being taken for temporary purpose is to be handed over back to the State Forest Department after completion of the project the land will be utilised either for community forest purpose or to be maintained by the project authorities as a green cover. The local people have supported the project since the development will help the area for improvement and generation of employment etc. The EIA and EMP have been prepared by CISMHE University of Delhi. EMP includes Bio Diversity Conservation Plan with Forest Protection Plan and Wildlife Conservation. As per the EC condition, MoEF has stipulated that clearance from NBWL to be obtained since

Kamlang Wildlife Sanctuary is situated within 10 KM. Various protective measures required to be taken during monsoon season when the river is in spate particularly drift wood and its removal to avoid any damage to various structures of the dam have been considered in detail. The FAC after examination of the proposal and site inspection in the meeting held on 7.5.2010 that this being the first HEP proposed in the private sector in Arunachal Pradesh where hydro electric potential is high and as the project is located at the tail end, has recommended the case. However, the FAC sought further information as elicited above. After obtaining compliance the FAC again considered in its meeting held on 20.5.2010 along with the presentation made and recommended the proposal for diversion.

28. It is stated that in the meanwhile complaints were received from Mr. Khapriso Kaong, Minister Arunachal Pradesh and Mr. Akhil Gogoi raising objections regarding violation of FC Act. The complaints were discussed in the FAC in the meeting held on 10.3.2011 and noted that in principle approval to the project is yet to be granted and FAC desired that the complaint may be enquired into by the State Government and NBWL Standing Committee and copy of the complaint was forwarded to them. It is stated that the State Government has submitted the report regarding the above complaints which is stated to have made study about the down stream impact and forwarded the recommendations to the NBWL Standing Committee. The NBWL Standing Committee on 14.10.2011 and 13.12.2011 examined the recommendation of the SBWL and thereafter clearance for the project was granted on 11.2.2012. Taking into consideration the recommendation of the Standing Committee of the NBWL

and the report of the State Government, Stage I Forest Clearance was granted by the Central Government on 1.3.2012 and subsequently the State Government has furnished the compliance report on 22.3.2013 regarding compliance of conditions of Stage I approval and thereafter the Central Government has granted Stage II approval on 3.5.2013. Apart from raising the points that the appeal is not maintainable, the said respondents have raised the point that Stage I approval cannot be assailed in the appeal by relying upon the judgment of NGT in VIMAL BHAI VS. UNION OF INDIA (Appeal No7 of 2012 dated 7.11.2012). While replying on the factual matrix of the case, the said respondents have reiterated that inspection has been carried out at every stage and the proposal was considered by every authority, including FAC which is an Expert Body and only thereafter the approval came to be granted. Regarding Forest Rights Act, 2006 it is stated that the State Government in its compliance report has submitted certificates from the District Commissioner of Anjaw and Lohit Districts apart from the resolutions of the Gram Sabhas and it was only after consideration of relevant factors and exercising due diligence Stage II FC approval was granted. It is reiterated that in the meeting of FAC on 7.5.2010 various aspects have been deliberated and it was only after complete application of mind and after considering the representation further decision was taken on 20.5.2010 recommending the proposal of diversion of forest land. The said respondents also relied upon the judgment of the Hon'ble Supreme Court in *KENCHAPPA's* case to show that ecological study has been made before recommending the FC. After the State Government has submitted its compliance report on 22.3.2013 as per the conditions of FC approval which includes IBA and MPCA, the Stage II clearance was accorded by MoEF on 3.5.2013 which according to the

said respondents, is in accordance with law. While reiterating the statement made by the 1st respondent Government of Arunachal Pradesh it is stated that the respondents have already taken undertaking from the user agency that the said respondents also rely upon the judgment of the Hon'ble Supreme Court in LAFARGE UMIAM MINING PVT. LTD., VS. UNION OF INDIA (2011) 7 SCC 338).

29. The 3rd respondent user agency in its reply dated 30.9.2013 while raising the preliminary issue regarding limitation, has also raised the misjoinder of parties stating that in the FC proceedings, the 4th respondent FAC which is not a juristic entity, granted approval under Section 2 of the FC Act and therefore it cannot be sued and the 4th and 5th respondents are neither necessary nor a proper parties. It is stated that the 5th respondent NBWL is constituted under the Wildlife (Protection) Act which is not within the purview of NGT Act, 2010 and for want of jurisdiction the 5th respondent is not a necessary party. The respondents 4 and 5 are the advisory bodies to the MoEF, the 2nd respondent which alone is the authority to grant clearance. Therefore the appeal filed by including respondents 4 and 5 is an abuse of process of law. The 3rd respondent has stated that the arraying of State of Assam as 6th respondent which has nothing to do with the issue involved in this appeal except that State of Assam is located 70 KM downstream from the project site, is also not called for. In fact, the area covered under the FC which is the subject matter of appeal, falls within the State of Arunachal Pradesh and not in Assam and therefore the State of Assam is neither a necessary nor a proper party. The 3rd respondent has also reiterated that in fact when EC was challenged in the appeal there was an attempt to implead the State of Assam and the

Tribunal in the order dated 18.3.2013 has held that the State of Assam is neither a necessary nor a proper party and inspite of the same the appellants have chosen to array the 6th respondent State of Assam and therefore the appeal is liable to be dismissed for misjoinder of parties.

30. The 3rd respondent has referred to the power supply position of India in 2012 – 2013. While the requirement was 998,114 MW, the availability was 911,209 MW and there was a power deficit of 86,905 MW which is 8.7%. Again in respect of peak demand there has been power deficit of 12,159 MW which is 9.0%. According to the 3rd respondent the project in question is an environmental friendly project in contradistinction to any other project which is inherently polluting the nature. To meet the energy requirement and finding that the thermal power and others were comprising maximum capacity from coal while the share of Hydro power was only minimum of 17.55% and various studies have established that the hydro thermal power mix for India is to be in the ratio of 60 : 40. Further, the thermal power has raised the fuel cost and leads to air pollution emitting SO_x, NO_x and fly ash and particulate matter. It was in those circumstances, hydroelectric power has been looked into as one of the major sources of power generation in the country. According to the 3rd respondent, the FC Act makes a regulatory mechanism reflecting the collective will of the nation protecting biodiversity and natural heritage permitting only unavoidable use of forest land for developmental projects. The objections and observations made in this appeal have been duly considered by EAC, FAC, NBWL Standing Committee and MoEF. The proceedings in the Forest Clearance is made at various stages starting from Part I from the project developer, Part II by DCF/DFO, Part III by CF,

Part IV by Nodal Officer/PCCF and Part V by Secretary of Forests of State Government, supported by other reports and FC Act, 1980 before forwarding the proposal to the Central Government in the MoEF and after following the requirements the MoEF granted the FC after appraisal by FAC.

31. The 3rd respondent would state that the project has obtained all clearances including Central Electricity Authority, Central Water Commission, Geological Survey of India, clearance of Seismic Design Parameters by National Committee on Seismic Design Parameters, consent for establishment from the State Pollution Control Board, clearance from wildlife angle by NBWL Standing Committee, EC from MoEF, in principle approval by Mega Power Status from MoP, clearance from Ministry of Defence, NOC from State Cultural Affairs & Heritage Department, NOC from Water Resources Department pertaining to irrigation and flood control sectors, FC from MoEF and consequential orders from the State of Arunachal Pradesh. It is stated that land measuring 714.32 ha was handed over to the 3rd respondent by the Government of Arunachal Pradesh, contracts have been signed including Long Term Access and Central Electricity Regulatory Commissions. The break up of forest land diverted for 1750 MW Demwe Lower HE project is given by the 3rd respondent in its reply as follows:

“The break-up of Forest Land diverted for 1750 MW Demwe Lower HE Project is given below:

S.No.	Particulars	Land in ha		Percentage
A	Total Forest Land	1415.92		
B	Underground Forest Land	7.62		
(A-B)	Total Surface Forest Land	1408.30		100%
A	Under Submergence	969.44		69%
I	River Bed		478.92	34%
li	Community Forest Land		309.18	22%

lii	Reserve Forest		181.35	13%
B	Project Components	438.86		31%
I	River Bed		24.01	2%
li	Community Forest Land		399.50	28%
lii	Reserve Forest		15.35	1 %

Category wise Forest Land

(A-B)	Total Surface Forest Land	1408.30		100%
a	River Bed		502.92	36%
b	Community Forest Land		708.68	50%
c	Reserve Forest		196.70	14%

An area of 290.24 ha of forest land is diverted for temporary use and after the project is completed it will be handed over back to the State Forest Department and the submergence area will be declared as Reserve Forest by the State Government. Therefore, the permanent diversion would be 88.61 ha land for project components and the submergence area will be declared as Reserve Forest. The particulars of land acquisition have also been provided by the 3rd respondent.

32. While controverting the allegation of lack of application of mind and furnishing misleading information as false, the 3rd respondent has stated that scrutiny by the competent authority at every level was given in detail particularly Part I Forest Advisory Committee's consideration and it was reviewed at every stage spanning over a period of more than four years and therefore it is inappropriate to state that the FC was granted either hurriedly or without detailed scrutiny and without application of mind. It is stated that permission was granted for carrying out topographical survey and geological investigation in the project area by the State Forest Department in the letter dated 24.1.2008 and subsequently the proposal for forest diversion was submitted on 8.10.2008. The MoEF in the FC Rules, 2003 has provided detailed guidelines and details have been furnished for

proposals seeking prior approval for diversion of forest land for non forest purposes and accordingly Form A of Part I was submitted in appropriate manner. Part I proposal was considered by DFO who raised queries on 21.2.2009 with regard to the status/identification of land for Compensatory Afforestation and Catchment area Treatment Plan etc and subsequently Form A of Part I was submitted by the 3rd respondent under Section 2 of FC Act to the State Government on 19.6.2009 for installed capacity of 1750 MW. Thereafter, the DFO has examined the factual details and forwarded his finding in the format as per Part II to the Conservator of Forest on 12.8.2009 along with site inspection report with all details. On receipt of Part II from the DFO, the CF has undertaken site inspection on 4.11.2009 in the proposed project area and completed Part III in the format and forwarded along with his recommendations with the inspection report to CCF and Nodal Officer on 6.1.2009. The CCF-Nodal Officer completed Part IV and forwarded his recommendation to the Principal Secretary, Forests of State Government on 11.12.2009. On receipt of Part IV, the Principal Secretary, Department of Environment and Forest, Itanagar completed Part V and forwarded the State Government's recommendation to MoEF on 23.12.2009 requesting to grant approval under Section 2 of the FC Act. On receipt of the said proposal from the State Government, the IG, Forest, MoEF in his letter dated 28.1.2010 requested CCF, MoEF, North East Region, Shillong to carry out site inspection to be placed before the FAC. The Additional PCCF, Shillong made site visit and submitted his report to the MoEF on 26.3.2010, inter alia highlighting the aspect relating to the legal status of forest land, component wise break up of the total forest land requirement, alternatives considered, reclamation plan, wildlife aspects, Parashuram Kund and Kamlang Wildlife Sanctuary etc. The said

report was sent by MoEF to FAC which in its meeting held on 7.5.2010 desired to have additional information. The 3rd respondent has made detailed presentation before the FAC in the meeting held on 20.5.2010 which includes Wildlife Management Plan, details of cascading effect of development of the Lohit river basin and proposed safeguard measures and influx management etc.

33. After detailed discussion, FAC on 20.5.2010 has recommended the proposal for granting FC subject to the conditions. Thereafter, the 3rd respondent on 2.8.2010 and 4.10.10, submitted details of the project including land acquisition to MoEF. There was a post appraisal of the project by FAC based on the representation of NGO in which the 3rd respondent on 4.1.2011 submitted its reply regarding the representation which relates to impacts in downstream areas, impacts of flow variation (on wildlife habitat), impacts on Parashuram Kund, Lohit river basin study etc. On 20.1.2011 the 3rd respondent has given another clarification on the proximity of KWLS and requested that the grant of FC should not be linked to wildlife clearance as the project does not involve diversion of land from KWLS. The FAC in the meeting held on 10.3.2011 has considered the representations and objections forwarded by the MoEF and desired that the further investigation and inspection is required. As further consideration is required, the matter was sent to the State Government on 29.3.2011 to consider before passing Stage I approval. Likewise, in respect of proximity of KWLS the meeting held on 27.5.2011 has considered the finding including the representation of Mr. Akhil Gogoi and concluded that no adverse impact is envisaged on Dolphins and IBA sites and forwarded the report to NBWL on 14.6.2011. Likewise, the State Government has

forwarded its report based on its further enquiry to IG, Forest on 10.8.2011. The NBWL Standing Committee in the meeting held on 14.10.2011 and 13.12.2011 has examined in detail the recommendation of SBWL particularly relating to the impact of the project on the downstream issues related to Dibru-Saikhowa National Park etc and being satisfied that the mitigation measures have been proposed, the NBWL has granted clearance to the project on 11.2.2011. Thereafter, the MoEF, after considering that the NBWL Standing Committee has examined the report of the State on the issue raised by Mr. Akhil Gogoi and having satisfied with the recommendations of the State Government and NBWL Standing Committee, has granted Stage I Clearance on 1.3.2012. Subsequently, the State Government on 22.3.2013 has submitted compliance report on the conditions stipulated in Stage I Clearance. The MoEF after being satisfied about the compliance, has granted Stage II FC on 3.5.2013 which was followed by the State Government granting clearance on 26.7.2013.

34. While denying the allegations made by the appellants in various paragraphs, it is stated by the 3rd respondent that the appellants have not chosen to mention as to how the State of Assam is affected by tree cutting when it's border is 60 KM away from the project site. It is further stated that the proposal has undergone detailed scrutiny before the FC was granted which has taken more than four years for finalising the issue. It is reiterated that the authorities at every level inspected the place and followed the guidelines framed under the Forest Conservation Rules, 2003 before granting prior approval for diversion of forest land for non forest purpose. It is stated that in respect of wildlife as per Part II Appendix of Forest Conservation Rules, 2003 as subsequently amended it enables the

DFO to file relevant details based on the site inspection which has clearly mentioned that no species of RET category were available in the area proposed to be diverted. It is reiterated about the list of common animals and birds which are mentioned. A reference is made to the remark made by the Additional PCCF – Regional Office of MoEF, Shillong which clearly indicates about the wildlife existing in the area particularly relating to 24 faunal species. It is reiterated that various issues raised in the appeal have already been finally disposed of by the Tribunal while deciding about the validity of the EC granted for the project.

35. In so far as it relates to vegetation, the same has been considered by FAC and it is not proper for the appellants to state that no study has been carried out. Further, the enumeration of trees has also been done by the DFO who made specific recommendation and there is no question of any misleading information given by the 3rd respondent or the government in this regard. Likewise, in respect of socio cultural sites also the 3rd respondent refers to various findings regarding Parashuram Kund and Nimkey sites while stating that in the EC proceedings the issue has been finally decided. It is also stated that the EAC has dealt with the mitigation measures which were stipulated while granting EC which is prior to the grant of FC. The 3rd respondent made a reference to EAC which has addressed the issue in the meetings held on 22.10.2009 and 16.11.2009 while considering the EC proposal. The 3rd respondent has also referred to the findings of various Advisory Committees and the reasons and comments and therefore it is stated by the 3rd respondent that when every authority at every stage has considered and gave report in detail and therefore it is not open to the appellants to continue to allege that there is

non application of mind. The aspect of impact on Kamlang Wildlife Sanctuary has been evaluated by the Addl. CPCF, Shillong.

37. In so far as the claim of ecologically sensitive zone, it is stated that the draft proceedings of ESZ were already taken care by the NBWL Standing Committee while granting NBWL clearance in the said angle. A reference is made about the direction of the Hon'ble Supreme Court which has stated that prior recommendations of the SBWL and NBWL Standing Committee are required only when the proposal requires diversion of land from wildlife sanctuary. As the project does not involve any diversion of land from Wildlife Sanctuaries, Wildlife Clearance and prior approval of the NBWL are not required and in any event the project has been referred and considered by the MoEF for clearance of EAC as well as the recommendation by NBWL.

38. Regarding medicinal plants, the 3rd respondent has referred to the relevant extract of Biodiversity Strategy and Action Plan, 2008 which relates to Dichu valley located on the river Dichu along the border of India Tibet and Myanmar, part of the Mc Mohan Line far away in the upstream of Lohit river, approximately 130 KM upstream and there is no adverse impact by virtue of the present project on the medicinal plants in the area. Further, MPCA sites is yet to be notified.

39. The 3rd respondent has also referred to the issue of Parashuram Kund and states that the dam site is located 1,500 m upstream along the river and 800 upstream from Parashuram Kund and the project EMP clearly contemplates maintenance of lean season flow particularly for 7 days

during Makar Sankranti Mela and in fact financial provisions have also been made for the development of the area concerned and that is also the case in respect of cost benefit analysis particularly relating to the calculation of NPV based on the direction of the Hon'ble Supreme Court on **GODAVARMAN THIRUMULPAD VS UNION OF INDIA 2006 (1) SCC 1** followed by various recommendations of CEC which is filing report to the Hon'ble Supreme Court periodically. The CEC takes into consideration the value of timber and fuel, value of non timber forest products, value of fodder, value of eco tourism, value of bio prospecting, value of ecological services of forest, value of flagship species and carbon sequestration value.

40. In respect of Forest Rights Act, 2006, it is stated that implementation of forest rights have been duly studied and there is no violation or procedural lapse during the implementation of FRA. It is also stated that in respect of Grama Sabhas in their meeting have shown that the claims were received and recognized the forest rights along with the beneficiary's name and therefore it cannot be said that FRA in respect of Scheduled Tribes' settlements and their benefits were not considered. It is reiterated that after a long procedure that went on throughout for four years during which the forest authorities considered the issues from time to time about the implication of the project in question and ultimately the Forest Advisory Committee which has deliberated on 7.5.2010 and which in fact wanted more particulars from the State Government and after compliance, has considered threadbare again on 20.5.2010 before recommending issuance of FC subject to various conditions to be fulfilled. Even thereafter it took nearly two years for issuance of FC since the clarifications on

various implications were further sought by various authorities and it was only after thorough satisfaction of all authorities concerned the FC came to be issued. The 3rd respondent while denying the apprehensions raised by the appellants about the conditions stipulated in the FC stated that the conditions have been imposed applying the precautionary principle and after thorough deliberations on environmental aspects and taking them into consideration and concern of regulatory authorities who allow developmental projects by stipulating additional mitigating measures so that the objective of sustainable development with which economic and social development can be achieved, is fulfilled concurrently. The FC has been granted only after clearance of EC and clearance from wildlife angle after the careful consideration by the concerned impact assessment and wildlife divisions in the MoEF. River basin studies and downstream study have been thoroughly verified by the EAC, MoEF as it was held in detail in the judgment of the NGT while dealing with the issue of validity of EC. The further study by the IIT, Roorkee which has been stipulated in the conditions during the construction of the project and further studies are to continue concurrently and mitigation measures are to be complied with.

41. Regarding the violation of Wildlife (Protection) Act, 1972 it does not come under the purview and jurisdiction of NGT and in this regard the judgment of the NGT dated 24.9.2013 has been referred to in respect of the case relating to Punjab and Haryana directing the Registry of NGT to retransfer the case of Punjab and Haryana for appropriate orders. The 3rd respondent has also stated that there is no violation and care has been taken regarding the on going project and therefore the conditions stipulated by the Hon'ble Supreme Court in LAFARGE UMIAM MINING PVT. LTD.

VS. UNION OF INDIA (2011) 7 SCC 338 have been followed. It is also stated that the NBWL in fact considered in detail the proposal for the project from the said angle in the meetings held on 14.10.2011 and 13.12.2011 in which all the issues raised in the appeal as well as in the EC which includes SBWL, NBWL, Demwe Sewak Tidding, Parashuram Kund, Medicinal Plants were dealt. The legal grounds raised by the appellants are denied by the 3rd respondent project proponent.

42. It is the contention of Mr. Ritwick Dutta, learned counsel appearing for the appellants that the issue involved in this case is limited only to the subject matter of Forest Clearance and it is a merit review as opposed to judicial review and the appellants have challenged the legal validity as well as the correctness of the orders passed under the Forest (Conservation) Act, 1980. He has also referred to the judgment of the Hon'ble Supreme Court in BOMBAY DYEING & MFG. 98 CO. LTD VS BOMBAY ENVIRONMENTAL ACTION GROUP & ORS (2006) 3 SCC 434 wherein the Hon'ble Supreme Court has held that in the matter relating to the environmental challenges the superior court has to consider on the factual matrix as to whether the action challenged is a legislative action or an executive action. If it is an executive action it must be decided as to whether the discretion conferred upon the statutory authority has been properly exercised and as to whether the discretion is in consonance with the principles of the act. It is also to be considered as to whether the relevant factors which are affecting public interest and the principle of sustainable development which forms part of the constitutional law, have been taken into consideration and whether the statutory principles have

been followed by complying with substantial processes and procedures under law.

43. The learned counsel has insisted that the Forest Clearance has to be quashed for failure to discharge the statutory obligation under the provisions of the FC Act as well as the National Forest Policy which mandates that diversion of forest must be subject to careful examination by specialists from the point of social and environmental costs. According to the learned counsel on the factual matrix no such examination was undertaken by the FAC. The learned counsel would assail the validity of FC and violation of principle of Public Trust Doctrine on the basis that the impugned decision violates the principle related to preservation of natural resources and in this regard he has referred to various judgments of the Hon'ble Supreme Court including M.C. MEHTA VS. KAMALNATH 1997 (1) SCC 388, FOMENTO RESORTS & HOTELS LTD V. MINGUEL MARTINS (2009) 3 SCC 571 apart from T.N GODAVARMAN THIRUMULPAD VS UNION OF INDIA (2012) 2 SC 2 and 2006 (1) SCC 1. Reliance is also placed on the judgment in NATURAL RESOURCE ALLOCATION IN RE, SPECIAL REFERENCE NO.1 OF 2012, (2012) 10 SCC 1. Further, the learned counsel would rely upon the judgment in CENTRE FOR PUBLIC INTEREST LITIGATION VS. UNION OF INDIA (2012) 3 SCC 1. He also would rely upon the judgment in CENTRE FOR ENVIRONMENTAL LAW VS. UNION OF INDIA (2013) 3 SCC 234. Therefore, according to the learned counsel there is a mutual public trust doctrine in respect of which law is well settled by a series of judgments of the Hon'ble Apex Court.

44. The learned counsel also challenged the FC on the basis of abuse of discretion, non application of mind and without due care and caution and without responsibility in the exercise of discretion. According to the learned counsel, the FAC and MoEF have abused the discretionary power while the Minister exercised discretion when the statutory law does not confer any such power while considering grant of wildlife clearance. He also challenges the validity of the impugned order on the ground of non consideration of relevant facts relying upon the judgment in SACHIDANAND PANDEY VS STATE OF W.B (1987) 2 SCC 295. The learned counsel also submits that the Minister for Environment and Forest has acted beyond the jurisdiction in overruling the majority opinion of the Members of the Standing Committee of NBWL under Wildlife (Protection) Act, 1972 which does not confer such power to the Minister. On the factual matrix of the case, it is the submission of the learned counsel that the impugned FC is liable to be quashed for violation and non consideration of natural resources and also not following the judgment of the Supreme Court in LAFARGE UMIUM PVT LTD VS. UNION OF INDIA (2011) 7 SCC 338. As per the National Forest Policy, 1988, the forests of Arunachal Pradesh must be safeguarded and there is a need for careful studies by the Experts when forest diversion is proposed. The MoEF as well as the State Government failed to show as to how the diversion of 1415.92 ha of forest land is in consonance with the National Forest Policy, 1988. The learned counsel also would submit that the FAC did not undertake any careful examination of the forest diversion proposal. The learned counsel relied upon the judgment in ZENIT MATAPLAST P. LTD. VS. STATE OF MAHARASHTRA & ORS (2009) 10 SCC 388 and the STATE OF TAMIL NADU & ORS VS. SHYAM SUNDER & ORS (2011) 8 SCC 73.

45 . Ecological sensitivity of Arunachal Pradesh has been ignored by FAC and MoEF and the project was approved in a routine manner which according to the learned counsel is arbitrary. In this regard the learned counsel would rely upon another project regarding diversion of 1165.66 ha of forest land for 3097 MW Etalin HEP in the Dibang Valley District of Arunachal Pradesh wherein the MoEF & CC has insisted the impact and ecological sensitivity of the State of Arunachal Pradesh. He would submit that on the facts it is clear that the FAC and MoEF have approved the project in a mechanical and casual manner. There was no document to show that the project is cleared by application of mind. The attitude of the authorities in considering the file as a mere paper work is clear from the proceedings and they failed to consider the object of law laid down as principles by the Hon'ble Supreme Court in MUNICIPAL CORPORATION OF DELHI VS. ASSOCIATION OF VICTIMS OF UPHAAR TRAGEDY & ORS (2013) 1 SCC (LS) 305. The learned counsel submits that there was no proper approval obtained from the Standing Committee of NBWL. The project has been agreed only by few members of the Standing Committee and 8 out of 12 disapproved the project while the remaining members kept silent. There is nothing to presume that NBWL is an Advisory Body as per the scheme of Wildlife Act, 1972. Therefore, the approval ought to have been obtained from the Standing Committee. In view of the order of the Hon'ble Supreme Court in GOA FOUNDATION VS UNION OF INDIA (W.P.460 of 2005 dated 4.12.2006) wherein there was a direction to MoEF to refer to the Standing Committee of NBWL wherever the ESZ is involved and in fact based on such direction the MoEF has issued guidelines on 15.3.2011. To substantiate his contention that the Standing Committee of

NBWL is not an Advisory Body but it is a decision making authority to take collective decision, the learned counsel has relied upon the order of NGT in AMIT KUMAR VS. UNION OF INDIA (O.A.No.138 of 2013 – 2013 CC Online NGT 757) wherein the NGT has referred to the word 'order' and not 'recommendation'. Therefore, the Standing Committee of NBWL is a distinct and separate legal entity and not a part of MoEF.

46. The learned counsel has also contended that the proposal itself is a concealment of material information particularly relating to endangered species of flora and fauna and has failed to explain the various species including Tigers and Leopards which are found even at the elevation of 1500 m. While controverting the contentions of the learned counsel appearing for the State of Arunachal Pradesh that the Wildlife (Protection) Act, 1972 is not within the jurisdiction of this Tribunal, it is his submission that the subject matter is the Eco Sensitive Zone around National Park and Sanctuaries which is under the Environment (Protection) Act, 1986 and consideration of project within 10 KM is in view of the order of the Hon'ble Supreme Court in GOA FOUNDATION VS UNION OF INDIA (W.P.460 of 2004). It is his further submission that the wildlife clearance is referred to while considering the Forest Clearance Stage I for 1750 MW Demwe Lower Project. The conditions of wildlife clearance have been reproduced verbatim in the Forest Clearance Stage I and therefore on the factual matrix of this case Wildlife Clearance is an integral part of the process based on which Forest Clearance was granted. While it is true that the Wildlife (Protection) Act, 1972 is not within the purview of NGT and not included in the Schedule of NGT Act, the issue is relating to Eco Sensitive Zone around the Protected Area and hence it comes under the purview of

the NGT as per the Act. The further contention of the learned counsel for the appellants is that the objection raised by the learned counsel for the State of Arunachal Pradesh that Wildlife Clearance was in compliance of conditions of EC and it cannot be raised in this appeal relating to FC is not correct and in fact while deciding about EC the Tribunal in the judgment dated 13.1.2015 has not chosen to deal with the Forest Clearance and the said judgment was upheld by the Hon'ble Supreme Court. He has also referred to various instances wherein FAC itself has referred the project to the Standing Committee of NBWL prior to the grant of Stage I Forest Clearance. Therefore, according to the learned counsel the examination by NBWL Standing is forming part of the decision making process based on which the Forest Clearance was granted and therefore it is an integral part of the process.

47. Per contra, Mr. A.D.N Rao, learned counsel appearing for the State of Arunachal Pradesh, the 1st respondent herein has referred to various notes submitted in respect of various issues like Parashuram Kund, FRA, Wildlife aspect, application of mind while granting Forest Clearance, NBWL Clearance granted by MoEF & CC, permission from Chief Wildlife Warden, Assam in respect of fluctuations in Dibru Saikhowa National Park and Cumulative Impact Assessment Study. The learned counsel submits that as against the EC granted by MoEF & CC dated 12.2.2010 in the appeal filed before this Tribunal the following issues were considered and decided viz., impact on Parashuram Kund, Nimke, downstream impact on Dibru Saikhowa National Park, IBA site, Chapories/Beels/fisheries Wild Buffalos, Hog Deer, Tiger, and Bengal Floricans etc. The said appeal against EC was also in relation to cumulative impact of multiple projects in the Lohit

basin, cumulative impact of large influx of labour, impact of NBWL clearance and in respect of all those issues the NGT has already dealt in detail in the judgment dated 13.1.2015 and the said judgment has been confirmed by the Hon'ble Supreme Court in the order dated 18.7.2016 and in as much as the issue has attained finality, the same cannot be permitted to be reagitated. The learned counsel has also referred to the portion of the judgment of NGT in Appeal No.8 of 2011 dated 13.1.2015 wherein the Tribunal has dealt with two aspects of preserving Parashuram Kund and proper muck disposal. Likewise, the implementation of Forest Rights Act also. It is the case of the learned counsel that the issue relating to diversion of forest land has been raised in all 22 Grama Sabhas¹⁰ in Lohit District and 12 in Anjaw District adhering to the procedure and provisions of Scheduled Tribes and other Forest Dwellers (Recognition of Forests Rights) Act, 2006. Further, it is his case that in Lohit District, FRA has been implemented sub-division wise in 10 Grama Sabhas viz. Khawmai/Sambrow, Langmeh (L/B Lohit), Langmeh (L/B Lang), Langjong, Pram/Pramaun and Kandey Area in Mawai – I Grama Panchayat of Namsai Sub Division and Pumla, Dumla and Tayluliang in Duraliang Gram Panchayat of Tezu sub division. Likewise, in Anjaw District the FRA has been implemented in 12 Gram Sabhas and in addition to that public notices were issued calling Gram Sabha meeting providing three months time. In addition to that newspaper publications were made in Eastern Mail (English) and Digaru and Miju (Local Language) in the entire Districts of Lohit and Anjaw. It is the case of the learned counsel that the entire issue relating to FRA has been discussed including location of Parshuram Kund and the Gram Sabhas have resolved along with beneficiaries' names with the consent of people towards the diversion of land for the project.

Therefore, it is his submission that the argument that there is violation of FRA is unfounded.

48. In so far as it relates to the issue of Wildlife aspect in respect of Demwe Lower (1750 MW) HEP the learned counsel after referring to the submissions already made on 21.3.2017, controverted the allegation made that the issue relating to Wildlife was not properly deliberated by the State Government and MoEF and submitted that NBWL Standing Committee has scrutinised the project in detail and granted the Wildlife Clearance to the project. Keeping in view the proximity of Kamlang Wildlife Sanctuary the State Board for Wildlife forwarded the recommendations to the NBWL Standing Committee after examination of wildlife aspects in detail. The mitigation measures and management plans suggested in Wildlife Management Plan in EAC approved by MoEF, form part of EC and Wildlife Clearance was granted by NBWL after site visit of Dr. Asad Rehmani and Mr Pratap Singh. It is further stated that the FAC has directed to constitute a three member committee and in furtherance of FAC direction, the State Government has constituted a three member committee to study the impact of the project on the wildlife and after site visit and considering various reports, a comprehensive report on the impact of project activities on the wildlife of the project area was submitted by the Government of Arunachal Pradesh to MoEF & CC with various recommendations and additional mitigative measures and after examination and having satisfied with the same, the MoEF & CC has granted Stage II Forest Clearance for the project in 2013.

49. In respect of the allegation regarding the presence of RET species in the project area and errors in listing of scientific names of species by the DFO, it is the submission of the learned counsel that the working plan which is applicable for the area gives the indicative list of wildlife for the entire Lohit Forest Division spanning over an area of 2401.97 sq.km and not restricted to the forest area subjected to diversion which is just 1415.92 ha (14.15 sq.km). During the site visit of Addl. PCCF, Regional Office of MoEF & CC the three member committee of DFOs has explained and shown the area and the existence of RET species in the proposed diversion area viz., 1415.90 ha is not found and therefore the remarks of the Principal Secretary, Department of Environment & Forests, Government of Arunachal Pradesh cannot be found fault with and the references to some of the species while referring to a vast area of 2401.97 sq.km of Rohit Forest Division there are chances of some typographical errors while compiling the working plan and more errors pointed out by the appellants have crept in, in the report prepared by the three member committee which was submitted as part of compliance of in-principle Forest Clearance of the project. The learned counsel has also referred to some of the species name which are wrongly printed according to him.

50. While dealing with the apprehension on presence of Tigers in the project component area, Mr. A.D.N. Rao submits that the appellants have misrepresented the definition of the project area and therefore their contention is wrong. The project area as per the Terms of Reference granted by MoEF & CC in the letter dated 25.3.2008 includes catchment area, submergence area and the project area will be acquired for various project appurtenances area, area within 10 KM from the main project

component viz., Dam, Power House etc. However, as per the FC Act and the Rules, the project area in respect of forest proposal is the area of forest land proposed for diversion. The provisions of the Act and the Rules make it clear that in the EIA report the project area refers to the area to be acquired for various project appurtenances i.e., project components area and area within 10 KM from the main project component. However, the term 'project area' mentioned in the forest proposal is in relation to the actual diversion of forest land viz., 1415.92 ha (14.15 sq.km). Based on the primary survey no RET species were found in the project component area. However, the presence of RET species in Influence Zone i.e., 10 KM radius of the project component area based on secondary literature due to proximity of Kamlang Wildlife Sanctuary and in catchment area, have been mentioned in the EIA report. Therefore, according to the learned counsel, it is the misrepresentation by the appellants in respect of the term 'project area' as defined in the EIA/EMP study.

51. The learned counsel has also mentioned about apprehension raised by the appellants regarding the presence of Hoolock Gibbon in Project Component Area which is unfounded based on the above said logical conclusion. While referring to the issue relating to application of mind in granting Forest Clearance, the learned counsel has referred to the submission made on 21.3.2017. Highlighting the issues in a chronology he has again stated that the proposal was reviewed at various stages spanning over a period of more than 4 years and the Forest Clearance was granted after the clearance from the NBWL Standing Committee. Therefore, it is not proper to say that the FC was granted without detailed scrutiny and without the application of mind. He has also referred to the

application made by the 3rd respondent in October, 2008 as to how the proposal was returned by the DFO by raising query which was answered in March, 2009 and the DFO carried out inspection and submitted his findings in Part II to the Conservator of Forest in August, 2009 and that was followed by various stages and ultimately the FCA in the meeting held on 7.5.2010 wanted further details which were submitted on 20.5.2010. The FAC has recommended the case after obtaining clarification and on considering the inspection report. He has also submitted that the very fact that as per the directions of FAC the 3rd respondent has submitted that about 37,108 no. of trees would be retained and the forest area required for the temporary use will be restored and handed over back to the State Forest Department makes it clear that all aspects have been considered. Therefore there is total application of mind by these authorities at every stage. He has also referred to the post appraisal by FAC as has been explained by us in the earlier portion of the judgment. It is his case that the NBWL sub committee comprising of Dr. Asad Rahmani and Mr. Pratap Singh visited the project site and downstream areas and both the members did not agree with each others' view and submitted separate reports before the Standing Committee of NBWL. The Government of Arunachal Pradesh submitted detailed response to the views expressed by Dr. Asad Rehmani in his report submitted before the NBWL Standing Committee. The Standing Committee of NBWL on 13.12.2011 has considered reports of Dr. Asad Rehmani and Dr. Pratap Singh along with the detailed response of the State Government considering the impacts on Dibru – Saikhowa National Park and Biosphere Reserve, Chapories of Lohit River etc including Parashuram Kund. The endorsements made by the non official members on the report of Dr. Asad Rehmani were duly recorded in the

minutes of the meeting dated 13.12.2011 and the PCCF, Government of Arunachal Pradesh has given point wise clarification to the observations raised by the non official members. The learned counsel submitted that after detailed examination of the view expressed by them and after satisfied with the mitigation measures the clearance from the Standing Committee of NBWL was granted to the project by giving a speaking order dated 11.2.2012 and this was followed by Stage I Clearance by detailed consideration at every stage. According to the learned counsel more than four independent site inspections were undertaken by various officers of statutory bodies of the State Government and MoEF & CC viz., DFO, CCF, PCCF, three member committee of DFO's and Expert Members of NBWL. Therefore, the contentions of the appellants as if there has been concealment of information and deliberate lack of application of mind, giving of misleading information are all incorrect.

52. In so far as it relates to the clearance from the NBWL Standing Committee, it is his contention that as per the provisions of Wildlife (Protection) Act, 1972 prior recommendations of State Board of Wildlife and Standing Committee of National Board for Wildlife are required only for such proposals requiring diversion of land from Wildlife Sanctuaries/National Parks. Since Demwe Lower HEP does not involve any diversion of land from Wildlife Sanctuary/National Park, Wildlife Clearance is not required under the Wild Life (Protection) Act, 1972. However, it is based on the direction of the Hon'ble Supreme Court in *GOA FOUNDATION* case which inter- alia stipulated that till Eco Sensitive Zones are declared by the concerned States around the Protected Areas, all cases where environmental clearances are proposed for the activities

within 10 KM zone, be referred to Standing Committee of NBWL for consideration of proposals under ESZ angle. Even before granting such clearance, on receipt of the proposal the Chief Wildlife Warden has visited the project site and examined the proposal in detail and recommended to the Principal Secretary for consideration by the NBWL Standing Committee in June, 2011. The NBWL Standing Committee has considered the proposal on 27.5.2011 and forwarded its recommendations to the NBWL Standing Committee after examining inter alia wildlife aspects in detail and after due deliberations on various aspects. Subsequently, the NBWL Standing Committee in its meeting on 14.10.2011 has considered the project wherein non official members raised concerns on downstream impacts due to the project like flow fluctuations during the peak operations of the project, impact on IBA/Chapories, impact on Dibru-Saikowa National Park etc. In response to the said observations of the non official members, PCCF, Government of Arunachal Pradesh informed that impact assessment study had been done by the State Wildlife Department on the downstream stretch of river Lohit and it was found that there would be minimal impact on wildlife fauna in the downstream areas. After detailed consideration of both official and non official members to get a clear picture of the possible impact on the aquatic and other fauna downstream of Lohit river, again the committee decided to constitute a team of Dr. Asad Rahmani and Dr. Pratap Singh who visited the project site and downstream areas and both of them did not agree with the view of other. The State Government has also submitted a detailed response to the views expressed by Dr. Asad Rahmani and Mr. Pratap Singh before NBWL Standing Committee which in its meeting held on 13.12.2011, has considered the site visit reports with all relevant factors and the

Chairperson of the Standing Committee who is the Minister, said that it will look into the comments and views of the committee and take appropriate decision. It was after taking all these aspects into consideration the MoEF & CC has granted Wildlife Clearance to the project on 11.2.2012. According to the learned counsel, the views have been properly recorded in the minutes of the meeting dated 13.12.2011 and only after considering the comments of the non official members the project was granted clearance by the NBWL Standing Committee on 11.2.2012. According to the learned counsel all these issues are forming part of EC which has been upheld by the NGT and confirmed by the Hon'ble Supreme Court.

53. While dealing with the next issue of permission from the Chief Wildlife Warden, Assam in respect of flow fluctuations in Dibru- Saikhowa National Park, the learned counsel referred to an earlier submission on behalf of the State Government dated 21.3.2017 and reiterated that Lohit river traverses a distance of more than 70 KM along the river course downstream of Demwe Lower HE Project and the project lies entirely within the State of Arunachal Pradesh. As the confluence point of Lohit river is located in Assam 105 KM downstream, the learned counsel has also referred to the WAPCOS's report in this regard. The learned counsel has also referred to the submission made by MoEF & CC in its counter affidavit stating that the aspect relating to impact on Dibru-Saikhowa National Park was adequately considered. Therefore, it is the contention of the learned counsel for the 1st respondent that the contention of the appellants that impact on Dibru-Saikhowa National Park was not considered, is misconceived. The learned counsel has also referred to the issue relating to Cumulative Impact Assessment by referring to the earlier submission

made on 21.3.2017 and would submit that the assessment study was made in the Lohit river basin in March, 2009 by entrusting it to WAPCOS, the Government of India Undertaking and was considered by the EAC in August, 2016 which includes the study on effect of Peaking Power Generation in Lower Siang HEP, Demwe Lower HEP and Dibang Multipurpose HEP on Dibru-Saikhowa National Park and recommended the approval to Lohit Basin Report and that was subsequently approved by the MoEF & CC on 13.10.2016.

54 . While dealing the arguments of the learned counsel appearing for the appellants regarding the National Forest Policy, 1988, it is the case of the learned counsel that the Forest Clearance was in conformity with the guidelines of the National Forest Policy and there is no violation of any of the directions given by the Hon'ble Supreme Court in *LAFARGE UMIAM MINING PVT. LTD VS. UNION OF INDIA* (2011) 7 SCC 338 wherein the Supreme Court has directed that the principles/guidelines prescribed in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 and Forest (Conservation) Act, 1980. The learned counsel has also referred to the direction of the Supreme Court in *GOA FOUNDATION* case wherein the Supreme Court has directed that all cases where EC were granted and where activities are within 10 KM be referred to the Standing Committee of NBWL. Therefore, according to the learned counsel in the absence of declaration of Eco sensitive Zones under the Environment (Protection) Act, 1986 the requirement for clearance of the NBWL Standing Committee in cases where EC has already been granted and activities are within 10 KM of Protected Areas originated in pursuant to the said direction of the Hon'ble

Supreme court which has been followed in this case. In the instant case, the project does not involve any diversion of land from Protected Area i.e., Kamlang Wildlife Sanctuary. However, in the absence of declaration of ESZ around Kamlang Wildlife Sanctuary and considering the direction of the Supreme Court dated 4.12.2006, an application was submitted for consideration by the NBWL Standing Committee from ESZ angle. Therefore, according to the learned counsel complete procedure has been followed and it was only after detailed examination of the project clearance was granted by the NBWL Standing Committee. According to the learned counsel, on a perusal of the Wildlife (Protection) Act, 1972 it is evident that the NBWL Standing Committee is an Advisory Body to the MoEF & CC and in as much as the Wildlife (Protection) Act, 1972 is not within Schedule I of the NGT Act, the Tribunal has no jurisdiction to decide about this issue. It is reiterated by the learned counsel that the Hon'ble Supreme Court has confirmed the judgment of the NGT dated 13.1.2015 upholding the EC on merits.

55. Mrs. Sumathi, learned counsel appearing for the respondent Nos.2, 4 and 5 including MoEF & CC while reiterating the facts of the case, has submitted that the Inspection Report of the Regional Office of MoEF & CC, Shillong dated 26.3.2010 covers all aspects viz., component wise break up of the total forest land requirement, justification for diversion of forest land, legal status of forest land, details of vegetation and wildlife aspects, compensatory afforestation scheme, catchment area treatment plan, reclamation plan, Parashuram Kund, Kamlang Wildlife Sanctuary, Cost Benefit Ratio etc. It is stated that the government has taken precautionary measures for protecting Parasuram Kund and its surroundings and also

taken note of adequate protection measures to be taken and has made financial provision for the local area development project by providing Rs.10 Crores and for preservation and maintenance of Parashuram Kund. It is the contention of the learned counsel that the Chief Conservator of Forests, Regional Office, Shillong has detailed various alternative routes of alignment and ultimately concluded that the present route for diversion is most appropriate and the said diversion of forest land has been considered at all levels of the State Forest Department which is essential and a possible milestone in the cascade development on the river Lohit and development of power sector in the State which in turn shall provide power to meet the national requirement. The learned counsel has submitted that the detailed EIA and EMP have been prepared by CISMHE, University of Delhi, EMP which includes Biodiversity Conservation Plan, comprising of Forest Protection Plan and Wildlife Conservation, CAT Plan, Fisheries Development Plan, Public Health Delivery System, provision of free fuel along with energy conservation measures, Muck Management Plan, restoration of construction areas, landscaping and creating of green belt around the reservoir. A budgetary allocation of Rs.305.147 Crores has been made for the Environment Management Plan and as per EC, MoEF & CC has stipulated that as the Kamlang Wildlife Sanctuary is located within 10 KM distance from the project and therefore clearance from the NBWL must be obtained. Accordingly, the proposal was considered in the NBWL Standing Committee meeting entrusting the work to two members of the committee to inspect the site who made separate reports, one rejecting the proposal and another supporting the proposal and after considering both, the decision was taken by the Standing Committee of the National Board for Wildlife in accordance with the powers under Section 5-C of the Wildlife

(Protection) Act, 1972. Ultimately, Minister of State (Independent Charge) Environment and Forests after discussing in the 24th meeting of the Standing Committee of NBWL and after discussing with the Ministry officials accorded recommendation for the project. After the complaints were received from Mr. Akhil Gogoi and Shri Khapriso Kaong, Minister line Arunachal Pradesh they were forwarded to the NBWL Standing Committee on 14.6.2011 and were considered and it was after considering the recommendation of the NBWL Standing Committee and the report of the State Government Stage I approval was granted by the Central Government on 1.3.2012 for diversion which was followed by Stage II approval on 3.5.2013 after the compliance of conditions laid down in Stage I approval. The learned counsel has submitted that the local people are happy and supporting the project since it encourages industrialisation and generation of employment in the area etc. The project is providing Hydro Electricity not only for the State but also for the entire country. The learned counsel has also referred to various Review Applications filed by the appellants herein against the judgment in Appeal No.8 of 2011 which came to be dismissed. The learned counsel has also referred to the observation in the judgment of the Hon'ble Supreme Court in NARMADA BACHAO ANDOLAN VS. UNION OF INDIA & OTHERS where the Hon'ble Supreme Court has explained about the sustainable development concept and therefore it is the submission of the learned counsel that the appeal deserves to be dismissed.

56. Mr. Tarun Johri, learned counsel appearing for the 3rd respondent while contending that the issues which are already decided while granting EC which was upheld by the Tribunal and ultimately confirmed by the

Hon'ble Supreme Court, shall not be permitted to be raised again in this appeal even if they happened to be overlapping issues in the Forest Clearance. The learned counsel has reiterated the submission of *res judicata* regarding impact on Parashuram Kund and Nimkey, downstream impact due to peak operation of project, cumulative impact of multiple projects in Lohit basin, post clearance study, cumulative impact of large influx of labour and impact on KWLS etc. The learned counsel has also referred to the chronological events of Forest Clearance starting from Part – I on 8.10.2008 and subsequent verification by DFO and particularly submits that in Part II Forest Proposal there is a list of common animals and birds found in the project area and stated that the list is indicative list of wildlife for the entire Lohit Forest Division spanning over an area of 2401.97 sq.km and not forest area covering diversion viz., 1415.92 ha. He has also referred to the term 'project area' in respect of forest proposal as per the provisions of the Forest (Conservation) Act, 1980 and the rules made thereunder. The learned counsel has taken us to part III of Site Inspection made by DFO followed by filing of Part IV by Nodal Officer, PCCF Office and subsequent site inspection particularly referring to certain extracts from the Site Inspection of the Regional Office of MoEF & CC, would submit that excluding the river bed, the forest land under permanent diversion is 615.14 ha and the proposal for diversion was considered necessary at all levels of Forest Department and Government of Arunachal Pradesh apart from the possible milestone and the cascading effect on development on the river Lohit and development of power sector in the State and the national requirement as recommended by the Regional Chief Conservator of Forest. As per the EC granted MoEF & CC has stipulated that the Kamlang Wildlife Sanctuary is at a distance of 10 KM from the

project and hence clearance from the NBWL is essential. In the light of the details and the information considered by NBWL, the contention of the learned counsel appearing for the appellants that RET species were not referred, has no meaning. The further contention of the learned counsel is that the point raised by the appellants about the cost benefit analysis as inadequate, as totally baseless and misleading. He has referred to FAC meeting held on 7.5.2010 and subsequent compliances made by the 3rd respondent to IG, Forest, MoEF & CC followed by the 2nd meeting of FAC on 20.5.2010 in which various aspects including reduction in number of trees to be cut, maintenance of minimum flow and Fisheries Management Plan, Wildlife Management Plan, Safeguards for the Influx Management have been considered in detail and having satisfied with the site inspection report and the clarifications submitted by the 3rd respondent, the State Government recommended the project for Forest Clearance subject to various conditions. The learned counsel has also explained about the details of the subsequent compliance of conditions of the project regarding the layout of the colony area. Further, to the effect that the remaining area 36 ha having purposeful construction density would not be used for construction activities and would be kept as greenbelt which indicates the keen interest shown by all the stakeholders regarding environment. He has also referred to the 3rd meeting of the FAC II dated 10.3.2011 wherein objections and representations of Mr. Akhil Gogoi have been considered in respect of the impact on various issues and desired that the State Government should make further enquiry and submit to the NBWL Standing Committee. Accordingly the State Government has made enquiry along with the NBWL Standing Committee and therefore even post recommendation enquiry has been gone into detail and therefore it cannot

be said that there is non application of mind in considering the proposal. This was followed by the Standing Committee of NBWL which has made appraisal regarding the project on 25.11.2011. Considering the objections and representations and having satisfied the NBWL Standing Committee has concluded that no adverse impact was foreseen by the proposed project during the construction activity and the NBWL has recommended the project and verified the provisions for Wildlife Management Plan and EMP report. Therefore the concern raised by Mr. Akhil Gogoi has been addressed by the Expert Committee. The learned counsel has referred to the operative portion of the extract of the NBWL Standing Committee minutes which states that the proposed construction of 1750 MW Demwe Lower HEP is located outside the boundaries of Kamlang Wildlife Sanctuary. Apart from that a number of streams of the river Lohit report and observations made regarding the representation made by Mr. Akhil Gogoi to contend that the NBWL Standing Committee has also considered the representation . He also submits that in addition to the above, as per the direction of the MoEF & CC the State Government has also considered the complaint of Mr. Akhil Gogoi. When the matter was referred for appraisal by the NBWL Standing Committee again on 14.10.2011 the project was considered when non official members raised concern on downstream impact. To have clear picture again, the NBWL Standing Committee itself has nominated two of its Members consisting of Dr. Asad Rahmani and Shri. Pratap Singh to make a first hand assessment and the sub committee visited the project site and different reports were submitted by the sub committee members. The differing reports were considered by the Standing Committee and the Chairperson of the committee thereafter has taken appropriate decision, as it is seen in the minutes of the meeting

dated 13.12.2011 of the Standing Committee of NBWL. The MoEF & CC has passed speaking order on 11.2.2012 stating that the Chairperson viz., the Minister has considered and recommended on behalf of the NBWL Standing Committee. In accordance with the relevant orders of the Supreme Court clearance of NBWL was done for the project subject to certain additional measures.

57. The learned counsel would submit that the proceedings of the MoEF & CC dated 11.2.2012 is a speaking order, assigning the reason and no fault can be found in it. Subsequently Stage I clearance was granted on 1.3.2012 followed by stage II clearance on 3.5.2013. The learned counsel has referred to the various issues raised at length and considered between Stage I and Stage II clearances including compliance report made by the State Government. The Forest Clearance granted by the State of Arunachal Pradesh dated 26.7.2013 is a consequence of the decision of granting Stage II clearance by MoEF & CC and therefore according to the learned counsel the entire happenings of events which are adequately recorded, show that there is total application of mind by all the authorities concerned. In so far as certain mistakes found in listing the names of species, it is stated that when compared to such large extent of Lohit Forest Division, the forest diversion is only a fraction viz., 14.15 sq.km. or 1415 ha and it is just 0.60 % of the forest area of the entire Lohit Forest Division and therefore the list of fauna described relates to the entire Lohit Division Working Plan. The learned counsel has referred to the contents of reply filed by the 3rd respondent and other respondents including Government of Arunachal Pradesh. While contending that the issue on Parashuram Kund and cost benefit analysis are all the subject

matters which were already dealt while deciding about the validity of EC. He reiterates the implementation of FRA as submitted by the 1st respondent State of Arunachal Pradesh and also regarding the consideration of issue by the 22 member Grama Sabhas in Lohit District and adjoining District. He also highlighted application of mind by FAC. That apart, while referring to the conditions stipulated in FC, it is stated that the concern of the appellants regarding declaration of reservoir area as Reserve Forest under the Assam Forest Regulation and Indian Forest Act has been taken care of by the State Government. He also reiterates the submission made by the State Government dated 21.3.2017 on the issue of granting permission by the Chief Wildlife Warden, Assam in respect of downstream impacts in Dibru-Saikhowa National Park as contended by the learned counsel Mr. A.D.N. Rao pointing out the distance of 70 KM along with river course downstream within the State of Assam. It is also his contention that in fact Dibru Saikhowa National Park was considered in detail by this Tribunal in Appeal No.8 of 2011 while deciding about the validity of EC by referring to Para 93 of the judgment and therefore it is not open to the appellants to raise the issue once again.

58. In so far as it relates to the allegation of violation of the National Forest Policy, it is stated that the FC itself is granted as per National Forest Policy, 1988 and there was no violation and adequate care is taken for conservation/protection of environment in respect of ongoing projects as held by the Hon'ble Apex Court in LAFARGE UMIAM MINING case. It is also stated that even under the EIA Notification, 2006 the EAC has comprehensively dealt with environmental aspects including dam safety, downstream impact, minimum environmental flow, protection measures for

Parashuram Kund, geological and seismicity aspects, sedimentation and silt flushing, Kamlang Wildlife Sanctuary etc. It is the case of the learned counsel that the NBWL Standing Committee has considered the project from ESZ angle based on the judgment of the Supreme Court in GOA FOUNDATION case and at every level careful scrutiny has been made by various authorities as per the National Forest Policy, 1988 and it is not correct to state that a lethargic attitude has been shown by the authorities while granting the impugned FC. The learned counsel also made a specific reference about the functions of NBWL Standing Committee and submitted that a reference to the direction of the Hon'ble Supreme Court in GOA FOUNDATION case. A reference is made in respect of the powers of the NBWL Standing Committee which according to the learned counsel is to advise the Central Government and therefore the performance is that of an advisory nature for regulating the activities in the area adjoining to Protected Areas. He has also referred to some of the aspects of the guidelines framed to contend that the NBWL Standing Committee is only an advisory body of the Central Government and therefore the advice of the NBWL Standing Committee can be overruled by MoEF & CC. He has referred to various meetings of the NBWL Standing Committee to contend that every one of the issues has been considered by the Standing Committee. Finally, the learned counsel has referred to the jurisdiction of NGT in dealing with the provisions of the Wildlife (Protection) Act, 1972 and submitted that in as much as it does not form part of any one of the enactments enumerated under Schedule I of the NGT Act, the Tribunal has no jurisdiction to decide the validity or otherwise of a decision taken under the Wildlife (Protection) Act, 1972, particularly the decision taken by the NBWL Standing Committee which is under the Wildlife (Protection) Act,

1972. The learned counsel has also referred to a decision of the Principal Bench in Appeal No.10 of 2013 and Appeal No.21 of 2013 wherein in an issue relating to Punjab and Haryana it was held that the Wildlife (Protection) Act, 1972 does not come within the purview of the NGT Act. Therefore, the appellants cannot challenge the NBWL clearance in the rejoinder, while the present appeal is relating to only challenging the FC. Therefore, Mr. Tarun Johri submits that the appeal has no merits and liable to be dismissed.

DISCUSSION AND CONCLUSION:

59. After hearing the learned counsel appearing for the parties elaborately and having referred to the volumes of documents filed including various reports and also by referring to the provisions of various enactments and making our anxious thoughts involved in this case, the broad issue to be decided is as to whether the FC granted for Demwe Lower Hydroelectric Project (HEP) (1750 MW) in respect of diversion of 1415.92 ha of forest land in Stage I Clearance dated 1.3.2012 followed by Stage II Clearance dated 3.5.2013 granted by the MoEF & CC and the consequential order of Government of Arunachal Pradesh dated 26.7.2013 granting permission for diversion, is in accordance with law or liable to be set aside on various grounds raised by the appellants.

60. In fact, when the validity of EC was argued before the Principal Bench of NGT in Appeal No.8 of 2011, the appeal relating to challenge of FC in Appeal No.92 of 2013 (PB) was also posted along with Appeal No.8 of 2011 and was heard along with Appeal No.8 of 2011. However, the appeal relating to EC in Appeal No.8 of 2011 was taken up separately and

judgment was pronounced by the Principal Bench on 13.1.2015. and thereafter the present appeal pertaining to FC in Appeal No.92 of 2013 (PB) was heard for some time in Delhi and after transfer to the South Zone Bench renumbered as Appeal No.30 of 2015.

61. The appellants have earlier challenged the EC granted for the project viz., 1750 MW Demwe Lower Hydro Electric Project dated 12.2.2010 by the MoEF viz., 2nd respondent in Appeal No.8 of 2011. The appellants have raised various issues relating to the presence of one, Mr. Abraham during the scoping stage of EAC while considering the project contending that his presence would vitiate the proceedings of EAC and consequently the EC. Apart from this the appellants have also raised about the scoping under the EIA Notification, 2006 as to whether any decision taken in scoping can be challenged or it should be treated finally. The more relevant aspects of the contention of the appellants herein in the EC proceedings, is relating to the consideration of EAC. The issues are (1) effect of the project on the cultural heritage of Parashuram Kund (2) Appraisal of proceedings done as per EIA Notification, 2006 (3) Delinking of the basin study from the EC and its effect (4) Effect of peaking operations of the project (5) Effect on Biodiversity including the effect on Dibru-Saikhowa National Park (6) Cumulative impact study and (7) Muck disposal and suggested sufficient safeguards. The said seven grounds which form part of Issue No.2 of Appeal No.8 of 2011 was discussed in the said judgment and ultimately it was held that sufficient safeguards have been taken for preserving Parashuram Kund and its water flow has been duly considered by EAC by application of mind. The said part of the issue

regarding Parashuram Kund was discussed in the said judgment dated

13.1.2015 in paragraphs 81 to 85 which are as follows:

“81. The first and foremost point in this regard relates to the affect of the project on the cultural heritage of Parasuram Kund. This point can be clubbed with the 7th point in the said category namely “muck disposal whether suggested sufficient safeguards.

82. *While speaking about the history of the mountainous and multiracial north-east frontier region called Arunachal Pradesh and its tradition and mythology and while observing that it has a long international border with Bhutan, China and Burma now called Myanmar and also observing that the Tribals of North Eastern States are historically protected, the Hon’ble Apex Court in State of Arunachal Pradesh Vs Khudiram Chakma reported in 1994 supp. (1SCC) 615, referring to Parasuram Kund observed as follows:*

“The history of the mountainous and multiracial north-east frontier region which is now known as Arunachal Pradesh ascends for hundreds of years into the mists of tradition and mythology. According to Puranic legend, Rukmini, the daughter of King Bhishmak, was carried away on the eve of her marriage by Lord Krishna himself. The ruins of the fort at Bhalukpong are claimed by the Akas as original home of their ancestor Bhaluka, the grandson of Bana Raja, who was defeated by Lord Krishna at Tezpur (Assamuy). A Kalita King, Ramachandra, driven from his Kingdom in the plains of Assam, fled to the Dafla (now Nishang) foothills and established there his capital of Mayapore, which is identified with the ruins on the Ita hill. A place of great sanctity in the beautiful lower reaches of the Lohit River, the Brahmakund, where Parasuram opened a passage through the hills with a single blow of his mighty axe, still attracts the Hindu pilgrims from all over the country”.

83. *Mr. Ritwick Dutta contends that in as much as Parasuram Kund has got an aesthetic value on the religious point of view, while approving any project which is likely to affect its sanctity should be carefully considered while deciding about the effects of such project on the said Kund. According to him this has not been considered as per the requirement. It is not in dispute that during the auspicious days of Makar Sakranti, for a period of 10 days before and after, Hindu devotees visit the Parasuram temple situated nearly 100 ms away from Parasuram Kund and large number of people take sacred bath in Parasuram Kund before climbing up to Parasuram temple and the Hanuman Temple situated adjacent to that. Therefore it is clear that Parasuram Kund is a place in the running water where devotees take their sacred bath before reaching the temple. Admittedly it is not the temple which is affected by the project but even according to the appellant it is the running water called Parasuram Kund which may be affected either by the unregulated flow of water due to the project or by accumulation of muck either during the time when the project construction is on or subsequently. On the other hand it is the contention of the learned Counsel for the project proponent which is also not in the much dispute that Parasuram Kund is located 100 ms along the river from dam site of Demwe Lower HE Project and the temple is located on the Hill on the left Bank river about 100m high from river bed. On a reference to the 31st meeting of the EAC held on 21st and 22nd October, 2009 it is clear that the EAC has taken note of the objection raised to the above said effect and it was ensured from the developer that continuous flow of water will be maintained downstream through a separate diversion channel of 6m dia and during the operation period, continuous water will be released downstream through a separate 40 MW installed unit which shall run 24 hours continuously to release 35 cumecs of water downstream to maintain the needs at Parasuram Kund. It is also informed that during the time of bridge construction by which traffic is regulated heavy machinery was used apart from huge blasting operations and that had no impact on the Kund. It was*

also informed that regarding the impact of flow variations from 35 cumecs to 1729 cumecs especially during the month of January when the normal flow is stated to be around 400 cumecs, a flow regulation with the project would take place and during the said month of January when Parasuram Kund Mela takes place, 1 unit of 342 MW will be operated as determined.

84. It is stated by the project proponent that regarding the tourism at Parasuram Kund even though as on date there is no major infrastructure, provisions are being made for developing infrastructure, sewage/ sanitations facilities, marketing complex, shelter, recreation areas with a provision of Rs. 2 Crores. It is seen in the minutes of the said meeting that the amount of Rs. 2 Crores would be enhanced to 10 Crores which was agreed by the developer which amount is directed to be used to ensure that no adverse impact takes place during the construction and operation stage. It was also directed by the EAC that during Mela period the release of water must be regulated. Regarding the sedimentation and silt flushing which includes the muck formation, it was informed that regarding the periodic reservoirs flushing, CEA/CWC has set certain guidelines and that the reservoir operation and all necessary precautions shall be taken and the reservoir be maintained at the MDDL during the period of monsoon. This was again considered by the EAC in its meeting held on 16.11.2009. It was confirmed that a warning system to be installed at Parasuram Kund, that there shall be no damage to the water body; Hill-Flora-Fauna, that there shall be no encroachment in the entire temple area, that efforts to beautify and develop the area should be taken up and that the availability of water to the devotees should not be hampered. The EAC has also taken note of the commitment made by the project proponent to implement the conformation of the SPCB. Therefore, it is clear that sufficient safeguard has been taken for preserving Parasuram Kund and its water flow that has been duly considered by the EAC on its application of mind.
85. In the impugned EC also the MoEF while imposing specific conditions has clearly specified in Clause 17 and 18 as follows:

“The project will release normal lean season flow for a period of 7 days during mela (Sankranti) period in Parsuram Kund, in the month of January as per the condition stipulated by the Parashuram Kund Improvement Society.

“The financial allocation for the protection of the Parasuram Kund should be enhanced from Rs. 2 crores to about Rs. 10 crores as suggested by the EAC. The said amount would be utilized for creating appropriate amenities infrastructure, structures and safeguards etc. as decided by Parasuram Kund Improvement Society who are looking after the developmental activities related to the Parasuram Kund”.

In such view of the matter we are of the considered view that the said two aspects of preserving Parasuram Kund and proper muck disposal have not only been considered but answered properly and therefore we are of the view that the effect of Demwe Lower HEP 1750 MW does not effect the cultural heritage of Parasuram Kund and sufficient safeguards has been taken up for an effective muck disposal.”

61. Regarding delinking of the river basin study in respect of the EC it was held in the said appeal that sufficient safeguard has been provided in the EC which states that any appraisal of river basin study should be upon

the project proponent. Relevant paras of the judgment in Appeal No.8 of 2011 are extracted as follows:

“87. As far as the decision regarding delinking of basin study from EC and its effects, it is the contention of the learned Counsel appearing for the appellant that the condition in the impugned EC which states in Clause no. 16 as follows:

“The project since falls in Lohit Basin and at present the Basin Studies is ongoing and it was stipulated during the grant of TOR for scoping that the Environmental Clearance for Demwe Lower HEP should not be linked with the completion of basin studies. However, any recommendations that emerge out from the basin studies shall be a binding on the project developer in future”, makes it clear that as the Lohit Basin Study is ongoing, the same need not be linked with the issuance of EC. It is his contention that the said condition is abnormal specially when it also states that any recommendations that emerge out from the basin study after completion will bind the project developer in future has no meaning because by that time the project would have come into effect. According to him it is putting the cart before the horse”.

88. On the other hand it is the case of the project proponent as well as the MoEF that the delinking of Lohit basin study from the projects have been done in similar cases like Kalai-II HEP for TOR, Hutong II HEP 1250 MW in Anjaw district, Anjaw HEP 280 MW, Raigam HEP 96 MW on Dalai river in Anjaw district and Gimliang HEP 99 MW on Dav river in Anjaw district. It is also their case that delinking process for grant of environmental clearance to the projects from completion of the river basin study is a well practised procedure and the same has been followed by EAC on earlier occasion in respect of EC granted for Gongri HEP 90 MW, Nafra HEP 96 MW, Divvin HEP 125 MW which were granted in the year 2010 and 2011 and that the basin study which was allotted in 2008 was completed in July 2011. Likewise EC was granted in respect of Teesta Stage VI HEP 500 MW, Teesta Stage III HEP 1200 MW, Roler HEP 36 MW, Jorethang, Loop HEP 96 MW in the year 2004 to 2007 while the basin study was completed in the year November, 2007. It is also stated that in respect of TATO and HEP 700 MW, EC was granted on 27.06.2011 while the Siang basin study which was allotted on 23.12.2010 is still in progress. Likewise it is pointed out that EC was granted on 19th May, 2011 regarding Sangtong, Karchham HEP 402 MW while its Sutlej basin study was allotted on 26.02.2011 which is still pending. It is also pointed out that EC in respect of Selisep 400 MW was granted on 02.06.2012 while the Chenab Basin Study was directed to be continued. In addition to that many other instances have also been pointed out wherein while river basin study are going on, they were delinked from EC proceeding.

89. The report of inter ministerial group prepared by the Government of India 2010 to evolve a suitable framework to guide and accelerate the development of hydro power in North Eastern Region has categorically decided that studies in the Basin should be taken up by CWC but that will not hold up the EC of individual projects. In as much as it is not in dispute that in respect of many other projects it has been the practice that regarding the hydro electric power projects, the pendency of river basin study cannot be an impediment for granting EC we cannot presume that the EC proceedings will be vitiated by the delinking process. In fact sufficient safeguard has been provided in the EC specifically stating that any result of river basin study should be binding upon the project proponent.”

62. Regarding peaking operation in Lohit River, again the finding of EAC was considered by this Tribunal in the said appeal in respect of the

flow of water and it was found that the river Dolphins were recorded in Brahmaputra Main Stream. However, during low water flow period, the upstream limit of Dolphin distribution in river Lohit is upto Tengapanimukh which is 72 KM downstream along the river from Demwe Lower HEP and therefore the likelihood of the presence of Dolphins in the upstream of Tengapanimukh was found to be negligible and it was held that the downstream impact including on the habitat of Bengal Florican has been taken note of by the MoEF by taking steps for preservation of the said species as observed in the following paragraphs in the judgment:

“90. In respect of the effect of peaking operation, a reference to the data analysis taken for 19 years regarding the flow in Lohit river shows that the said river is well acquainted with flow variability ranging from 200 cumecs to more than 12000 cumecs. It is also seen that more than 54 per cent times the flow in Lohit River at Dam site is more than 1000 cumecs out of which about 33.23 per cent time flow is about 1729 cumecs which is the designed discharge of Demwe Lower HEP. It is also seen that even during non monsoon months of December, January and February the river rejoin experience large discharge varying in the range from ranging from minimum of 1010 cumecs to 1373 cumecs and during monsoon season, the same will be operated at MDDL by keeping the natural flow regime since no storage is allowed. During lean season the flow at dam site will vary between environmental flow release and design discharge from power generations. It is stated that to minimise the impacts of downstream ecologically, detail assessment of environmental flow release is carried out by M/s WEAPCOS as part of Lohit Basin study and the same has been considered by the Expert Appraisal Committee as also the MoEF. In such circumstances we have to necessarily come to a conclusion that the effect of peaking operations of the projects has been thoroughly considered by the EAC. Regarding study of effect on biodiversity including Dibro-Saikhowa National Park, it is clear from the records that as the Government of India has been implementing the National Wetlands Conservation Programmes (NWCP), and as per the guidelines for conservation and management of wetlands in India prepared in June 26, 2009 the Government has identified nearly 15 wetlands and there are no wetlands from the State of Arunachal Pradesh, except 3 namely Depar Beel, Urapad Beel and Sone Beel which are located about 501 km, 557 km and 529 km respectively from Demwe Lower Project. It is also clear that chapories of Lohit River have not been identified as wetlands of national importance. The chapories of Lohit river stated by the appellants relying upon BMHS publication is stated to be located about 33 km away downstream from the project site. The chapories are the elevated regions provide retreat and shelter for animals during flood. A study made by a three Member Committee constituted by the National Environment Appellate Authority covering 60 kms of river stretch from the dam site of Demwe Lower HEP in Assam/ Arunachal Pradesh Boarder, found that no endangered bird species including Bengal Florican were recorded by the Committee.

91. To study the variation between design discharge of 1729 m³/s and average river discharge of 400 m³/s, four representative cross sections at the identified chapories were taken and variation in water level was assessed by the Committee which shows that maximum water elevation in all 4 locations remain well below the lowest elevation of representative chapories. The project being run of the river scheme is not likely to retain the inflow and sediment/silt/boulders/nutrients etc and

during monsoon, river flow would be released normally and it was found during the field visit that none of the Avian/ fauna / species were encountered and their presence in area was also negated by the local communities. Regarding the river dolphins it was found as seen in the GOAP Committee that dolphins were recorded only in Brahmaputra main stream. However, during low water period, the upstream limit of dolphin distribution in the river Lohit is Tengapanimukh which is stated to be located about 72 km downstream along the river from Demwe Lower HEP. Therefore it was found that the likelihood of the presence of dolphins in the upstream of Tengapanimukh during dry season is negligible. It is found to be not an ideal condition for habitat of dolphins owing to limitations of low depth. There has been interaction with local communities including fisherman by the committee who conformed the non availability of dolphins in the downstream dam. Regarding the globally threatened avian species stated to have been situated in chapories like Bengal Florican, Swam Francolin, Lesser Adjutant, white beak Duck, Jerdom's Babbler, Indian Skimmer and Black-breasted Parrot Bill, the same are not regularly found and the impact of the project was found to be negative. Therefore the EAC has considered the downstream impacts including those on the habitat of Bengal Florican and MoEF is stated to be taking steps for conservation and preservation of the said species in the entire country.

92. Relating to the downstream flow characteristics, the studies show various data's taken of 95% dependable year to consider the worst case. Catchment area proportion method was used for working out contribution of each tributary on 10 daily basis in the downstream stretches.
93. Regarding the impact on Dibru-Saikhowa National Park (DSNP), it is seen from the minutes of EAC that it was at its direction and as part of Lohit Basin studies the flow variations at Dibru-Saikhowa was undertaken by M/s WAPCOS which has filed its report to MoEF and it was stated that the National Park is situated about 105 km downstream of the project. It is also stated in the report that the flow in lean season at Dibrusaikhowa National Park in Lohit River varies between 400-700 cumec while the maximum discharge of peaking of Demwe Lower would be at 500 cumec at National Park which is well within the range of natural flow. The report thus concluded that there is no other effect on non monsoon peaking operation, as the submergence level at all times remain below the lowest elevation of the park. All these facts have been thoroughly considered by the EAC as it is seen in the minutes of its three meetings."

63. Again under the said caption the cumulative impact study on divergent subjects including maintenance of minimum flow and fishery aspects was considered and held that there has been total application of mind in that regard. Therefore, in respect of the above said issues the findings of the Tribunal have become final and since the Hon'ble Apex Court has confirmed, it is not necessary for this Tribunal at this stage again decide the same.

64. In this appeal the appellants have challenged the Stage I Forest Clearance dated 1.3.2012 granted by the MoEF, followed by Stage – II

Forest Clearance dated 3.5.2013 and the consequential order of the State Government dated 26.7.2013. Under the impugned order dated 1.3.2012 the MoEF viz., the 2nd respondent has granted Stage – I Forest Clearance on the basis of the proposal of the State Government and recommendation of FAC under the Forest (Conservation) Act, 1980 (FC Act) for diversion of 1415.92 ha (1408.30 ha surface land + 7.62 ha underground land) of forest land for construction of Demwe Lower Hydro Electric Project (1750 MW) in favour of the 3rd respondent in Lohit District of Arunachal Pradesh, subject to various conditions. The conditions stipulated in Stage – I Forest Clearance include that the entire reservoir area should be declared as a Reserved Forest under the Indian Forest Act, 1927 with regulated fishing rights and that no further clearance to any other HEP on Lohit would be considered without a study on the cumulative impact on aquatic life, adjoining forest land, ecological aspects which has to be done by the State Government with a specifically drawn up expert team on the subject. The further condition stipulates that the State Government will carry out a study on the impact of the project on the wildlife of the area and submit the report with mitigative measures before final approval. It further states that no damage to the flora and fauna of the area shall be caused. In addition to the above said conditions there are conditions which direct a comprehensive study be conducted on the ecological impacts of the environmental changes and mitigation thereof, associated with the project, a cumulative assessment to be conducted presuming all the proposed dams are constructed on the Lohit River and on the basis of consideration of any subsequent proposal and upstream river stretches. Further, the State Government is directed in consultation with the MoEF to commission Indian Institute of Technology (IIT), Roorkee to conduct the studies related

to ecological impacts and cumulative impacts of the project stating that the study by IIT will not precede the construction of the project but will continue and the mitigation measures proposed in the study will be complied with concurrently. At this point of time it is relevant to note that the contention of the learned counsel appearing for the appellants is that these studies which are directed to be carried out post clearance have no meaning when once the project starts.

65. Stage II Forest Clearance, which is granted by the MoEF on 3.5.2013, refers to the compliance report submitted by the State Government on the Stage I Clearance which is otherwise called in-principle approval. The said compliance report is dated 22.3.2013 which particularly relates to Condition Nos.20 21, 22 and 23 of the Stage I Clearance which is as follows:

(xx)	A comprehensive study will be conducted on the ecological impacts of the environmental changes and mitigation thereof, associated with the commissioning of the project.	The draft Terms of Reference (TOR) for said study has been submitted to the Asstt. Inspector General of Forests (FC), MOEF vide letter no. FOR-199/Cons/2007/Vol-I/559-60 dated 19 th March 2013 for approval. Copy of draft ToR is enclosed (Annexure-VIII)
(xxi)	A cumulative impact assessment shall be conducted presuming all the proposed dams are constructed on the Lohit River. This study should be made the basis of consideration of any subsequent proposal on upstream river stretches.	The draft Terms of Reference (TOR) for said study has been submitted to the Asstt Inspector General of Forests (FC), MoEF vide letter no. FOR-199/Cons/2007/Vol-I/559-60 dated 19 th March 2013 for approval. Copy of draft ToR is enclosed (Annexure –VIII) On receipt of TOR approval from MOEF, the said studies shall be commissioned to India Institute of Technology (IIT), Roorkee.
(xxii)	The State Government in consultation with this Ministry will commission Indian Institute of	The draft Terms of Reference (TOR) for said study has been submitted to the Asstt. Inspector Generla of Forests (FC), MoEF

	Technology (IIT), Roorkee to conduct the studies proposal related to ecological impacts and cumulative impacts of the project.	vide letter no FOR-199/Cons/2007/vol-I/559-60 dated 19 th March 2013 for approval. Copy of draft ToR is enclosed (Annexure-VIII) . On receipt of TOR approval from MOEF, the said studies shall be commissioned to India Institute of Technology (IIT), Roorkee.
(xxiii)	The above mentioned studies by the IIT, Roorkee will not precede construction of the project, but will continue, and mitigation measures proposed in the studies will also be complied with concurrently.	The User Agency has furnished undertaking at (Annexure-XVII) .

66. The State Government has given the background of Lohit basin as stated above and also the impact of hydro power project stating that implementation of such natural resource project inherent challenges on the environmental and social impacts both potentially positive and negative, are expected. It is stated that the implementation of water resources projects increase the possibility of general socio economic development of the region particularly in rural areas of developing countries. It is stated that it provides infrastructure viz., electricity, road, water supply and distribution network etc which acts as stimulus for further development and economic growth. The compliance further refers to the assessment for the environmental and social aspects of the Hydro Electric Project and impact downstream areas by changing the water flow, water commissions, physical structure of river basin and flood plain. It is stated that in the Lohit basin cascade hydro functioning site of development a total of 13 hydro electric projects have been identified so far and notably the Demwe Lower HEP which is the lower most project of river Lohit, is in advanced stage of execution. Based on the EAC direction for separate Lohit basin study, the work was entrusted to M/s. WAPCOS covering the projects proposed to be

developed in which is the main Lohit river. Further, pursuant to the direction of EAC, a simultaneous study on the impact during peaking operation of Demwe Lower HEP and Dibang Multi purpose project at Dibru Saikhowa National Park has also been conducted by M/s. WAPCOS as a part of Lohit basin study and the study has been concluded and it is binding on all projects. The compliance also speaks about the upstream study and there was a three member Expert Committee to examine the same upto about 160 KM stretch of Lohit river and a comprehensive study was prepared which was considered by the Standing Committee of State Board for Wildlife, Arunachal Pradesh and subsequently by the Standing Committee of NBWL and the directives of the FAC that no further clearance to any other project on Lohit would be considered without study on the cumulative impact of aquatic life etc and that has been included in Stage I Forest Clearance for the project in question.

67. It is stated that regarding the directions of the Standing Committee of NBWL two separate studies, one relating to “cumulative impact assessment for all the proposed dams on the Lohit River” and another “comprehensive study and ecological impact associated with the commissioning of the project” shall be concurrently taken up by IIT, Roorkee during the execution of the project. Similar studies have been recommended by different divisions of MoEF viz, ST Division and WL Division with respect to cumulative and downstream impact and as per the EP stimulus M/s. WAPCOS has completed the basic study on the downstream of the project. It is stated that the scope of the basic studies have already been covered including the down stream study by M/s. WAPCOS. All the said studies are stated to be under a fixed time frame and segment

wise falling in three segments. It is based on the said compliance report of the State Government, the 2nd respondent MoEF in ST Division granted Stage II Forest Clearance under Section 2 of the Forest (Conservation) Act, 1980 for diversion of forest land with various conditions on 3.5.2013 which is also impugned in this appeal.

68. A reference to Stage II Forest Clearance dated 3.5.2013 shows that the Central Government has considered the compliance report on Stage – I Clearance. The conditions contemplated under Stage II Clearance are certainly not synonymous to that of conditions prescribed in Stage I clearance and therefore it cannot be contended that post clearance conditions are imposed. It is true that while granting Stage II FC there is one condition viz., Condition No.9. The mitigative measures suggested on the study conducted as per condition No.xiv of the in-principle approval will be implemented at the cost of user agency. Condition No.xiv of the Stage I FC (in principle clearance) states that the State Government will carry out a study on the impact of the project on the wildlife of the area and submit the report with mitigative measures before final approval. The final approval being one granted by the concerned State Government which in this case was granted by the Government of Arunachal Pradesh on 26.7.2013 which is also impugned in this appeal. In the final order passed by the Government of Arunachal Pradesh dated 26.7.2013 completing the process of Forest Clearance, there is no clause synonymous to Clauses 20, 21, 22 and 23 of the Stage I Forest Clearance as elicited above. Therefore, there is no gainsaying that after the grant of clearance, comprehensive and cumulative impact assessment study is directed to be made. On the other hand, the final order of Government of Arunachal

Pradesh dated 26.7.2013 gives various directions particularly to the user agency viz., the 3rd respondent directing to comply with various conditions stipulated in the EC, recommendations of the State Board for Wildlife and implementation of conditions stipulated and comprehensive report to be made to the State Government. In fact, it is stated that in the event of failure of the project proponent to deposit the amount, the MoEF will withdraw the Stage II Forest Clearance. There is one more direction in the State Government's order under the item "any other condition" which states that the Additional Principal Chief Conservator of Forests (Central) Regional Office, Shillong may impose various conditions from time to time in the interest of conservation, protection and development of flora and fauna of the area. All these conditions show that there is application of mind by the authorities at every point of time.

69. It is seen that the State Government has forwarded the forest proposal to the MoEF in December, 2009 and thereafter at the instance of MoEF Additional Principal Chief Conservator of Forests, Regional Office, Shillong visited the site and submitted a Site Inspection Report to the MoEF in March, 2010 covering all aspects relating to the forest land, alternatives considered for the location of the project on the wildlife aspect of Kamlang Wildlife Sanctuary etc and thereafter the proposal was considered by the FAC in the meeting held on 7.5.2010. A reference to the minutes of the meeting of the FAC dated 7.5.2010 shows that FAC has considered the proposal and found that it is the first HEP in private sector in Arunachal Pradesh where Hydro Electric Potential has been recognised. It is stated that the project is located at the tail end and there will be a total of five

dams on the Lohit river and therefore the FAC desired to have further information on the following:

- i. the justification of large area for permanent colony,
- ii. the justification of large area for temporary use,
- iii. the safeguards to ensure meeting the needs of the large temporary work force,
- iv. the hydrological aspect of the number of dams at different heights of rivers and its impact on aquatic life, adjoining forest land ecology etc.
- v. the impact on the wildlife of the area

With the above direction, the FAC has desired to consider the proposal again.

70. The user agency viz., the 3rd respondent has submitted its response to IG, Forest, MoEF on 17.5.2010 wherein it is stated that the user agency will take utmost care to reduce the tree felling by optimally using the area for infrastructure and construction facility and for the muck dumping area. It is further stated that the trees enumerated between FRL and FRL-4m would be retained without any felling. The reply further states about the minimum flow of water and Fisheries Management Plan stated to have been physically evaluated by the EAC during EC appraisal. Further, with regard to the alternate arrangement for the migratory fishes, as suggested by EAC, the reply of the 3rd respondent refers to Condition Nos.6, 12 and 13 of Special conditions of EC which are as follows:

“vi) During the construction period, continuous water shall be released downstream through a separate diversion tunnel of 6 m dia as proposed and during the operation period, continuous water will be released downstream through a separate 40 MW installed unit, which shall run 24 hrs continuously to release 35 cumec of water downstream to maintain the needs at the

Parasuram Kund as well as for maintaining the aquatic life in the downstream.

xii) The proposed reservoir of the dam should be declared as protected area with provision for development and conservation of fish species

xiii) The proposed fisheries development on the reservoir or the tributaries of Lohit River should be implemented within the timeframe. Three hatcheries are proposed for the indigenous species, viz. *Tor putitora*, *T. Mosal*, *T. Tor*, *Acrossocheilus hexagonolepis*, *Labeo rohita*, *L. Dero*, *Schizothorax richardsoni*, *Schizothoracichthys progastus* are suggested. A total budget of Rs. 456.25 lakhs is allocated for this purpose and the proposed plan should be implemented in consultation with the State Fisheries Department.”

71. The reply also speaks about the Lohit river basin study. That apart, the reply contains about the Wildlife Management study stating that the detailed list of trees and faunal aspects were considered by rendering the Inter Disciplinary Study by the Mountain and Hill Environment (IDSMH), Delhi University in collaboration with North East Hill University, Shillong as a part of the comprehensive EIA study. The study was stated to have been carried out to describe the faunal elements in the region starting from general understanding of faunal elements based on available literature and working plan of the Forest Department, apart from considering the Wildlife Management Plan of the project area. It also states about the primary and secondary data, communication of EIA study including that of upper radius of included area (10 KM radius) and the catchment area of Lohit basin reveals data on Wildlife which includes 50 species of mammals, 59 species of birds, 34 species of reptile and 45 species of butterflies. However, only 24 species of mammals 28 species of birds and 30 species of butterflies were recorded during the study from the project area recognising the need of conservation and likelihood of existence of faunal elements in the influenced and catchment area. Therefore, a comprehensive wildlife management plan was drawn taking note of the existing wildlife profile in the region as well as customs, culture and traditional rights of the locals,

considering the significance of the area under the Biodiversity Action Plan as per the Biological Diversity Act, 2002. The Environment Management Plan and Fisheries Development Plan have also been enclosed with the said reply made by the 3rd respondent pursuant to the consideration by FAC dated 7.5.2015 as stated above. The FAC at its meeting on 20.5.2010 has considered the reply filed by the User Agency viz., 3rd respondent. The FAC having found that the project being the first HEP in the private sector in Arunachal Pradesh where hydro electric potential has been recognised and as the project is located at the tail end and it is the first of total five dams proposed on the Lohit river, has recommended the project with following further conditions:

- i. "Standard condition of CA and NPV.
- ii. No further clearance to any other HEP on Lohit would be considered without a study on the cumulative impact on aquatic life, adjoining forest land, ecological, aspects which has to be done by State Government with a specifically drawn up expert team on the subject.
- iii. The project proponent will explore the possibility of shifting the proposed colony to an area with lesser tree density to substitute the high tree density area. The objective is to save as many trees as possible out of total 43,000 trees. The project proponents will submit this alternative before final approval with the approval of State Government.
- iv. The State Government will carry out a study on the impact of the project on the wildlife of the area and submit the report with mitigative measures before final approval.

Any tree felling will be done under strict supervision of the state Forest Department."

72. After such recommendations were made by FAC, which were based not only on thorough study of the entire issue but also considering the reply filed by the 3rd respondent user agency subsequent to post appraisal of the project by FAC based on representation made by Kalpavriksh of Pune, an NGO in respect of which responses were called by

MoEF. The 3rd respondent replied on 4.1.2011 responding to the observations made by Kalpavriksh relating to impact in the downstream area, impact of flow variation (on wildlife habitat), impact on Tailung/Parashuram Kund, Lohit river basin study, delinking Demwe project Relivings of Forest Rights Act (FRA) for area submergence, Catchment Area Treatment and Compensatory Afforestation. The representation given by various stakeholders in the meeting held on 10.3.2011 desired that the competent authorities viz., State Government and Standing Committee of NBWL should consider before the Stage I approval is granted. In the meantime, the Standing Committee of NBWL has been advised by MoEF based on a direction of the National Environment Appellate Authority, in the interim order passed in appeal No.9 of 2010 to consider the upstream effects of Demwe Lower HEP project on river Lohit and important bird areas.

73. It was thereafter, the matter which has been hitherto considered by FAC under the Forest (Conservation) Act, 1980 has been referred to the State Board for Wildlife which has considered the issue in its meeting held on 27.5.2011. Dealing with the proposal for diversion and relying upon the study made by the Committee constituted by the PCCF and Chief Wildlife Warden, Government of Arunachal Pradesh has noted that the aspect of bird species, migration vis-a-vis fish were examined by EAC of MoEF as part of EC and adequate measures with financial provisions have been made and Fisheries Management Plan approved by the MoEF. The SBWL has also desired certain additional measures to be taken viz.,

- (1) the Government of Arunachal Pradesh may likely to study
evolve any suitable scheme to work out the

preventive/ameliorative measures in close consultation with local community for effective implementation and monitoring of conservation and management of the downstream area i.e., Floporia area.

(2) the Activities pertaining to education and others due to will post and media binding apart from active involvement of community in developing and implementing Conservation and Management Plan to be undertaken.

74. The SBWL as per the direction of the MoEF, has also considered the observations made by Mr. Akhil Gogoi relating to the impact of Wildlife Habitat and ultimately recommended the case by submitting the same to the State Government for referring to MoEF. Thereafter, the Government of Arunachal Pradesh viz., the 1st respondent on 14.3.2011, has sent the proposal with the recommendations of the SBWL to the Standing Committee of NBWL. It is seen that the Government of Arunachal Pradesh has given various explanations to the queries raised by the Standing Committee of NBWL which ultimately considered the proposal on 14.10.2011 under the Chairmanship of the Hon'ble Minister of State (independent charge) for Environment and Forest. The committee has considered the views of Dr. Madhusudhan of Nature Conservation Foundation, who mentioned that the mining area was left adjoining Kamlang Sanctuary and birds were regularly seen in this area. He also made a statement that the impact of the project will be felt downstream and it will be large beyond the physical area of the project depending upon the manner in which the water in the river would be regulated. He also submitted that the fishing activity in the river as well as agriculture and river

transportation and livestock rearing might adversely get impacted by the project. Another Member of the Standing Committee of NBWL Dr. Asad Rahmani pointed out that the proposed dam would have significant negative impact on land and wildlife, the “chapories” of Lohit river and Dibru Saikhowa National Park, both of which designated as Important Bird Areas containing “critically endangered” bird species including Bengal Florican which is a Schedule I Species under the Wildlife Protection Act. Another Member Ms. Prerna Bindra pointed out that State does not rest on the said project alone and there would be many more projects to come up in Arunachal Pradesh’s Lohit basin. She also stated that the protected aerial distance of 8.5 KM from the Kamlang Wildlife Sanctuary was the distance from the proposed dam site, and that the distance of the reservoir created as part of the project would be just 50 mt from the sanctuary. However, the Chief Conservator of Forest and Forest Secretary, Members of SBWL who are also the members of the Standing Committee of NBWL have stated that the impact assessment study have been made by the State Wildlife Department on the downstream stretch of Lohit river. They also submitted that the minimum flow available subsequent to the operationalization of the Hydro Electric Project would be maintained at 20% level even during lean season. It was after considering the objections raised by the non-official members of the Standing Committee of NBWL, the Standing Committee has decided finally under the Chairmanship of the Hon’ble Minister of State to constitute a Team consisting Dr.Asad Rahmani, and Sri. Pratap Singh to get a clear and balanced picture of the possible impact on the aquatic and other fauna downstream of Lohit river and get a first-hand assessment on the impact of wildlife desiring to convene a separate meeting to discuss the important issue in November, 2011. Dr.

Asad Rahmani and Mr. Pratap Singh after conducting inspection have given separate reports which were discussed by the Standing Committee of NBWL in its 24th Meeting held on 13.12.2011. It is seen that the non-official members supported the report of Dr. Asad Rahmani for rejecting the proposal, whereas Arunachal Pradesh State Government representative supported the proposal. The Official Memorandum of MoEF dated 11.2.2012 issued by the Deputy Inspector General of Forests states by referring to the report of Dr. Asad Rahmani, that there was lack of data and the need for further study, but also refers to the main concern of non-official Members of the Standing Committee of NBWL that during Diurnal fluctuation of water flow from the dam through the peaking operation between 1200 – 1279 QMC which is projected to cause corresponding variation in water level 105 km down stream upto Dibru- Saikhowa National Park and it will have detrimental effect on conservation of eco-system including habitats of Bengal Florican and Wild Buffalo. The said communication of the D.I.G, Forest dated 11.2.2012 as stated above, mentions that keeping the fact into consideration that it is a clean energy project, the Standing Committee of NBWL held on 13.12.2011, under the Chairmanship of Minister of State (Independent Charge), Environment and Forest recommended the clearance on behalf of the Standing Committee of NBWL as per the relevant orders of the Hon'ble Supreme Court with additional measures viz.,

- (1) A comprehensive study will be conducted on the ecological impacts of the environmental changes and mitigation thereof, associated with the commissioning of the project.
- (2) A Cumulative Impact Assessment shall be conducted presuming all the proposed dams are constructed on the Lohit River. This study should be made the basis of consideration of any subsequent proposal on the upstream river stretches.

- (3) The State Government in consultation with this Ministry will commission Indian Institute of Technology (IIT), Roorkee to conduct the studies related to the ecological impacts and cumulative impacts of the project.
- (4) The above mentioned studies by the IIT, Roorkee will not precede construction of the project, but will continue concurrently and mitigation measures proposed in the studies will also be complied with concurrently.”

The communication further states that the Official Memorandum is issued with the approval of Minister of State (Independent Charge), Environment and Forest and the Chairperson of the Standing Committee for NBWL incorporating the said four conditions stated in the Official Memorandum dated 11.2.2012. The said four conditions were incorporated as Condition Nos. 20, 21, 22 and 23 in the Stage I Forest Clearance dated 1.3.2012, the subject matter of challenge in this appeal along with the other conditions. This was followed by the Stage II Clearance and the consequential order of the State Government.

75. The narration of the above said facts would clearly shows that the views of the Standing Committee of NBWL constituted under the Wildlife (Protection) Act, 1972 has been taken into consideration cumulatively for the purpose of issuing Forest Clearance under the Forest (Conservation) Act, 1980 for the project in dispute. It is relevant to state at this point of time that as far as the Forest Clearance for the project in question it is covered under the Forest (Conservation) Act, 1980 and the rules made thereunder in 2003. Section 2 of the Forest (Conservation) Act, 1980 requires approval of the Central Government either for dereservation of forests or use of forest land for non-forest purpose. The said approval is granted by the Central Government based on Forest Advisory Committee recommendation under Section 3 of the Forest (Conservation) Act, 1980.

76. Rule 3 of the Forest (Conservation) Rules, 2003 stipulates the composition of Forest Advisory Committee which is as follows:

“3. Composition of the Forest Advisory Committee. – (1) The Forest Advisory Committee shall be composed of the following members, namely: -

(i) The Director General of Forests, Ministry of Environment and Forests, - Chairperson.

(ii) The Additional Director General of Forests, Ministry of Environment and Forests – Member.

(iii) The Additional commissioner (Soil Conservation), Ministry of Agriculture – Member.

(iv) Three non-official members who shall be experts one each in Mining, Civil Engineering and Development Economics – Member

(v) The Inspector General of Forests (Forest Conservation), Ministry of Environment and Forests. – Member Secretary.

As per the Forest (Conservation) Act, 1980 and the Rules made thereunder, it is based on the FAC recommendation, the FC is granted by the MoEF. But, as we have elicited above, on the factual matrix of this case, while FAC has made proposal on various occasions, at one point of time since the issue relating to Eco-Sensitive Zone is involved in this case, as per the decision of the Hon'ble Supreme Court, a reference was made to the State Board for Wildlife which is constituted under the Wildlife (Protection) Act, 1972 and after the Standing Committee of the State Board has considered, it was referred to the Standing Committee of NBWL which is also constituted as per Section 5-A of the Wildlife (Protection) Act, 1972 which reads as follows:

“Constitution of the National Board for Wild Life.—

(1) The Central Government shall, within three months from the date of commencement of the Wild Life (Protection) Amendment Act, 2002 (16 of 2003), constitute the National Board for Wild Life consisting of the following members, namely:— (a) the Prime Minister as Chairperson; (b) the Minister in-charge of Forests and Wild Life as Vice-Chairperson; (c) three members of Parliament of whom two shall be from the House of the People and one from the Council of States; (d) Member, Planning Commission in-charge of Forests and Wild Life; (e) five persons to represent non-governmental organizations to be nominated by the

Central Government; (f) ten persons to be nominated by the Central Government from amongst eminent conservationists, ecologists and environmentalists; (g) the Secretary to the Government of India in-charge of the Ministry or Department of the Central Government dealing with Forests and Wild Life; (h) the Chief of the Army Staff; (i) the Secretary to the Government of India in-charge of the Ministry of Defence; (j) the Secretary to the Government of India in-charge of the Ministry of Information and Broadcasting; (k) the Secretary to the Government of India in-charge of the Department of Expenditure, Ministry of Finance; (l) the Secretary to the Government of India, Ministry of Tribal Welfare; (m) the Director-General of Forests in the Ministry or Department of the Central Government dealing with Forests and Wild Life; (n) the Director-General of Tourism, Government of India; (o) the Director-General, Indian Council for Forestry Research and Education, Dehradun; (p) the Director, Wild Life Institute of India, Dehradun; (q) the Director, Zoological Survey of India; (r) the Director, Botanical Survey of India; (s) the Director, Indian Veterinary Research Institute; (t) the Member-Secretary, Central Zoo Authority; (u) the Director, National Institute of Oceanography; (v) one representative each from ten States and Union territories by rotation, to be nominated by the Central Government; (w) the Director of Wild Life Preservation who shall be the Member-Secretary of the National Board.

(2) The term of office of the members other than those who are members ex officio, the manner of filling vacancies referred to in clauses (e), (f) and (v) of sub-section (1), and the procedure to be followed in the discharge of their functions by the members of the National Board shall be such, as may be prescribed.

(3) The members (except members ex officio) shall be entitled to receive such allowances in respect of expenses incurred in the performance of their duties as may be prescribed.

(4) Notwithstanding anything contained in any other law for the time being in force, the office of a member of the National Board shall not be deemed to be an office of profit.”

77. Section 5B of the said Act enables the NBWL at its discretion to constitute a Standing Committee of National Board for Wildlife consisting of the Vice-Chairman of the NBWL, who is the Minister in charge of the Wildlife, the Member Secretary and not more than 10 members to be nominated by the Vice-Chairperson from amongst the members of the

National Board. Section 5B which relates to the constitution of the Standing Committee reads as follows:

“Standing Committee of the National Board.—

- (1) The National Board may, in its discretion, constitute a Standing Committee for the purpose of exercising such powers and performing such duties as may be delegated to the Committee by the National Board.
- (2) The Standing Committee shall consist of the Vice-Chairperson, the Member-Secretary, and not more than ten members to be nominated by the Vice-Chairperson from amongst the members of the National Board.
- (3) The National Board may constitute committees, sub-committees or study groups, as may be necessary, from time to time in proper discharge of the functions assigned to it.”

This Tribunal is conscious of the fact that having been constituted under the NGT Act, 2010, it has jurisdiction only in respect of the enactments mentioned under Schedule I. The enactments under the said Schedule does not include the Wildlife (Protection) Act, 1972 and therefore in normal circumstances this Tribunal would not venture to deal with any decision either of SBWL or NBWL. But the factual matrix of the case which we have taken efforts to explain in detail clearly shows that while deciding FC under the Forest (Conservation) Act, 1980 the Government has invited a decision by NBWL under the Wildlife (Protection) Act, 1972 as it involves Ecologically Sensitive Area and it was based on the decision taken by the Standing Committee of NBWL, FC itself which is challenged in this appeal, has been granted and therefore one cannot brush aside the validity or otherwise of the decision taken by NBWL on the factual matrix of this case while deciding about the validity or otherwise of the impugned Forest Clearance both Stage I and Stage II and the consequential State Government Clearance granted under the Forest (Conservation) Act, 1980.

78. Having come to such conclusion, it is incumbent on our part to examine the decision taken by the Standing Committee of NBWL. Even if the Standing Committee of NBWL which is a delegated authority of NBWL itself is taken as an Advisory Body for NBWL to take a decision, the question is as to whether having constituted as per the Section 5B(2) of the Wildlife Protection Act, 1972, it will be open to the Chairperson to just like that brush aside the views of the majority of the members of the Standing Committee of NBWL. The communication of the Deputy Inspector General of Forest dated 11.2.2012 which refers about the Standing Committee of NBWL met on 13.12.2011 does not in any manner give the reason for brushing aside the views of the non-official members of the Standing Committee. Having constituted a Statutory Standing Committee as per the provisions of the Central enactment and in the absence of the method of decision to be taken by such Standing Committee, we are of the view that either the Chairperson who happens to be the Hon'ble Minister of State should have given proper reason for rejecting the objection of majority of the non official members or the decision ought to have been arrived at based on the opinion of the majority of the members of the Standing Committee of National Board. Neither of these acceptable principles are followed in making a decision under the Wildlife (Protection) Act, 1972 by the Standing Committee. Even though the Standing Committee of NBWL is a recommendatory body, the same being a Statutory Committee, is bound by the laudable principles of justice and fair play while taking a decision particularly in respect of the region which is admittedly an ecologically sensitive area. If any convincing reason is given by the Standing Committee of NBWL, it stands differently for this Tribunal while considering the validity or otherwise of the same. In the absence of any

reason but only to reject the majority of the non-official members who happened to be experts in the field and whose objections have been elicited in the communication of the Deputy Inspector General of Forest dated 11.2.2012, in our considered view and in all fairness either the Hon'ble Minister incharge of the Forest or the Standing Committee of NBWL should have taken the decision with proper reason. In the absence of any acceptable reasons, we have no hesitation to hold that the decision of the Minister as if it is the decision of the Standing Committee of NBWL which forms the basis of the granting of FC in this case under the Forest (Conservation) Act, 1980, is not sustainable in law.

79. However, as we have clearly decided with elaborate discussion regarding the other authorities under the FC Act, particularly that the FAC has dealt with every aspect of the issues involved in the project in question and in fact considered the objections raised by the outsiders and therefore, there is no question of non-application of mind and also taking note of the fact that in the appeal, where EC was questioned, many of the issues were answered by us even though the issue relating to the FC which is peculiar and based on the Forest Policy of the Government, has not been discussed in detail, we do not want to set aside the impugned FC both Stage I and Stage II and the consequential order of the State Government on that basis. On the other hand, we are of the view that in the interest of justice, the Standing Committee of NBWL, if desires, should consider all the issues afresh, taking into consideration the views expressed by the majority of the members and also to have a fresh look on the ecologically sensitive area in respect of which various points have been raised which we have elicited in our judgment and take a decision. Till such decision is taken, we

consider it necessary to suspend the impugned FC both Stage I and Stage II and the consequential order of the Government of Arunachal Pradesh, so as to enable the Standing Committee of NBWL to have a fresh look on the issue based on which the 2nd respondent shall pass appropriate orders.

80. Accordingly, the appeal stands partly allowed, holding

(1) That there is no illegality or infirmity in the proceedings of the authorities under the Forest (Conservation) Act, 1980 during the consideration of the proposal of the project in question by FAC and other authorities under the Act.

(2) However, the decision taken by the Standing Committee of NBWL dated 13.12.2011 as it is explained in the Official Memorandum of MoEF dated 11.2.2012 is not in accordance with the established principles of law and hence the Standing Committee of NBWL shall reconsider the issue relating to Demwe Lower Hydro Electric Project and pass appropriate orders within a period of six months from the date of the judgment.

(3) Till such orders are passed, the impugned FC Stage I dated 1.3.2012 and Stage II dated 3.5.2013 issued by the MoEF and the consequential order of the Government of Arunachal Pradesh dated 26.7.2013 relating to diversion of 1415.92 ha of Forest Land for construction of Demwe Lower Hydro Electric Project (1750 MW) in Lohit District of Arunachal Pradesh stands suspended.

4. After the appropriate directions/orders are passed by the Standing Committee of NBWL as per the direction given above it will be open to pass suitable further orders by the MoEF in respect of the project.

However, on the facts and circumstances of the case, there will no orders as to cost.



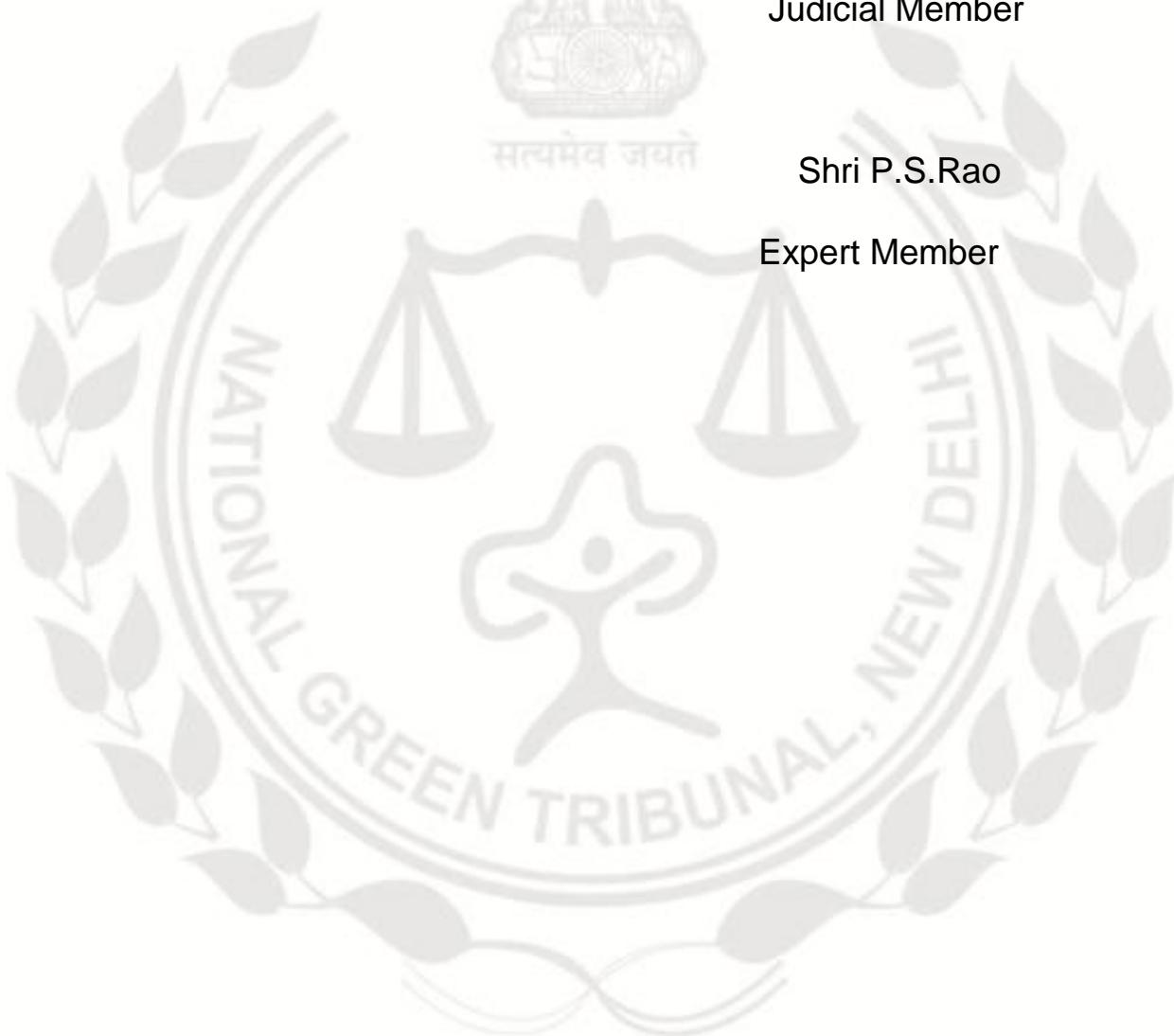
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Justice Dr.P.Jyothimani

Judicial Member

Shri P.S.Rao

Expert Member



NGT



NGT