

**BEFORE THE NATIONAL GREEN TRIBUNAL
(WESTERN ZONE) BENCH, PUNE**

**M.A. No.19/2015 (WZ)
IN
APPLICATION No.135(THC)/2013(WZ)**

CORAM:

**Hon'ble Dr. Justice Jawad Rahim,
(Judicial Member)
Hon'ble Dr. Ajay A. Deshpande
(Expert Member)**

B E T W E E N:

SATARA MUNICIPAL COUNCIL,
Through : Its Chief Officer,
Mr.Abhijit Satish Bapat,
Aged 31 Yrs. Office : 1, KesarkarPeth,
Satara 415 001.

.....Applicant

A N D

- 1. Ministry of Environment, Forests
And Climate Change,**
Through :Principal Secretary,
ParyavaranBhavan, CGO Complex,
Lodhi Road, New Delhi 110 003.
- 2. Ministry of Environment, Forests
And Climate Change,**
Through : Chief Conservator of Forest (C),
Regional Office, Western Region,
Kendriya Paryavaran Bhavan,
Link Road No.3, E-5 Ravi Shankarnagar,
Bhopal 462 016 (M.P.)
- 3. Revenue and Forest Department,**
Through Its Principal Secretary,
Government of Maharashtra,
Mantralaya, Room No.456/461,
Annex, Hutatma Rajguru Chowk,
Madam CamaMarg, Mumbai 400 032.
- 4. Department of Environment,**
Through : Its Director,

Maharashtra State, Mantralaya
Mumbai 400 032.

**5. The Additional Chief Principal
Conservator of Forest,**

2nd Floor, Van Bhavan, Ramgiri Road,
Civil Lines, Nagpur 440 001.

6. The Deputy Conservator of Forest,
“Vana Bhavan”, Godoli RopVatika,
Satara 415 001.

7. The Principal Secretary,
Water Resources Department,
Mantralaya, Madam Cama Road,
Hutatma Rajguru Square,
Nariman Point, Mumbai 400 032.

8. Executive Engineer,
Jihe-Kathapur,
Lift Irrigation Division,
Krishna Nagar, Satara,

**9. Member Secretary,
State Environment Impact
Assessment Authority,**
Maharashtra State.

.....Respondents

Counsel for Applicants

Mr. Sameer Khale, Mr. Makarand Rodge and
Mr. Rahul Garg, Adv.

Counsel for Respondent No.1 :

Mr. Milind M. Mahajan Adv.

Counsel for Respondent No.3,5&6:

Mr. Anant L. Joshi, Adv.

Counsel for Respondent No.4&9 :

Mr. R.B. Mahabal, Adv.

Counsel for Respondent No.7 & 8 :

Mr. P.S. Suryavanshi, Adv.

Dated : 9th February, 2017

JUDGMENT/ORDER

1. This is one of such unique case where this Tribunal was required to invoke its inquisitive jurisdiction in order to reassert the well settled principles of environmental jurisprudence namely; 'precautionary principle' and 'Doctrine of public trust' to adequately address issues related to environmental sustainability of proposed reconstruction of Kas dam, located in close proximity of 'World Heritage site of Kas plateau' which is also an environmentally eco-sensitive zone (ESZ).

2. This case raised substantial environmental issue related to legal propositions as well as factual technical aspects related to environmental impacts of the proposed reconstruction of dam. Before dealing with these issues, it would be necessary to record the factual data, including the chronological details related to this project.

3. This Tribunal, in its final order dated 13th January, 2014 passed in Application No.135(THC)/2013 (WZ), had continued the directions issued by Hon'ble High Court of Bombay, Nagpur Bench in Writ Petition No.1277/2000 to seek leave of this Tribunal in case of any proposed tree cutting activity within 10 km. from the Sanctuary and

National Park. This leave is required to be taken in the peculiar circumstances of rapid degradation of the forest cover, need of protecting the forest cover and view taken by the Hon'ble High Court based on the 'Precautionary Principle'. This particular Application is, therefore, filed by Applicant, Satara Municipal Council (SMC) to seek leave of this Tribunal to cut 675 trees which are spread over forest area of 2.66ha that is likely to be submerged in the reconstruction project.

4. The Applicant's contention is that presently the drinking water supply to Satara city is provided from the existing Kas water storage reservoir which is about 35 km. away from Satara city. This existing dam was constructed by the British Government, across river Urmodi in 1885 and the present water storage capacity of the existing dam is 107 Mcft. The Applicant's plea is that with the rapid increase in population, the water requirement is increasing substantially. It is urged that there is no other permanent source of water and therefore, it is necessary to augment the water storage at the Kas dam to cater to the long term water requirement of Satara city. The Applicant has therefore proposed that the height of the existing Kas dam be increased by 12.45m to enhance the water storing capacity of the dam from 107 Mcft to 500 Mcft. The

Applicant's further contention is for this augmentation project, they will need additional 23.63 Ha. of non-forest land as well as 2.67 Ha. of forest land at village Kas, Taluka Jaoli, District Satara. That both these land areas are covered in proposed ESA as per the draft notification by Ministry of Environment, Forest (MoEF) on 10th March 2014 regarding eco-sensitive area in the Western Ghats.

5. The Applicant claims it has obtained all necessary permissions for this project, including in-principle forest clearance vide MoEF letter dated 19/12/2014. On that basis they have submitted their Application for EC to SEAC Maharashtra and vide order dated 21st March 2013, the said project was appraised for grant of TOR by SEAC. Thereafter, the SEIAA, Maharashtra has also appraised the project and sought clarification of MoEF regarding permissibility of such project in ESA area. The Applicant contends that MoEF vide letter dated 13th November 2013 informed SEIAA that the drinking water projects as well as hydro power projects are not prohibited in ESAs. Thereafter SEIAA, Maharashtra in its 25th meeting has considered the Communications from MoEF regarding non-applicability of Environment Clearance Regulations 2006 for the drinking water projects and agreed with the clarifications received from MoEF which clarified that as this particular project is

purely a drinking water project, the EC Regulations 2006 are not applicable.

6. The Applicant has therefore, approached this Tribunal for grant of leave to go ahead with the project and also to cut the 675 trees as identified by the Forest Department, in compliance to the condition stipulated in the in-principle Forest Clearance granted to the project.

7. On registering this Application, notices were issued and the parties have entered their appearance. Considering the proximity of the proposed project to the 'World Heritage site' of Kas plateau which incidentally is also an ecologically sensitive area, this Tribunal had to be more cautious while dealing with this particular Application. The anxiety with which the Tribunal has approached the issue can be easily gauged by going through the daily orders, pertaining to this case.

i) On 8th April 2015, the Tribunal asked the Applicant and concerned Agency to describe the methodology of implementation of irrigation project and the potential impact of Kas plateau eco system.

ii) On 7th July 2015, Chief Officer of Satara Municipal Council (SMC) submitted that the EIA study presented before SEIAA and approval of SEIAA was sought.

iii) On 20th July 2015 on observing that no information was furnished on the action plan and methodology, time was again given to the authorities.

iv) On 20th August 2015, SEIAA and MoEF sought additional time and considering the absence of replies

from the Environmental Regulatory Authorities, the Tribunal, on its own, framed six specific questions which are pertaining to assessment of environmental sustainability of project

(i). *Why the EIA Notification dated 14th September, 2006 is not applicable to the project in question though a part of forest is being affected/impacted due to the same, and there is impoundment of water by expansion of project.*

(ii). *Whether the project requires permission from Archaeology Department of India since it is a protected site as declared by UNESCO (World Heritage Site).*

(iii). *Whether any scientific studies are carried out regarding material and methodology which is to be used for construction of the dam in order to ensure that the plateau of kas will not be damaged, impacted or otherwise environmentally degraded in any manner even though the impugned project is implemented.*

(iv). *Whether the Irrigation Department has suggested any particular use of material for the construction of dam in order to ensure due protection of the plateau of kas and avoid degradation of the environment in the surrounding area, particularly continuity of the blooming of flowers per year which attracts the tourists and makes it specifically protected site which comprises wide variety flowers many of which are of rare quality and are not generally found elsewhere?*

(v). *Whether any other alternatives for providing additional water supply to Satara City were examined?*

(vi). *Whether Irrigation Department had conducted study in respect of safeguards which are necessary for implementation of the project in question and the same are approved/recommended by SEIAA?*

8. Even thereafter, no replies came from the authorities. Under these compelling circumstances, the Tribunal was constrained to appoint a two Members Expert Committee comprising of Dr. S.R. Asolekar, Professor of Central Environmental Science and Engineering, IIT, Powai and Dr. Shrirang Yadav, Professor of Botany, Head of the Department Shivaji University, Kolhapur vide order dated

4/11/2015. The Committee finalised the Terms of reference in consultation with the authorities and submitted the final report on 16/2/2016. All the Respondent authorities were asked to respond to this report of the Expert Committee. It is necessary to note that none of the authorities including MoEF, SEIAA, DOE Maharashtra have responded on various technical observations and findings of the report and merely dealt on their statutory role, limited to EIA notification, 2006.

9. The report of this Expert Committee is quite elaborate and has explicitly recorded its findings in the clear terms as under:

“Finally, with the backdrop of facts discussed above, the antiquity of region, unique physiognomy, topography, floral and faunal diversity, diversity in microhabitats, fragile nature of ecosystem, the Kas Plateau being the World Heritage Site, evolutionary ecotone, eco-sensitive zone and active site for natural evolution, the site needs to be protected from human interference and any kind of development has to be inhibited to protect the World Heritage Site.

Therefore, the Committee is of considered opinion that the proposal should not be accepted at all nor it is desirable in the vicinity of World Heritage Site (Kas Plateau)”.

10. While coming to such conclusion, the Committee has referred to numerous literature as well as carried out certain analytical studies to deal with air pollutant

emissions which are likely to be released during the road transportation of construction material for Kas dam. The Committee has also noted that neither there are any efforts reportedly made to identify alternate sources of drinking water for the city of Satara nor any alternative measures for augmentation of local water supplies are proposed. The Committee has also recorded that total 3375 trees are required to be cut for the construction of the project as against 675 trees as reported by the Applicant. The Committee has also referred to ecological significance and fragility of the Kas eco-system highlighting its uniqueness and also its sensitivity to even minor environmental pollution or changes, in view of the rare and endangered species of flora, which predominantly are of endemic nature.

11. In response to this particular report as well as directions of this Tribunal, Respondent Nos.4 and 9 i.e. State Environment Department and State Environmental Impact Assessment Authority (SEIAA) filed an affidavit dated 18th March 2016. The important submissions of the Respondents are reproduced below :

“8. I say and submit that EAC MoEFCC in its 70th meeting held on 10-11th December 2013 has considered this case at Agenda Item No.22. EAC has gone through the complete details of the case as recorded in the minutes and decided that “..In view of the above, EAC expressed its inability to consider the project for the

purpose of ToR / EIA /EMP etc, as this does not fall within the purview and mandate of the EAC". Having clearly expressed this, EAC clearly loses its jurisdiction to deal with this matter. EAC has gone ahead making some observations, which therefore are of the nature of **Obiter Dictum** and are devoid of any authority and jurisdiction.

9. I say and submit that MoEF&CC thereafter has clarified it vide their letter dated 24th April 2014 at point no.6 that "... the instant project is purely drinking water supply scheme and does not attract the provisions of EIA Notification 2006 and its subsequent amendment 2009".

10. I say and submit that we agree with this observation of MoEFCC. Also as and by way of hierarchy and organizational discipline, one ought to stop after MoEFCC opinion on the issue of applicability of EIA Notification of 14.09.2006 and after considering all subsequent amendments. The general conditions stated with reference to submergence and rehabilitation, are in context and cases of hydro power projects and command area irrigation projects; and too for the determination of their Category of A or B. But ab-initio they don't apply to drinking water projects that are not covered in category 1(c) or any other Category in Schedule-I of EIA Notification.

11. I say and submit that considering the above EAC MoEFCC minutes and conclusive letter of the MoEFCC itself, SEAC-I-Maharashtra and SEIAA-Maharashtra can't and don't have any different view, on merit and as and by way of procedural discipline. 'SEAC and SEIAA-Maharashtra' are creature of EIA Notification 2006 and are bound by and are under the scope, ambit, authority and jurisdiction prescribed in it, and nothing beyond that. They are not the standing executive arms or 'Environment Department' as part of Government of Maharashtra of India for carrying out other functions than that contained in the EIA Notification and powers delegated under this Notification.

12. I say and submit that when the matter is referred to them, they ought to first satisfy themselves by following the procedure prescribed in '**Clause 5, Screening, Scoping and Appraisal Committees**' and at the most '**7 Stages in the Prior Environmental Clearance (EC) Process for New Projects :- (I) Screening and (II) Scoping**' of EIA notification. However the moment they realize and become aware that the impugned project before them is not covered under EIA Notification, they ought to rescue themselves by formally recording reasons and finding in that context. In my respectful submission, **EAC/SEAC/SEIAA do not have any general advisory powers in case of projects that are not in their jurisdiction.**

18. I say and submit that 'Environmental Clearance' is not required for this project. There is no complaint involving substantial issue of environment or Relief, compensation, restitution, damage to environment and no appeal/complaint is pending before Respondents in this regard by anyone. Respondent Nos.4 and 9 have no complaint or objection to execution of this project, as much as they see no additional environmental issue in this than mentioned by MoEFCC by their letter."

12. In the meantime, SEIAA-Maharashtra referred the report of the Expert Committee to SEAC-Maharashtra for its expert comments and recommendations. The Minutes of SEAC dated 11th and 12th March, 2016 would indicate that SEAC-Maharashtra initiated the process to offer its comments. The relevant Minutes are reproduced below:

"Member Secretary, SEAC-I apprised the Committee about the creation of a two member committee by NGT (WZ) to study the impact of increasing the height of the Kas dam by Satara Municipal Council on the biodiversity and ecology of Kas plateau. SEIAA has referred the report to SEAC-I for its expert comments and recommendations. The Committee felt that it will

require some time to study the report and frame its recommendations on the report. Therefore it was decided that the matter should be kept in next SEAC meeting when a proper decision can be taken up. This may be informed to SEIAA by Member Secretary, SEAC. It was also decided that a team comprising of the Chairman, Shri D.A. Hiremath, Shri C.I. Sambutwad and Dr. Ramesh Dod shall visit the Kas Plateau and dam to study the situation.”

However for the reasons best known to SEIAA-Maharashtra, SEIAA has not referred to this development and the Tribunal was not informed about any expert comments/recommendations received from SEAC.

13. The MoEF also filed affidavit and on 6th September 2016, sought some time to examine and appraise the Expert Committee Report. Thereafter, MoEF filed another affidavit on 21st October 2016 and submitted that the drinking water projects are not covered under EIA Notification, 2006 and therefore, the MoEF vide letter dated 24th April 2014 had communicated its view to SEIAA wherein it is mentioned that no EC is required for this project and also observed that SEIAA may take final view in this regard. MoEF further submitted that as an abundant precaution, state government was directed to take certain steps by the said communication which are as under :

- *Necessary clearance for diversion of forest land for the project to be obtained from the designated authority before commencement of work.*
- *Any other mandatory clearance/statutory permission from any other organization/department to be obtained by the project proponent.*

- *Environmental Safeguard measures/ management plan may be formulated and implemented approximately and in the timely manner.*
- *Structural safety of dam is to be ensured by appropriate designated authority.*
- *Report of Shri Kasturirangan Committee on Western Ghat has to be visited to examine if such works are permitted in the area. Also permission from UNESCO may be required and if so, necessary permission may be taken in view of the proximity to a UNESCO world heritage site.*

14. As regards the views of MoEF on the Expert Committee Report, the MoEF submits the following :

“That this Hon’ble Tribunal has directed by order dated 15-7-2016 that the Ministry should give its observation with respect to the Report of the 2-Member Committee is at present cannot be furnished to this Hon’ble Tribunal by the Ministry in view of the fact that the Expert Appraisal Committee (EAC) has been dissolved on 02-09-2016 and is still awaited to be reconstituted. It is further submitted that in view of the provisions of EIA Notification, 2006 since Drinking Water Projects are not covered, the Ministry is not under obligation to appraise a project which does not fall under its jurisdiction. It is further submitted that since the EAC vide its letter dated 24-4-2014 has already expressed its view on Satara Municipal Council, it would be inappropriate for the Ministry to reappraise the entire issue for which even the Ministry is not legislatively bound to do so as it will amount to exceed the jurisdiction vested with the Ministry as per EIA Notification, 2006. Thus in view of the aforesaid submission, it is most humbly brought to this Hon’ble Tribunal that the Hon’ble Tribunal may be pleased to delete the name of Ministry of Environment, Forest & Climate Change from the array of Party as Respondent as the present dispute does not seeks any direction which may be required to be complied by the Ministry.”

15. And finally, the MoEF has not offered any comment or opinion on the said report of the Expert Committee, on

various technical issues flagged by the committee raising serious apprehension of environmental degradation and effect on the eco-sensitive area of Kas plateau.

16. Interestingly, while going through the documents, the Tribunal observed that there are two separate letters having same number and date issued by MoEF on 24th April, 2014. In the letter annexed to MoEF affidavit dated 21st October, 2016 and also submitted by SEIAA/DoE earlier there are total eight (8) conditions and the condition No.7 stipulate that the SEIAA may accordingly take the view in the matter. However, the said communication which is annexed by Satara Municipal Council on 20th September 2015, the communication is different and para 7 stipulates that the MoEF reserves the right to reconsider the matter, if so warranted. We have referred to these discrepancies, in two separate communications issued on the same date, in our order dated 5th April, 2016 which has not been adequately answered by MoEF so far. This is important as one of these letters contemplate that MoEF reserved the right to reconsider the project, if there are some specific circumstances. Alternatively, the other communication has placed responsibility of taking suitable decision on SEIAA. A careful reading of both these communications and its language would manifest the acknowledgement of EAC's

apprehensions related to the project due to its proximity to Kas plateau.

17. Another important factor which the Tribunal had to deal with was the Minutes of SEIAA-Maharashtra dated 15th and 16th July, 2014 wherein following is recorded :

“ In these circumstances, it has been clarified by MoEF that if project is only for drinking water supply and not for hydropower project or irrigation project with command area development, the project does not attract the provisions of EIA notification, 2006 unless there are issues related to relief and rehabilitation and forest area submergence. SEAC noted that the project fell in the Western Ghat and Kas village was included in the eco-sensitive zone in both reports by Gadgil and Kasturirangan Committees. It also falls in the vicinity of World Heritage Site of Kas Plateau. There is no relief and rehabilitation involved. Forest submergence is only 2.6 ha and water supply is by gravity. SEAC could not take decision without any scientific study considering the eco sensitivity of the location and until the Western Ghat report is finalised. SEAC is of the opinion that this may be got clarified by MoEF.

SEIAA considered the matter and decided to seek a clarification in the matter.

Authority in its 71st meeting discussed the clarification received from MoEF in this matter and noted its contents as –

It is noted that the instant project is purely drinking water supply scheme and does not attract the provisions of EIA Notification, 2006 and its subsequent amendment, 2009. The State Government, however, should take/ensure following necessary steps and actions :

- a) Necessary clearance for diversion of forest land for the project to be obtained from the designated authority before commencement of work.*
- b) Any other mandatory clearance/statutory permissions from any other organization/department to be obtained by the project proponent.*
- c) Environmental safeguard measures/ management plans may be formulated and implemented appropriately and in a timely manner (and pari-pasu with the project implementation).*
- d) Structural safety of dam is to be ensured by appropriate designed Authority.*
- e) Report of Shri Kasturirangan Committees on Western Ghat has to be visited to examine if such works are permitted in the area. Also, permission from UNESCO may be required and if so, necessary*

permission may be taken in view of the proximity to a UNESCO world heritage.

After detailed discussion, SEIAA agreed with the clarification received from MoEF. Chief Officer, Satara Municipal Council shall abide by the conditions stipulated by MoEF. The compliance with the condition (e) regarding permission from UNESCO, may be addressed during forest clearance.”

18. Two distinct points emerge from this record of the Minutes, firstly, the MoEF clarification is conditional and the project does not require Environmental Clearance unless there are issues related to relief and rehabilitation and forest area sub-mergence. Secondly, the environmental safeguard measures and environment management plan needs to be formulated and implemented. In our considered view, both these aspects need certain elaborately considering facts of the case, particularly, when SEIAA has agreed with the clarification received from MoEF. Firstly, it is not disputed that the proposed project involves submergence of forest area of 2.65 ha. Secondly, the MoEF has cast the responsibility on the State Government to ensure that safeguard measures and EMP is formulated and appropriately implemented in timely manner.

19. Under these circumstances, the Tribunal wanted the SEIAA and Department of Environment to come on record with the safeguard measures/EMP area and its implementation strategy. Unfortunately, even till the date of final hearing, the State Government has failed to come up

with this EMP and its implementation strategy. Rather surprisingly, the joint affidavit of SEIAA and DoE dated 18/3/2016, referred above, just denies any regulatory or statutory role with regard to this project.

20. The sum and substance of all the above factual matrix, would lead to a critical issue which the Tribunal has to decide :

“Whether any project which may not require Environment Clearance as per EIA Notification, 2006 but is likely to have adverse impacts on environment, is not amenable to environmental Regulations and statutory supervision?”

21. There is a wide range of legislative and regulatory instruments in India aimed to preserve and protect the environment resources. The legislature, in response to the growing needs of Environmental Protection and Conservation, has enacted several Regulations even considering the futuristic scenario, in view of long term environmental impacts and also, uncertainty in prediction of such environmental impacts. The Environmental (Protection) Act, 1986 is one such Regulation which has been enacted to provide for protection and improvement of environment and is rightly recognized an ‘umbrella Act’ and also ‘enabling act’ covering various facets of Environmental Protection and Conservation. India has been proactively engaged in implementing various international agreements

and treaties related to environment. The prefatory note and the statement of object and reason of Environment (Protection) Act, 1986 underline the necessity to have a general legislation for Environment Protection to cover the gaps in existing ones so as to enable co-ordination of activities of various Regulatory Agencies and also avoid potential environmental hazard. It is manifest from this, that the main intent of the Act is to cover the existing legislative gaps, if any, and adequate and suitable regulatory responses shall be available with authorities for environment protection and conservation. The words “Environment” and “Environment pollutant” have also been defined in a very inclusive manner in the said Act as under :

*“**Environment**” includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.*

*“**Environmental pollutant**” means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment.”*

22. The Environment (Protection) Act, 1986 also empowers the Central Government to take measures to protect and improve environment. The relevant Section-3 is reproduced below :-

3. Powers of Central Government to take measures in protect and improve environment –

- (1) Subject to the provisions of this Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

(2) *In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters namely :-*

- (i) -----
- (ii) -----
- (iii) *Laying down standards for the quality of environment in its various aspects;*
- (iv) *Laying down standards for emission or discharge of environmental pollutants from various sources whatsoever;*
Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;
- (v) *Restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;*
- (vi) -----
- (vii) -----
- (viii) -----
- (ix) -----
- (x) -----
- (xi) -----
- (xii) -----
- (xiii) -----
- (xiv) -----

23. Similarly, the Central Government has powers under Section 5 of the Environment (Protection) Act, 1986 to issue directions in exercise of its powers and performance of its functions under this Act. The Section is reproduced for clarification :-

“5. Power to give directions. *Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.*

Explanation.- For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct--

- (a) *the closure, prohibition or regulation of any industry, operation or process; or*
- (b) *stoppage or regulation of the supply of electricity or water or any other service.*

24. Plain reading of these provisions would clearly indicate the legislative wisdom and intent wherein the Central Government has been bestowed upon the powers to take all such measures as it deems necessary and expedient for environmental protection. We would like to emphasise the words and context of “All such measures as it deems necessary and expedient”. It can be realised that the legislature has given paramount importance to the Environment Protection and Conservation considering its irreversibility and its long-term adverse impacts on human being. In furtherance to this, the Central Government has been reposed with somewhat unprecedented powers to ensure timely and effective actions to ensure environmental protection. It is manifest from the plain reading of Section 5 that the legislature has given such extra-ordinary powers to the Central Government with an aim to effectively empower the Central or State Government to intervene in case of emergent conditions of environment pollution and degradation. This Section-5 enables the Central Government to issue appropriate directions to various authorities for compliance on various facets of Environment Protection and Conservation. Obviously all those powers need to be exercised according to the Law.

25. The Environment Clearance Regulation, 2006 is one such Notification which has been issued under the powers conferred upon the Central Government under Section 3 and 5 of the Environment Protection Act. This Notification is primarily based upon the well documented principles of environmental governance namely; precautionary principle and responsibility of the developer to show that his/her project activities are benign to environment. Under these Regulations, some activities are given environmental clearance by the State Level authority i.e. SEIAA and some activities are granted environmental clearance by the Central Government as per the delegation listed in the Notification. The Environmental Clearance Regulations prescribe list of projects and activities which require prior environmental clearance before executing the project depending about its likely adverse impact on the environment.

26. The stand of the MoEF, DoE and SEIAA is that the present project does not fall under Environmental Clearance Regulations for the simple reason that it is a drinking water project and as per the Environmental Clearance Regulations, only river valley project with culturable command area or hydropower generation more than 25 megawatt, are required to obtain EC. Though such

interpretation of MoEF is not the issue for adjudication before the Tribunal, but *prima-facie*, such a decision will require elaborate judicial interpretation, particularly in view of the phrasing of the schedule attached to Environment Clearance Regulations wherein the projects or activities are listed in column 1 and the category with threshold limits for authority to grant EC are listed in column 3 and 4. What we can observe here is that the river valley projects are covered in 'project or activities' in column 1 and the cultivable command area or the power generation are listed in column 3 and 4. The Regulations 2 of EIA notification 2006 starts with the words '*the following project or activities shall require prior environmental clearance*' though; the EC granting authority is based on the threshold limits defined in column 3 and 4. It is not disputed that the present project is a river valley project. We are, therefore of the considered opinion that such an opinion and clarification of MoEF will require judicial scrutiny for the finality. Be that as it may, the Tribunal is presently not dealing with any challenge to such a decision and therefore, we are not inclined to go into details of this issue.

27. However, it is necessary to note that the Environment Clearance Regulations 2006 are notified under Environment (Protection) Act, 1986. Such notification may specify the

mandate of working of the authorities constituted by such notification, like EAC, SEAC and SEIAA in terms of consideration of project and appraisal of project yet the Environmental Clearance Regulation 2006, in no case, restricts the responsibility and supervisory powers and control of the Central Government in terms of Section 3 and Section 5, as listed above, to protect the environment. The Central Government has full powers and more importantly, responsibility over and above, as notified by Environment Clearance Regulations 2006, under the provisions of Environment (Protection) Act, 1986 to take suitable measures to protect the environment. The Environment (Protection) Act, 1986 essentially aims at covering such gaps in environmental governance and the language of Section 3 of the Act would clearly demonstrate the legislative intent to empower MoEF in all such scenarios where environmental protection and conservation issues are raised or contemplated.

28. The Indian environmental legislative framework is expansive. The environment protection and improvements were explicitly incorporated into the constitution by the 42nd Amendment of 1976. Article 48(A) was added to the directive principle of the said policy that declares :-

“The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country”

A new chapter entitled Fundamental Duties was added by the Article 51-A(g) that imposes a similar responsibility on every citizen to protect and improve natural environment, including forest, lake, rivers and wildlife and to have compassion for living creatures.

29. The Directive Principles of the constitution are the policy prescriptions that guide the Government. In several environmental cases, the Courts have been guided by the language of Article 48A. Mr. Shyam Divan and Armin Rosencranz in ‘Environmental Law and Policy in India’ has summarised the approach taken by the Hon’ble Supreme Court to derive, adopt and apply the range of principles to guide the development of environmental jurisprudence. Notable amongst the fundamental norms recognized by the Court are :

1. *Every person enjoys the right to a wholesome environment, which is a facet of the right to life guaranteed under Article 21 of the Constitution of India.*
2. *Enforcement agencies are under an obligation to strictly enforce environment laws.*
3. *Government agencies may not plead non-availability of funds, inadequacy of staff or other insufficiencies to justify the non-performance of their obligations under environmental laws.*
4. *The ‘polluter pays’ principle which is a part of the basis environmental law of the land requires that a polluter bear the remedial or clean up costs as well as the amounts payable to compensate the pollution of victim of pollution.*

5. *The 'precautionary principle' requires government authorities to anticipate, prevent and attack the causes of environmental pollution. This principle also imposes the onus of proof on the developer or industrialist to show that his or her action is environmentally benign.*
6. *Government development agencies charged with decision making ought to give due regard to ecological factors including (a) environmental policy of the Central and State government; (b) the sustainable development and utilization of natural resources; and (c) the obligation of the present generation to preserve natural resources and pass on to future generations an environment as intact as the one we inherited from the previous generation.*
7. *Stringent action ought to be taken against contumacious defaulters and persons who carry on industrial or development activity for profit without regards to environmental laws.*
8. *The power conferred under an environmental statute may be exercised only to advance environmental protection and not for a purpose that would defeat the object of the law.*
9. *The state is the trustee of all natural resources which are by nature meant for public use and enjoyment. The public at large is the beneficiary of the sea-shore, running water, air, forests and ecologically fragile lands. These resources cannot be converted into private ownership.*

30. The Public Trust Doctrine was declared as a part of Law of the land by the Hon'ble Supreme Court in "*M.C. Mehta Vrs. Kamalnath, 1997(1) S.C.C. 388*". The Public Trust doctrine primarily rests on the principle that the natural resources like air, sea, water and forest needs to be protected for the enjoyment of the general public. This doctrine has been elaborately defined in various judgments of the Hon'ble Supreme Court which has been extensively adopted in environmental matters.

31. The precautionary principle was formulated by the Hon'ble Supreme Court as applied in "*Vellore Citizens'*

Welfare Forum Vrs. Union of India, in A.I.R. 1996 S.C. 2715”

and the “Taj Prapezium case” (M.C. Mehta Vrs. Union of India, 1997 S.C. 734)” which has placed the onus of proof on the developer or the industrialists to show that his or her action is environmentally benign. In the above judgment of M.C. Mehta, it is held that:

“Principle 15 of Rio Conference of 1992 relating to the applicability of precautionary principle which stipulates that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing effective measures to prevent environmental degradation is also required to be kept in view. In such matters, many a times, the option to be adopted is not very easy or in a straight jacket. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest. Precautionary principle retires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment.”

32. Another important aspect of environmental litigations is related to uncertainty of event, particularly, the impact on the environment. The environment is evolving science and many of the anticipated impacts and scenario cannot be assessed beforehand due to complexity and dependency of such predictions on innumerable attributes which are primarily dynamic in nature. The Hon’ble Supreme Court has therefore expanded the precautionary approach to even consider such uncertainty in the environmental matters and has held that the uncertainty is an accepted norm but the same has to be weighed and balanced towards

environmental protection. In the instant case, the Tribunal is faced with a controversy where certain level of uncertainty is involved as far as environmental impacts of the proposed project on the unique and fragile eco-system of Kas plateau. We are conscious of the fact that in case of such uncertainty, the environmental protection and conservation of local eco-system needs to be the cardinal principle on which the Tribunal has to adjudicate. This is well settled principle of the environmental jurisprudence. The Apex court in "A.P. Pollution Control Board vs Prof. M.V. Nayudu (Retd.)& Others" has held that:

"Uncertainty becomes a problem when scientific knowledge is institutionalized in policy making or used as a basis for decision-making by agencies and courts. Scientists may refine, modify or discard variables or models when more information is available; however, agencies and Courts must make choices based on existing scientific knowledge. In addition, agency decision making evidence is generally presented in a scientific form that cannot be easily tested. Therefore, inadequacies in the record due to uncertainty or insufficient knowledge may not be properly considered...."

*The 'uncertainty' of scientific proof and its changing frontiers from time to time has led to great changes in environmental concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. In Vellore Citizens' Welfare Forum vs. Union of India and Others [1996 (5) SCC 647], Hon'ble Apex Court referred to these changes, to the '**precautionary principle**' and the new concept of 'burden of proof' in environmental matters. Kuldip Singh, J. after referring to the **principles** evolved in various international Conferences and to the concept of 'Sustainable Development', stated that the **Precautionary Principle**, the Polluter pays **Principle** and the special concept of Onus of Proof have now emerged and govern the law in our country too, as is clear from Articles 47, 48-A and 51-A(g) of our Constitution and that, in fact, in the various environmental statutes, such as the Water Act, 1974 and other statutes, including the Environment (Protection) Act, 1986, these concepts are already implied. The learned Judge declared that these **principles** have now become part of our law.*

33. In another case of “Goa Foundation and Peaceful Society Vrs. Union of India and Ors. (NGT PB) (MANU/GT/0057/2013 : 2014(4) FLT 60), it is observed that:

“The precautionary principle would operate where actual injury has not occurred as on the date of institution of an application. In other words, an anticipated or likely injury to environment can be a sufficient cause of action, partially or wholly, for invoking the jurisdiction of the Tribunal in terms of Sub-sections (1)(2) of Section 14 of the NGT Act. The language of Section 20 is referable to the jurisdiction of the Tribunal in terms of Sections 14 and 15 of the Act. The precautionary principle is permissible and is opposed to actual injury or damage. On the cogent reading of Section 14 with Section 2(m) and Section 20 of the NGT Act, likely damage to environment would be covered under the precautionary principle and therefore, provide jurisdiction to the Tribunal to entertain such a question. The applicability of precautionary principle is a statutory command to the Tribunal while deciding or settling disputes arising out of substantial questions relating to environment. Thus, any violation or even an apprehended violation of this principle would be actionable by any person before the Tribunal. Inaction in the facts and circumstances of a given case could itself be a violation of the precautionary principle, and therefore, bring it within the ambit of jurisdiction of the Tribunal, as defined under the NGT Act. By inaction, naturally, there will be violation of the precautionary principle and therefore, the Tribunal will have jurisdiction to entertain all civil cases raising such questions of environment. Such approach is further substantiated by the fact that Section 2(c), while defining environment covers everything, Section 2(m) brings into play a direct violation of a specific statutory environmental obligation as contemplated under Section 5 of the Environment Act as being substantial question relating to environment. These provisions, read with Section 3(1) and Section 5 of the Environment Act, which place statutory obligation and require the Government to issue appropriate directions to prevent and control pollution, clearly show that the legislature the legislature intended to provide wide jurisdiction to the Tribunal to deal with and cover all civil cases relating to environment.”

34. The Public Trust Doctrine in the environment governance is a well settled legal proposition. Coupled with the precautionary principle, the public trust doctrine would

envisage that the Central and State Government have the statutory responsibility to exercise sovereign supervisory and regulatory control and have an affirmative duty to ensure environmental protection while planning and executing such projects. In view of all the above facts and circumstances, we are not inclined to accept the stand of the MoEF or the Environment Department, State of Maharashtra that as the project of reconstruction of Kas dam do not attract the Environment Clearance Regulations, they are not legally obliged to ensure Environmental sustainability of this project.

35. Now coming to the technical aspects related to the project, the major concerns of the Tribunal have been duly spelled out in its daily orders which have been referred in above paragraphs. Some of the important issues were related to availability of the construction material for construction of dam and also effect of transportation of such construction material on the surrounding environment. This particular aspect was significant because the entire road transportation of huge quantity of construction material including soil, clay and stone was proposed to be transported through the existing road which is bisecting the Kas plateau which is an ESA area. Noting

the non-availability of detail information about the requirement of the total quantity of construction material and also any analytical study to assess impact of such transportation on the sensitive ecology of Kas plateau, the Tribunal had appointed an Expert Committee. The Expert Committee in its report has dealt on this issue extensively and has placed its concerns regarding the transportation of construction material through the existing road bisecting the Kas plateau.

36. The Committee also estimated the material required from outside and estimated that more than 6 lakhs construction material needs to be procured from outside. This material is required to be transported by road through the existing road which is bisecting the Kas plateau. The Committee has also carried out analytical interpretation and modelling to assess particulate emission load. The Committee noted that such particulate emissions will affect the ecological niches / habitats supporting various plant communities, high number of plant and animal species. The Committee apprehended that such ecological niches / habitats which are typically referred to as microhabitats which surely will be erased as a result of construction of dam.

37. Faced with such prediction of impacts and the main environmental significant activity of road transportation, the Irrigation Department has now come up with an alternative plan for transportation of construction material. The new plan submitted on record envisage that the existing alternative road which is diverted from the main road towards Kas plateau and reaches the Kas dam without touching the Kas plateau area will be used for material transportation.

38. Learned counsel appearing for Irrigation Department and the Satara Municipal Council submitted that this road is generally about 500 to 600m away from Kas plateau and also, there is elevation difference of 50 to 100m as the road is passing at lower elevation that of the Kas plateau. They, further, submit that this road is a tarred road though some limited stretch is WBM road which will be tarred before commencing the project work to make it a proper road for transportation of material. It is also submitted that all the necessary permissions, including forest department have been obtained. They further submit that infact, the road passing through the Kas plateau is likely to be closed in view of the over-crowding of the tourists and the vehicles, as they are adversely affecting the Kas eco-system. Learned Counsel for Satara Municipal Council and Irrigation

department further submitted that necessary air pollution control measures, like use of appropriate trucks with PUC, covering of the trucks, washing of the tyres, watering the road wherever necessary etc. will be adopted. They further submit that the authorities are bound by any directions which may be issued by the Tribunal in this regard.

39. We have also gone through the communication of MoEF dated 24th April 2014. The MoEF, though, is of the opinion that the project does not attract provisions of the EIA Notification, 2006, was surely sensitive to the special circumstances related to this project and has specified certain steps and actions which are required to be taken up by the State Government. In other words, the State Government was put under obligation in terms of MoEF communication dated 24th April, 2014 to ensure that the environmental safeguards, measures/management plans are formulated and implemented appropriately and in timely manner, *pari-pasu* with the project implementation. The State Government, Maharashtra is therefore, required to act as per these conditions, in case the project has to go ahead. The provisions of the EIA Notification, 2006 cannot circumvent or circumscribe the responsibility of the Central and State Government, as cast upon by the Environmental (Protection) Act, 1986, to protect and conserve the

environment. We, therefore do not have any hesitation to agree with the stand of MoEF as contained in communication dated 24th April 2014 that the State Government has responsibility to ensure that the environmental safeguard measures/management plan for the execution of the said project is properly formulated and implemented appropriately.

40. Considering the facts referred above and the proposed modifications suggested by the Irrigation department, the Tribunal is required to consider the present application for grant of leave to cut the trees. The Tribunal is a statutory body and has to function within the framework of NGT Act, 2010, and do not have plenary powers as available with constitutional courts. The Hon'ble Supreme Court in "Sachidan and Pandey Vrs. State of West Bengal, in A.I.R. 1987 S.C. 1109, 1114-15" has held that :

"Whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Art.48A of the Constitution... and Art.51A(g). When the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy making authority. The least that the Court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases, the Court may go further, but how much further will depend on the circumstances of the case. The Court may always give necessary directions. However the Court will not attempt to nicely balance relevant consideration. When the question involves the nice balancing of relevant considerations the Court may feel justified in resigning itself to acceptance of the decision of the concerned authority."

41. In view of above discussions, while holding that preservation, conservation and protection of pristine and fragile eco system of Kas plateau is the statutory duty and responsibility of the State and Central Government under the provisions of the Environment (Protection) Act, 1986 we are inclined to grant leave to cut 675 trees for proposed reconstruction of Kas dam, with following directions which we issue under Section 20 of the National Green Tribunal Act, 2010, based on the principles of sustainable development and precautionary principle:

- 1)** The Central and/or State Government shall appraise and formulate environmental safeguard measures / management plan to be implemented by Satara Municipal Council and Irrigation department, prior to execution of the project.
- 2)** The Central and State Government shall ensure the timely and effectively implementation of such EMP plans by regular monitoring and inspections.
- 3)** In any event, if the project activities are found to be or apprehended to be detrimental to the eco-system of Kas plateau, the project proponent and also the Central and State Government shall immediately stop the construction activities of the project till necessary corrective actions are taken.

42. The MA No.19/2015 is accordingly allowed subject to conditions as above and is disposed of. No order as to costs.

43. While parting with the judgment, we would like to place on record our appreciation of the work done by Dr. Asolekar of IIT Bombay and Dr. Yadav of Kolhapur

University in preparation of report. We direct the Applicant Satara Municipal Council to pay honorarium of Rs. 1 lakh each to both these experts for the studies which led to the submissions of report.

....., **JM**
(Dr. Justice Jawad Rahim)

....., **EM**
(Dr. Ajay.A. Deshpande)

Date :9th February, 2017
ajp

NGT