

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

.....

APPEAL NO. 28 OF 2013

In the matter of :

Paryawaran Sanrakshan Sangarsh Samiti Lippa
Village & Post - Lippa
Tehsil Moorang
District - Kinnaur
Himachal Pradesh – 172109

Verses

1. **Union of India**
Through the Secretary,
Ministry of Environment and Forests,
Paryavaran Bhavan, CGO Complex,
Lodi Road, New Dehi- 1100003,
2. **State of Himachal Pradesh**
Through the Chief Secretary,
Government of Himachal Pradesh,
Shimla – 1711002.
3. **Himachal Pradesh Power Corporation Ltd.**
Integrated Kashang HEP,
Through General Manager,
HPPCL, Kinfed Bhawan,
Recken-Peo, Dist. Kinnaur,
Himachal Pradesh- 172107

Counsel for Applicant:

Mr. Rahul Choudhary, Advs.

Counsel for Respondents :

Ms. Panchajanya Batra Singh, Adv for respondent No. 1

Mr. Abhishek Chaudhary, Adv, Mr. U.K Uniyal, Sr. Adv, Mr.

Dhananjay Garg Adv for respondent no. 2, 3 & 4.

ORDER/JUDGMENT

PRESENT :

Hon'ble Mr. Justice Swatanter Kumar (Chairperson)

Hon'ble Mr. Justice Sonam Phintso Wangdi (Judicial Member)

Hon'ble Dr. D.K.Agrawal (Expert Member)

Reserved on: 11th February, 2016
Pronounced on: 4th May, 2016

- 1. Whether the judgment is allowed to be published on the internet?**
- 2. Whether the judgment is allowed to be published in the NGT Reporter?**

Justice Sonam Phintso Wangdi, (Judicial Member)

1.The Appellant is an organization formed by the villagers of Lippa, one of the villages affected by the Kashang Hydro Electric Project in Kinnaur District of the State of Himachal Pradesh. They have filed this appeal under Section 18(1) read with Section 16(e) of the National Green Tribunal Act, 2010 seeking to assail the order of the Department of Forest, Government of Himachal Pradesh dated 15.01.2013 according sanction for diversion of 17.6857 hectares of forest land, order dated 22.03.2011 issued by the Ministry of Environment and Forests, Government of India (the Respondent No.1) granting Stage I Forest Clearance and order dated 14.06.2011 also issued by the Ministry of Environment and Forest granting final approval for diversion of 17.6857 hectares of forest land for construction of 130 MW Integrated Kashang Stages II and III Hydro Electric Project in

favour of M/S Himachal Pradesh Power Corporation Limited in the Kinnaur District of Himachal Pradesh.

2.The Integrated Kashang Project proposed by the Respondent No. 3 viz., the Himachal Pradesh Power Corporation Limited, with installed capacity of 243 MW has four stages that harnesses the Kashang river generating 195 MW from the power house installed for the river and 48 MW from the Kerang stream from the power house installed on its right bank.

3.We need not enter into the details of the four stages being irrelevant for the purpose of this appeal but, suffice it to note that the 17.6857 hectares of forest land required for the Stages II and III of the project fall under Kalpa and Pooh Sub-divisions in Kinnaur District of the State of Himachal Pradesh (the Respondent No. 2) consisting of four Panchayats i.e., Pangi and Telang in Kalpa Sub-division and Lippa and Rarang in Pooh Sub-division. It is stated that the entire project would require diversion of a large area of forest land measuring about 119.6 hectares from the cold desert region lying on the tree line limit at an elevation of 2000 to 3155 meters and that during the past decade there had been a gradual decrease in the forest cover in Kinnaur which now constitutes only 10% of the geographical area of the district. It is alleged that the Forest Clearance was granted by the Respondent No. 1 and the Respondent No. 2 State Government without giving due consideration to this aspect.

4. Apart from the above the appellant has also taken objections as set out hereunder in seriatim:

- (i) Although one of the conditions stipulated in the Environment Clearance dated 16.04.2010 granted by the Ministry of Environment and Forest required that, as the Wild Life Sanctuary existed at a distance of 1.5 km from Stage IV, clearance from the Standing Committee of National Board of Wild Life (NBWL) under the Wildlife (Protection) Act, 1972 should be obtained, no such permission had been sought for. This, as per the Appellant, was also in violation of the order of the Hon'ble Supreme Court dated 04.12.2006 in Writ Petition No. 460 of 2004 in the matter of Goa Foundation v/s Union of India by which it was directed that all projects falling within 10 km from National Parks and Sanctuaries should be sent to the Standing Committee of the NBWL.
- (ii) That when the project consisting of four stages was an integrated one with the total installed capacity of 243 MW for which a single Environment Clearance had been granted for all the stages, similar approach also ought to have been adopted in granting forest clearance. However, the project proponent was applying for forest clearance separately for each of the stages. By adopting such piecemeal approach the project proponent was projecting low area of forest and thus was misleading. In the present case involving Stages II and III of the project, the

justification sought to be given was that it was limited only to 17.6857 hectares when actually it was 61.89 hectares that was required to complete all the four stages and 57 hectares just for laying transmission lines.

- (iii) That although the Forest Advisory Committee (FAC) under the Forest Conservation Division of the Respondent No. 1 in its meeting held on 25.10.2010 to discuss on the diversion of 17.6857 hectares of forest land for 130 MW Integrated Kashang Stages II and III Hydro Electric Project, had sought for information from the Respondent 3 on the seasonal river flow analysis of the two rivers, ecological impact of diversion of water on aquatic fauna and flora and the surrounding natural vegetation and wildlife habitat values and detailed muck disposal plan on the basis of studies undertaken by a reputed institute like GB Pant Institute of Himalayan Environment & Development in collaboration with reputed naturalists/ecologists/wildlife specialists, however in its subsequent meeting held on 11.02.2011 the committee accepted the version of the state government that such study had already been carried out by Indian Council of Forestry Research and Education (ICFRE) in the EIA report.
- (iv) That no study has been carried out to assess the impact of drying up of Kerang stream on the vegetation and forest cover.

- (v) That as the project lies on the Chilgoza pine belt, the very existence of the species which is already endangered, will be under threat thereby jeopardizing the livelihood of the community which heavily depends on the tree for their sustenance.
- (vi) That Respondent No. 2, the State Government, and Respondent No. 3, the project proponent, have failed to comply with the Forest Rights Act, 2006 thereby violating Condition 16 of the 'In Principle' Forest Clearance granted by the Respondent No. 1 vide letter dated 22nd March, 2011. Condition 16 categorically required the user agency to obtain the clearance under the provisions of Scheduled Tribes & Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 before final approval and to submit certificate towards the final settlement of all claims and rights over the proposed forest land under the Act along with the Advisory dated 03.08.2009. Although in the year 2009 the Respondent No. 2 had initiated the process of filing claims under the Forest Rights Act, 2006 in Kinnaur, a tribal district, not a single claim has been recognized. To the contrary, the stand taken by the Respondent No. 2 in its compliance report dated 22.03.2011 submitted to the Respondent No. 1, was that the rights and concessions over the forest land involved in the proposal were already settled as per the Forest Settlement of Sutlej Valley Bushahar State of 1921 AD.

(vii) That while the entitlements provided under the Forest Settlement of 1921 were merely concessions and dependent upon the exercise of discretionary powers of the State, the concessions provided under section 3 (1) (a), (b) and (c) of the FRA are conferred as legal rights. Thus the rights traditionally enjoyed by the residents of the villages including Lippa village have been recognized under the Forest Rights Act, 2006 and the grant of approval for diversion of forest land without settlement under the Act was illegal.

(viii) The diversion of the forest land is also in violation of the Panchayats (Extension to Scheduled Areas) Act, 1996 in as much as Kinnaur district lies in Schedule-V area where the provisions of the Act applies. Under section 4 (d) of the said Act, every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and customary mode of dispute resolution. Section 4 (i) makes it mandatory to consult the Gram Sabha or the Panchayat at the appropriate level before acquiring any land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas. Since the project proponent has failed to comply with the provision there is a clear violation of the Act even notwithstanding the fact

that the affected Panchayats have passed resolutions opposing the project.

- (ix) Loss of livelihood and irrigation facilities have not been considered while approving diversion of forest jeopardizing the existence of 200 families of Lippa village. The diversion of Kerang stream will prevent the huge loads of silt flowing from the Pager stream near the village threatening the safety of the villagers. It has also become uncertain as to whether the discharge of water left after diversion of the stream will be sufficient to meet the irrigation requirements for the village.
- (x) While approving diversion of forest land, impact on climate change has not been taken into consideration having regard to the fact that the project lies in the snow bound high altitude where any increase in temperature would cause heavy precipitation resulting in natural calamities like landslides.

5. Based on the above, the appellant seeks to quash the Forest Clearance granted by order dated 15.01.2013 passed by the Department of Forest, Government of Himachal Pradesh and orders dated 22.03.2011 and 14.06.2011 passed by the Ministry of Environment and Forest granting stage I of Forest Clearance and final approval for diversion of 17.6857 hectares of forest land respectively for construction of 130 MW Integrated Kashang Stages II and III Hydro Electric Project in favour of M/S

Himachal Pradesh Power Corporation Limited in Kinnaur District of Himachal Pradesh.

6.As would be apparent from the foregoing, we have dealt with the grounds of challenge to the impugned orders at some length, as it was felt essential to put in perspective the issues in *lis* in the appeal but, for the reasons that shall be stated hereafter, it shall not be necessary to deal with all those for the purpose of its disposal.

7.In the replies filed by the Respondents they have denied all material allegations and have sought to justify the impugned orders as being correct which as per them were issued after taking into consideration all relevant factors. Since the orders being assailed primarily are the ones issued by the Respondent No. 1, the reply filed by them would be crucial and, therefore, require deeper consideration, particularly on those aspects which are germane for disposal of this appeal. We may enumerate those as under:-

- (i) It is not disputed by the Respondent No. 1 that the FAC had desired that a study on various environment aspects should be carried out by reputed institute like GB Pant Institute of Himalayan Environment & Development in collaboration with reputed naturalists/ ecologist / wildlife specialists. However, this was not insisted upon as the State Government had submitted that such studies had already been carried out by the ICFRE. Apart from this the

FAC had also taken into consideration the presentation made by the project proponent. It was only thereafter that the FAC had recommended the proposal for diversion of 17.6857 hectares of forest land for construction of 130 MW Integrated Kashang Stages II and III Hydro Electric Project but subject to fulfillment of certain conditions.

(ii) On the question as regards FAC having ignored the impact of the project on Lippa – Asrang Wildlife Sanctuary and the project proponent having failed to take approval from the NBWL as stipulated in the Environment Clearance letter dated 16.04.2010, it was stated that the Ministry had accorded Stage – I approval on 22.03.2011 based on the recommendation of the FAC subject to fulfillment of certain conditions. Later, following the compliance of those conditions, the Ministry accorded Stage II approval on 14.06.2011 *inter alia* on the condition that the State Government shall implement the recommendations of the Standing Committee of NBWL on the EIA/EMP of the project area and its impact on Lippa and Asrang Wildlife Sanctuary.

(iii) As regards the allegations of various factors and concerns likely to have disastrous impact on the fragile ecosystem of the area being ignored, it is stated that adequate provision and safeguards have been made by laying down site – specific conditions to secure maximum protection and conservation of flora and fauna of the area.

(iv) On the question of non-compliance of condition 16 of the 'In Principle' Forest Clearance dated 22nd March, 2011 issued by the Ministry making it obligatory to obtain clearance under Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act, 2006, it is fairly conceded that the Ministry had accepted the compliance report of the State Government indicating firstly, that the proposed diversion of 17.6857 hectares of forest land had been initiated on 20.03.2008 whereas the advisory by the MOEF for compliance of the Forest Act, 2006 had been issued only on 03.08.2009 and Secondly, that the rights and concessions on forest land involved in the proposal were already settled as per Forest Settlement of Sutlej Valley Bushahar State of 1921, which the people were already enjoying unhindered since then and, therefore, the provisions of the Advisory dated 03.08.2009 were not attracted.

8. The foregoing are the only aspects specifically dealt with by the Respondent No. 1 in its reply. Notably, the issue as regards the violation of the Panchayats (Extension to Scheduled Areas) 1996 as alleged in the appeal has not been traversed leaving us to draw our conclusion consequential thereto.

9. Respondent No.3, the project proponent, has resisted the appeal by filing an elaborate reply wherein preliminary objection has been raised on the maintainability of the appeal primarily as being barred by limitation.

10. After the pleadings were complete, parties were heard at length on the 10th and 11th February 2016. It is of relevance to note that this appeal was listed for hearing along with Appeal No. 14 of 2011 in the matter of **Bhagat Singh Kinnar v/s Ministry of Environment and Forests &Ors** as in both the cases the same project was involved as would be evident from order of the Tribunal dated 26.03.2013. The only difference being that while in Appeal No. 14 it was the Environment Clearance granted for all the four stages of the 243 MW Kashang Hydro Electric Project that was being assailed, in the present appeal the question is limited to the Forest Clearance granted for Stages II and III of the 130 MW Kashang Integrated Hydro Electro Project. Appeal No. 14 has since been disposed of by judgement dated 28th January, 2016 under which a Committee has been constituted to ensure compliance of the latest standards and proper implementation of the mitigation measures.

11. During the course of the arguments on 11th February, 2016, we had expressed our *prima facie* view that there was non-compliance of Condition 16 of the Forest Clearance dated 22nd March, 2011 issued by the Ministry of Environment and Forests thereby establishing statutory violation of the Forest Rights Act, 2006.

The Department of Forest, Government of Himachal Pradesh accorded sanction for diversion of 17.6857 hectares of forest land by their impugned letter dated 22.03.2013. On being asked by us, it was fairly conceded by the Learned Counsel for parties

that the appeal may be disposed of by issuing necessary direction for compliance of the condition which *inter alia* required the user agency to obtain clearance under the provisions of ST & OTFD (Recognition of Forest Rights) Act, 2006 in the light of the Panchayats (Extension of Scheduled Areas) Act, 1996 and such other directions as would be found appropriate by this Tribunal. The arguments were thus concluded relieving us of the task of dealing with all the issues and the details of the facts and circumstances of the case.

12. Before proceeding further, we have felt an imperative need to make some observations, having noticed the magnitude of and the scale at which hydro projects are being set up in the State of Himachal Pradesh. We are conscious of the fact that the jurisdiction of this Tribunal is confined to the enforcement and compliance of the laws set out in Schedule I to National Green Tribunal Act, 2010. At the same time, there can be no manner of doubt that the activities associated with the hydel projects and its consequences would fall within the ambit of those statutes as would be evident from various proceedings instituted before the Tribunal, not discounting the present one

13. From the order of the Hon'ble High Court of Himachal Pradesh dated 23.12.2009 in CWPIL No. 24 of 2009 it is revealed that there were as many as 150 hydel projects under varying stages of construction in the State as on the date of the order. We do not know how many more have been added thereafter. By the said order, a High Level One Man Committee constituted of

one Mr. Ajay Shukla, Additional Chief Secretary (Forest) was appointed directing him to submit a report on various issues as set out in the order. The report submitted by the Committee is, to state the least, most alarming. We may reproduce portions of the report which reads as under :-

*“ I would, however, like to begin with a caveat in order to place hydel projects in states like Himachal in their proper environmental context. All policy makers must understand, and accept, that hydel projects in mountainous terrains, constrained by the requirement of design, technology, geography and finances, shall inevitably cause damage to the environment during construction phase. **There cannot be totally environment friendly hydel project in the Himalayas.** The results of blasting, excavating, tunneling, cutting, tree-felling, diverting of rivers – all these are bound to have a severe and damaging effect on the environment and ecology of the area affecting water sources, green cover, wild-life. Conditions imposed on the project developers can only attempt to minimize these effects but cannot do away with them altogether. It is therefore for the concerned governments, both at the centre and the states, to weigh the pros and cons decide whether this is a cost worth paying and if the answer is in the affirmative then they must accept that there is always be collateral damage in the process. The responsibility for such damage has to be shared between the government and the project. It would be naïve to believe that mere imposition of a few conditions while according clearances would prevent any environmental impact.*

.....

RECOMMENDATIONS.

- (1) During our visits to the major river basins of the state- Sutlej, Beas and Ravi- we found that the main valleys have already been saturated with hydel projects every few kilometers and now projects are being allotted in ever increasing numbers in the side valleys of the tributaries. The effects of such large scale felling of trees, dumping of muck and diversion of waters over the entire river basin (not just a few isolated spots) has never been studied by the govt. before allotting these projects. **Individual EIAs and EMPs for individual projects do not address the larger concerns for, where environmental impacts**

are concerned, the whole is larger than the sum of the parts. Unlike the pure manufacturing process where the incremental cost of production is always a declining figure, in matters of environmental costs (such as in generation of hydel power) the incremental environmental cost is always an increasing figure as environmental impacts accumulate, in other words, the environmental cost of producing the second megawatt of power is more than that of producing the first megawatt. The Committee therefore recommends that the state govt. should carry out basin-wide EIAs for all the river basins of the state and till these are finalized no more hydel projects should be allotted or, where allotted their clearances should be withheld. [This is precisely what has been ordered by the Forest Advisory Committee of the MoEF in respect of more than 100 proposed hydel projects in the Ganga basin of Uttarakhand, as per a Times of India report on 17.6.2010].

(Underlining supplied)

14. Our conviction on the adverse consequence on the environment highlighted by the One Man Committee as reproduced above appears to be well justified in view of the reply Annexure A-9 furnished by the Executive Engineer, IPH Division R/Peo, District Kinnaur, Department of I& PH, Government of Himachal Pradesh in response to an application under the RTI Act. The letter reveals that as many as 167 water sources have been adversely affected in the project areas of Karcham Wangto HEP which is another project on the same river. The number of water sources that have dried up and where discharge of water have been affected or reduced in the same area are 35 and 66 respectively. These illustrate the adverse effect on only one aspect of the environment within just one project area. We can, therefore, well imagine the cumulative impact of the 150 projects.

15. Deeply perturbed, this Tribunal by order dated 04.02.2015 issued direction upon the Ministry of Environment and Forests to file a specific affidavit answering as to whether or not, in the EIA Report in respect of the Kashang project, cumulative impact assessment of the other existing, under construction and hydro projects proposed in the same section, was taken into consideration. In compliance to the said direction the MOEF filed an additional affidavit dated 03.03.2015, which in our view contained grossly inadequate information. Far from being specific, the MOEF in their affidavit, apart from being vague, is found to be clearly evasive leaving us to arrive at the only conclusion that no cumulative assessment was carried out at all.

16. From the above, we are left with a deep sense of foreboding and serious anxiety on the future of the State and its progeny. Article 48A of the Constitution of India enjoining the State to endeavor to *inter alia* protect and improve the environment is not a mere incantation. It rather casts a heavy burden upon the State. Under Article 51 A (g) duty has been imposed upon every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures. The Hon'ble Supreme Court has re-emphasized this position in ***Fomento Resorts and Hotels Limited and Another vs. Miguel Martins and Others : (2009) 3 SCC 571.*** Of course, earlier Part IV of the Constitution of India under which these Articles fall, was considered not to be enforceable

but, now its infraction has been held to violate right to life enshrined under Article 21.

17. No doubt, the concept sustainable development has been evolved in the interest of development for larger public interest. However, in *Association for Environment Protection vs. State of Kerala and Others* : (2013) 7 SCC 226, it has held that the 'doctrine of public trust' makes it incumbent upon the Government to protect the resources for enjoyment of the general public rather than to promote their use for private ownership or commercial exploitation to satisfy the greed of a few. Reference can also be made to in *Intellectual Forum, Tirupathi vs. State of A.P. and Others* (2006) 3 SCC 549, *Sarang Yadwadkar & Ors. Vs. The Commissioner, JNNURM Office* Original Application No. 2 of 2013 decided on 11-07-2013, *Puran Chand & Ors. Vs. State of H.P. & Ors.* Appeal No. 48 (T_{HC})/2012 decided on 2-02-2016. It has been held that while invoking this principle, balance has to be struck between the development needs and environmental degradation. Enunciating the concept of 'public trust', *M. C. Mehta Vs. Kamal Nath* (1997)1SCC 388 also *Indian Council of Enviro-Legal Action Vs. Union of India* (1996) 5SCC 281. It is trite that environment, ecology and the bounties of nature are for every citizen and the State is the trustee of these and is responsible to appropriate these in a just and equitable manner without being influenced by unwanted commercial exploitation. The doctrine of 'public trust' initiated by the Courts charges the State with such responsibility with the object to meet inter-

generational equity by resorting to the principle of sustainable development. We may also usefully refer to ***State of Tamil Nadu vs. M/s Thindstone : AIR 1981 SC 711.***

18. We have adumbrated with the foregoing principle in a rather prolix manner but, it has been done so as an effort to impress upon the State of Himachal Pradesh the folly of allowing hydel projects in the State at such alarming scale which was highlighted earlier manifestly resulting in serious consequences to its ecology and environment and, the very life and livelihood of the people in whose benefit the State claims to have allowed the projects.

19. We, therefore, hope and expect that the State of Himachal Pradesh will give serious consideration to what we have alluded to and the anxiety expressed by us and consider reviewing its decision on those projects where actual works have not yet commenced or have just commenced.

20. Reverting back to where we left, as noted already, the parties having agreed that directions maybe issued on the admitted position discussed earlier, when the arguments were closed. It would thus be unnecessary for us to deal with the various contentions raised by the parties except to direct as follows:

- (i) The Respondents No.1 and 2 shall ensure that the entire proposal pertaining to Forest Clearance in respect of Stages II and III of 130 MW Kashang Integrated Hydro Electric Project is placed before the Gram Sabha of

villages Lippa, Rarang, Pangi and Telangi in Kinnaur District of Himachal Pradesh as prescribed under the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 as required under Condition 16 of the Forest Clearance dated 22.03.2011 issued by the Ministry of Environment and Forests;

- (ii) On the matter being referred to it, the Gram Sabha shall consider all community and individual claims which would bring within its ambit religious as well as cultural claims which would include impact on (a) places of worship likely to be affected by the construction works and activities cognate thereto; (b) Silt load in Kerang Stream caused by the diversion of water from the Kerang stream to Kashang stream and (c) the livelihood of the villagers caused by loss of forest land, landslides and possible loss of water sources due to the project.
- (iii) The Gram Sabha shall take up with the project proponent mitigation measures to offset the adverse impact of the project.
- (iv) While conducting the proceedings, the Gram Sabha shall, so far as it is possible, follow the process, guidelines and the procedure prescribed by the Ministry of Environment and Forests in its various letters from time to time.
- (v) In order to ensure transparency and confidence of the villagers in the proceedings, the presence of a Judicial

Officer of the rank of District Judge or such other Judicial Officer of the same rank be requested.

(vi) It shall be ensured that the entire proceeding is completed in not later than three months from the date of commencement of the proceeding before the Gram Sabha.

(vii) On completion of the proceedings to the satisfaction of all, the Respondents No. 1 and 2 shall submit a report before this Tribunal by way an affidavit duly sworn by competent Officers.

21. With the above directions and observations this appeal stands disposed off.

22. No order as to costs.

Justice Swatanter Kumar
Chairperson

Hon'ble Mr. Justice Sonam Phintso Wangdi
Judicial Member

Hon'ble Dr. D.K.Agrawal
Expert Member

New Delhi,

4th May, 2016