

**BEFORE THE NATIONAL GREEN TRIBUNAL
EASTERN ZONE BENCH, KOLKATA**

.....

APPEAL NO. 04/2014/EZ

&

M.A. No.90/2014/EZ

M.A. No.18/2015/EZ

M.A. No.155/2015/EZ

M.A. No.165/2015/EZ

M.A. No.310/2015/EZ

THEMREI TUITHUNG & ORS.

VS

STATE OF MANIPUR & ORS.

IN THE MATTER OF:

- 1. Themrei Tuithung
Thoyee Village,
Ukhrul District, Manipur 795145.**
- 2. Samuel longva
Thoyee Village,
Ukhrul District, Manipur 795145.**
- 3. Joseph Phungthar
Ramrei Village,
Ukhrul District, Manipur 795145.**
- 4. Samuel Zimik
Ramrei Village,
Ukhrul District, Manipur 795145.**
- 5. David Shiro
Riha Village,
Ukhrul District, Manipur 795145.**
- 6. Shimdhar Jajo
Riha Village,**

Ukhrul District, Manipur 795145.

7. Vareso Kasar
Chadong Village,
Ukhrul District, Manipur 795145

8. Standhope Kashung
Chadong Village,
Ukhrul District, Manipur 795145

.....Appellants

Versus

सत्यमेव जयते

1. State of Manipur
Through its Chief Secretary,
Government of Manipur,
Imphal
2. Union of India
Through the Secretary,
Ministry of Environment and Forests,
Paryavaran Bhawan, CGO Complex,
Lodhi Road, New Delhi 110003.
3. Irrigation and Flood Control Department,
Government of Manipur,
Through its Chief Engineer,
Imphal
4. Ministry of Tribal Affairs
Through the Secretary,
Ministry of Tribal Affairs,
Government of India,
New Delhi

.....Respondents

COUNSEL FOR APPELLANTS:

Richa Relhan, Advocate, Pramod Kumar, Advocate, Sankar Prasad Pani, Advocate, Ritwik Dutta, Advocate, Preeta Dhar, Advocate, Rahul Chaudhary Advocate

COUNSEL FOR RESPONDENTS(O.A.06/2015/EZ):

S. B. Meitei, Advocate, U. Hazarika, Senior Advocate, Shubhayu Roy, Advocate, Bikash Ranjan Bhattacharjee, Sr. Advocate Respondent No.1 & 3,

Vikas Malhotra, Advocate, Gora Chand Roy Chowdhury, Advocate, M.P. Sahay, Advocate, Somenath Bose, Advocate Respondent No.2

B.V. Neren, Advocate, Udit Gupta, Advocate, Kushagra Shah, Advocate, Anuraag Mehta, Advocate Respondent No.4

JUDGMENT

PRESENT:

Hon'ble Mr. Justice Pratap Kumar Ray, Judicial Member

Hon'ble Prof. (Dr.) P. C. Mishra, Expert Member

Reserved On: 22.01.2016

Pronounced On: 26. 02.2016

1. Whether the Judgment is allowed to be published on the net?

Yes

2. Whether the Judgment is allowed to be published in the NGT Reporter?

Yes

JUSTICE PRATAP KUMAR RAY (JUDICIAL MEMBER)

1. The present appeal has been filed under Section 16(e) of the National Green Tribunal Act, 2010 (in short NGT Act) by Mr.

Themrie Tuithung and another seven appellants who are agriculturists and forest dependent people depending upon the agriculture lands located along the Thoubal River (Yangwui Kong) in Mapithel valley as well as upon the forest in Mapithel Range for their livelihood and survival. In the appeal the appellants have challenged the order according forest clearance under Section 2 of the Forest (Conservation) Act, 1980 (in short FC Act) granted by the State Government of Manipur vide an order of the Governor No.57/68/2006–For.&Env. Dated 15th January, 2014 to the Thoubal Multipurpose Project (in short Project) proposed at the tri-junction of Ukhrul, Senapati and Thoubal districts of Manipur for diversion of 595 hectares of forest land. The project is being developed by the Irrigation and Flood Control Department, Government of Manipur. It is the submission of the appellants that they are directly affected by the construction of the project and are “persons aggrieved” as per NGT Act.

2. This case has a chequered history. Before adverting to the submission made by the appellants and the respondents, the earlier

action and conduct of the appellants assailing construction of Mapithal Dam by filing O.A. 167/2013 under Section 14 of NGT Act, 2010 before the National Green Tribunal, Principal Bench, New Delhi which was disposed of on 16.01.2014, is required to be discussed for effective adjudication of this appeal.

A. The Original application No. 167/2013 was moved by all the appellants being the applicants thereto. This application was filed under Section 14 of the NGT Act, 2010 seeking intervention of the Hon'ble Tribunal in exercise of the power of original jurisdiction by the NGT under the NGT Act, 2010. The said application was filed on the grievance that work on Mapithel Dam (Thoubal Multipurpose project) should be stopped until forest clearance under Section 2 of the Forest (Conservation) Act, 1980 by the State of Manipur was issued. The prayers made thereto are reproduced as under:-

“(a) A prohibitory order issued to the respondents directing them to stop work on the Mapithel Dam (Thoubal Multipurpose Project) in the State of

Manipur, until the provisions of the Forest (Conservation) Act, 1980 are complied with.

(b)The Ministry of Environment and Forests be directed to initiate action for violation of Forest (Conservation) Act, 1980 against the concerned officials of the Irrigation and Flood Control Department, Government of Manipur and all other concerned persons.

(c)Pass any such order, as the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

B. The grounds taken in the aforesaid O.A. are as follows:-

A. Because the Project area covers around 595 hectares forest land as per the EIA Report of the Respondent No. 2 itself.

B. Because the Forest land is very important for the people residing therein who are dependent on the same and exercises rights on the said forest land.

C. Because the Respondent No.2 does not have the requisite clearances as per the Forest (Conservation) Act, 1980 and the same is opposed to the precautionary principle.

D. Because the Ministry of Environment and Forests itself has made note of the fact that no forest approval has been obtained by the Respondent No.2 and despite this, has taken no action against the said Respondent."

C. The State of Manipur and Irrigation and Flood Control Department viz. Respondent Nos. 1 & 3 filed opposition of the said original application. One Miscellaneous Application No. 646/2013 was filed by the applicants thereto, who are the present appellants in this appeal. An affidavit-in-opposition was filed by the Respondent Nos. 1 & 3 viz. The State of Manipur and Irrigation and Flood Control Department contending inter-alia about the material fact of clearance of the project by the Planning Commission, Govt. of India on 1st May, 1980 long before the enactment of Forest (Conservation) Act, 1980, starting of the project in the year 1980, construction of barrage and part of the canal system, completion and commission during the year 1981 with irrigational potential of 4000 hectares and also other relevant facts regarding rehabilitation and settlement programme for the inhabitants of the affected villages and acceptance of the said package by the villagers. The original application also was contested by filing the appropriate affidavit to that effect by the Respondent Nos.

1 & 3 showing the particulars of the rehabilitation and settlement package and acceptance of the same. In the affidavit-in-opposition the detailed facts regarding completion of the work and other particulars were narrated including the compensatory afforestation issue, catchment area treatment plan, the procedural issue on felling of trees from forest area, liability and responsibility of the User Agency and submission of the funds and other features thereof which were urged by those applicants. It was further contended that the land was acquired/purchased from the villagers way back in the year 1980. In paragraph 9 of the additional affidavit on behalf of the Respondent Nos. 1 & 3 as filed in connection with the said M.A. 646/2013 read with O.A. 167/2013 along with the relevant annexures showing the details of payment for land compensation and other packages to the petitioners thereof were narrated which was not disputed by the present appellants, who are the applicants thereto. Para 9 of said

additional affidavit as filed in said O.A. 167/2013 is reproduced as under:-

“9. I state that as already stated herein above, each individual petitioner does not have the locus standi to file and maintain the present petition inter-alia the following reasons:-

That, the deponents that the Petitioner No.1, Shri Themrei Tuithang and Petitioner No.2, Samuel Longva, belongs to Thawai Village, Ukhrul District. The Thawai Village is not affected area due to the construction of Thoubal Multipurpose Project, as such these two petitioners are not entitled for rehabilitation and resettlement (R&R) package. However, the cost of the Forest Land falling under the Thawal Village had already been paid to the respective village Headman. Further, those individuals who are having paddy fields and which are to be submerged due to construction and operation of the project had also been given appropriate compensation. As per the records, the two petitioners (Petitioner No. 1 and 2) do not own or possess any paddy field in their names which are to be submerged after the construction and operation of Thoubal Multipurpose Project.

The Petitioner No.3 (Joseph Phungthar) and Petitioner No.4(Samuel Zimik), both belong to erstwhile Lamlai Khullen (now rename as Ramrei Village). Lamlai Khullen will be submerged due to the construction and operation of the Project, as such, they are entitled to R&R Packages. Both the petitioners No.3 &4 had already received a sum of Rs.5,00,932/- each during 2008 and resettled at higher altitude. In addition to that, cost of forest land falling under Lamlai Khullen had already been paid.

The Petitioner No. 5 (David Siro) and Petitioner No. 6(Shimdehar Jajo) both belong to Riha village. Riha village is not affected due to the construction and operation of the Project, as such, they are not entitled to R&R packages. As per records, these two petitioners neither possess nor own any paddy field in their names which are to be submerged due to the construction of the dam, therefore, they are not entitled for payment of any compensation.

The Petitioner No. 8 (Stanhope Kasung) belongs to Chadong Village. He is entitled to R&R Package amounting to rs.6,60,990/- as compensation being the cost of wet paddy field. Out of the aforesaid amount he had already taken Rs.5,75,511/-. The balance amount of Rs.85,479/- is available with the Project Authority since 2003. Further, the cost of forest land falling under Chadong Village had also already been paid.

I state that, the aforesaid facts are not disclosed by the petitioners at the time of filing of the aforesaid case and the petitioners have no locus standi to file the present case. The deponents further state that R&R packages for all the eligible affected villagers including petitioner No.7 who are entitled for R.R. packages, can collect the same from the Deputy Commissioner, Ukhrul District, Manipur.”

The name of the petitioners as mentioned thereof in said O.A. as petitioner Nos. 1 to 8 are the respective appellants in this appeal. This affidavit was affirmed on 4th October, 2013 by the Additional Secretary (IFC), Government of Manipur.

D. When the prayer for interim order in connection with the M.A.646/2013 was heard, Mr. Ritwick Dutta, Id. counsel appearing for the applicants of the Miscellaneous application seeking interim order of stay of construction of said project submitted various provisions of Forest (Conservation) Act, 1980 and also the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (in short FRA 2006). On hearing the Miscellaneous application on 20.11.2013 though the Hon'ble Tribunal passed an order of status quo to continue but having regard to the fact that the project proposal was made in the year 1988 and clearance of the first Stage was done in the year 2010, did not express any opinion on the merit about the Forest Rights Act and Forest clearance issue as referred to. But due to pendency of the completion of the project for more than 25 years, Tribunal directed the respective authorities concerned viz. the Ministry of Tribal Affairs and Ministry of Environment and Forests to pass appropriate order to the State of Manipur relating to

Second Stage Forest clearance following the procedure in accordance with law including taking note of all memoranda issued by the Government of India from time to time on that regard within the time frame of six weeks. The order dated 20th November, 2013 reads as such:-

“ The issue which has been raised in this application is about the proposal made by the Government of Manipur for construction of a multipurpose hydroelectric project for which an application was made to the concerned authorities by the State Government as early as in the year 1988. Accordingly, it appears that for the purpose of implementing the project 595 hectares of land were acquired and in pursuance to the acquisition proceedings, compensations have been paid to the stakeholders.

It was ultimately in the year 2010 that the MoEF, Government of India has issued stage 1 clearance for the project. It is not in dispute that the project involved very huge amount and the first stage of project pursuance to the approval has been proceeded with. In the meantime when the second stage of the project has to be proceeded, which requires further approval, some of the residents of the area have filed the present application seeking for a direction to the project proponent to follow the provisions of the Forest (Conservation) Act 1980 in respect of the Mapithel Dam (Thoubal Multipurpose Project) in the State of Manipur and till then stop further activities.

The Tribunal by its order dated 12.11.2013 has passed an order on the basis that in respect of the second stage, the project proponent namely the State of Manipur has filed application to the MoEF in the year 2013 admittedly after filing of this application and having found that the application is pending before the MoEF to pass orders, has observed that when such application is pending with the MoEF any permission granted by the State Government to proceed with the project under the

Forest(Conservation) Act 1980 cannot be valid in law and therefore, we directed Respondent No.1 not to proceed with the project as per the order dated 20.11.2013.

Mr. Ritwik Dutta Learned counsel appearing for the applicant who has prayed for the Interim order of stay has taken us to various provisions of not only the Forest (Conservation) Act but also the Forest Rights Act 2006. He would submit that as per the present Act of 2006 which is distinct from merely granting rehabilitation to the tribal people but is relating to the community forests resources and to substantiate his contention he would also refer to the Judgment of the Honorable Apex Court in Vedanta case reported in 2013 (6) SCC 476. Therefore, according to him by virtue of the new Act of 2006, the Ministry of Environment and Forests has to follow certain procedures and in fact the Government of India itself has issued a communication as early as on 03.08.2009 in the form of a memorandum stating that in respect of use of forest lands for non forest purposes for granting permission certain procedures are to be followed as contained therein. Therefore, according to him until and unless the MoEF grants approval by following such procedures, the Respondent No. 1 (Government of Manipur) cannot be permitted to proceed with the second stage of the project.

On the other hand Mr. Hazarika, Learned Sr. counsel appearing for the State of Manipur would submit that even as per the original pleading of the applicants the applicants have not raised anything about the Act of 2006 and therefore, the tribal people from whom the lands were acquired, having received very huge amount of compensation cannot be permitted to raise other issues now. According to him, the Government have spent huge amount from exchequer for the purpose of the project in the State which is affected due to various reasons like insurgency, and thus, any order of stay to the second stage of the project would be detrimental to the public interest. Mr. Hazarika has also taken us to the Memorandum of Agreement entered in the year 1993 where by not only adequate compensation has been paid to all stakeholders but also various rehabilitatory measures have been accepted and signed by the village representatives formed as a sub-committee and therefore, there is no necessity to redo the same at this stage, since it would be against the public interest.

Mr. Vikas Malhotra Learned Counsel appearing for the MoEF would submit that in fact the application made by the Respondent No. 1 (Manipur Government) for the purpose of approval for the second stage has been sent to the Ministry of Tribal Affairs of the Government of India for its comments on 24.10.2013 and a reminder has also been sent on 19.11.2013 and as soon as the comments are received from said Ministry, the MoEF would take action expeditiously.

Having heard all the respective Counsel, and taking note of the facts that the project proposal has been made in the year 1988, clearance of the first stage having been granted in 2010 and is pending for more than 25 years, and without expressing any opinion on the merits, we are of the view that certain directions must be given to the MoEF as well as the Ministry of Tribal Affairs to expedite the matter in public interest. Accordingly, we direct the Ministry of Tribal Affairs with whom the proposal sent by the MoEF is pending, to forward their comments forthwith to the MoEF within a period of one week from the date of receipt of the copy of the order.

On receipt of the comments from the Ministry of Tribal Affairs, the Ministry of Environment and Forests shall pass appropriate orders on the proposal given by the State of Manipur in respect of the second stage clearance by following the procedure in accordance with law, including all the memoranda issued by the Government of India from time to time in this regard and such order shall be passed expeditiously and in any event within a period of 6 weeks thereafter.

We hope that both the Ministry of Tribal Affairs as well as the Ministry of Environment and Forests will scrupulously follow this order and report the same on the next date of hearing.

Till such orders are passed Status Quo as on date shall continue.

Mark this copy to the Secretary, Ministry of Tribal Affairs Government of India.”

On the basis of the said order ultimately the final forest clearance was issued in exercise of power under Section 2 of the Forest (Conservation) Act, 1980 upon considering the different comments from the Ministry of Tribal Affairs and Environment and Forests and the respective orders as per statute, by the State of Manipur relating to the present project. Having regard to such position, an application being M.A. 17/2014 was filed by the Respondent Nos. 1&3 of this appeal viz. State of Manipur and Irrigation and Flood Control Department seeking necessary direction/vacating stay order/status quo dated 12.11.2013 and 20.11.2013 and thereby to dismiss the original application. In this M.A. it was contended about the grant of final approval (Stage-II) clearance under Section 2 of the Forest (Conservation) Act, 1980 for the said project by the Ministry of Environment and Forests and grant of clearance under Section 2 of the said Act and the final clearance by the State Government for the project. On considering this Miscellaneous Application, the Principal Bench

of the National Green Tribunal vide order dated January 16, 2014 closed the original application and all pending Miscellaneous applications and vacated the interim order as passed in the said proceeding upon holding inter-alia that conditions contemplated by the Government of Manipur in the approval/clearance order dated 15.01.2014 should be followed strictly by the project proponent. By the said order the Hon'ble Tribunal observed that "in view of the finality in granting approval by the State Government in accordance with the provision of Forest (Conservation) Act **nothing survives in the present application for further adjudication.**" However, in the subsequent paragraph the Hon'ble Tribunal observed to this effect "needless to state that it will be open to the parties aggrieved, to work out their remedy, in the manner known to law." The order dated 16.1.2014 passed by Principal Bench, NGT, New Delhi in M.A. No. 17/2014 in Application No.167/2013 reads as such:-

“ It is brought to the notice of this Tribunal, when the matter was taken up for further hearing, by the counsel appearing for the State of Manipur, that pursuant to the clearance granted by the MoEF dated 31st December, 2013, the Government of Manipur has passed an order dated 15th January, 2014 and accorded final approval to the diversion of 595 hectares of forest land for Thoubal multipurpose projects, Manipur under Section 2 of the Forest (Conservation) Act, 1980, however, subject to certain conditions.

In view of the finality in granting approval by the State Government in accordance with provisions of Forest (Conservation) Act, nothing survives in the present application for further adjudication.

Accordingly, the application stands closed. Needless to state that it will be open to the parties aggrieved, to work out their remedy, in the manner known to law. It is made clear that the conditions contemplated by the Government of Manipur in the approval order dated 15th January, 2014 shall be strictly followed by the project proponent.

The application and all pending MAs stand closed and interim orders stand vacated. No costs.”`

E. The order dated 20th November, 2013 passed in the M.A. 646/2013 read with O.A. 167/2013 giving a green signal to proceed with the forest clearance issued by the Hon'ble Tribunal despite the submission made by the appellants thereto being the present appellants herein on Forest Rights Act, 2006 and the Forest (Conservation) Act, 1980 was not challenged in appeal under Section 22 of the NGT Act, 2010 before the Apex Court on the grievance that the Forest Rights

Act should be protected prior to the clearance under Section 2 of the Forest (Conservation) Act, 1980. Hence the order as passed on that date granting permission to the respective Ministries viz. Tribal Affairs and the Environment and Forests to proceed with the proposal given by the State of Manipur in respect of the Second Stage clearance following the procedure in accordance with law and all memoranda of the Government of India on that field reached its finality. The present appellants who are the applicants thereto could have agitated the issue before the Apex Court in an appeal against that order. But without doing such they accepted the same. Besides when status quo order was vacated considering the M.A. 17/2014 filed by the respondent State of Manipur by the order dated 16.1.2014, the Principal Bench of NGT categorically observed “ nothing survives in the present application for further adjudication” and vacated interim order on closing all pending M.A.s and the O.A. Besides such, the Hon’ble Tribunal directed the State Government to comply with all the conditions

stipulated in the said approval order dated 15.1.2014 strictly in its letter and spirit.

Having regard to the earlier direction and result thereof, though the Hon'ble Tribunal earlier in said O.A. directed that anybody who is aggrieved could work out remedy in the manner known to law but issue on provisions of the Forest Rights Act and the Forest (Conservation) Act , 1980 as urged practically became a dead issue after the finality of the final approval/order of clearance by state of Manipur due to order of tribunal aforesaid.

In the event of the appellants having any grievance even in the final order as passed by the Tribunal in the proceedings, they could have preferred an appeal under Section 22 of the NGT Act, 2010 before the Apex Court for appropriate remedy when particularly there was observation by the Principal Bench that "Nothing survives in the present application for further adjudication" and direction passed to

comply with the conditions contemplated in the final order dated 15.1.2014 strictly by the project proponent.

3. Now we are proceeding to advert on the respective pleadings of the appellants and the respondents in the present appeal.

Submission by the Appellants

The project was originally approved by the Planning Commission in May 1980 for construction of the Mapithel Dam on the river Thoubal, one of the longest rivers of Manipur at Phayang for the purpose of water supply, irrigation and power generation involving a catchment area of 565 sq.km with maximum dam length of 1120 m and maximum height of 66 m. The catchment area has predominantly forest area as per Environment Impact Assessment Report (in short EIA report) prepared by the Project proponent in 2006 and 44 villages fall within the catchment area having around 7223 households with large percentage of people being agriculturists and forest dependent. The rehabilitation and resettlement programme for the affected villages is currently under challenge

before the Hon'ble High Court of Gauhati (Imphal Bench) by way of Writ Petition (C) No. 211 of 2011 and the appellant No.8, Mr. Standhope Kashung is a petitioner No. 22 in the said petition. The Hon'ble High Court of Gauhati by order dated 25th April, 2012 issued an interim stay on the settlement packages for the affected villages.

The project started its construction illegally without forest clearance under FC Act and the present appellants had approached this Hon'ble National Green Tribunal vide Application No. 167/2013 against such illegal activities for which the Tribunal granted a stay order on 12.11.2013. However, the Hon'ble Tribunal disposed of the said application on 16.01.2014 after the grant of stage-II forest clearance passed by Ministry of Environment & Forests (in short MoEF) and the State Government passed the impugned order dated 15.01.2014 on diversion of forest land for the project under FC Act.

The appellants have challenged the impugned order dated 15.1.2014 based on the following facts as submitted in the Appeal:-

(i) Forest diversion proposal is not in the public domain on MoEF website as mandatorily required.

(ii) Mandatory site inspection by the Regional office of the Ministry of Environment and Forest in Shillong was not conducted during forest clearance process.

(iii) There was violation of the circular of MoEF's Forest Conservation Division dated 3.08.2009 regarding mandatory prior consent of affected villages to diversion proposal as part of forest clearance process to comply with the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (in short FR Act) which came into force in January, 2008.

(iv) Current construction of dam using forest land (including riverine tracts) without environmental clearance was illegal and is violation of the conditions of forest clearance.

It is also the submission of the appellants that acquisition of forest lands prior to forest clearance is contrary to the law laid down

by the Hon'ble Supreme Court in **Karnataka Industrial Areas Development Board Vs. C. Kenchappa** (2006) 6 SCC 371 as no environmental and ecological impacts are comprehended and grant of forest clearance is in violation of the judgment of Hon'ble Supreme Court in **Orissa Mining Corporation Vs. Ministry of Environment and Forest** (2013) 6 SCC 476 as no consent of the Gram Sabhas have been sought.

With the aforesaid submissions the appellants prayed for an order to quash the impugned order dated 15.01.2014 issued by the Government of Manipur granting forest clearance to the project along with a prayer for interim relief to stay the operation of Forest clearance order failing which irreparable loss would be caused to the environment.

The appeal along with the M.A. No. 90/2014 was filed in the Principal Bench of the Tribunal on 14.02.2014 and notices were issued to the respondents as per the order dated 19.02.2014. On 21.04.2014 the MoEF was directed to produce the records in respect

of site inspection made by the Conservator of Forest including the site inspection made by the Regional office of MoEF, Shillong as required under the 4.10 of the forest guidelines and clarification issued by the Govt. of India, MoEF which is applicable upto June, 2014. Subsequently, after the establishment of the Eastern Zone Bench of the Tribunal at Kolkata, the appeal was transferred from the Principal Bench to Eastern Zone Bench and listed with effect from dated 27.05.2014.

4. Affidavit-in-opposition by the Respondents and rejoinder, Supplementary affidavit etc. by appellants.

A. Respondent No.1 and 3, the Govt. respondents in their affidavit, while denying the allegations made by the appellants, would submit that the appeal is barred by Resjudicata as the petitioners of the present appeal filed an earlier petition being O.A. 167 of 2013 on the same subject matter challenging the same project. The said petition was heard extensively by the Hon'ble Tribunal and finally disposed of the matter vide order dated 16.01.2014 vacating the interim order of stay in view of the fact

that final approval (Stage II clearance) under Section 2 of the FC Act, 1980 granted by MoEF. It is the contention of the Government respondents that all objections raised in the present appeal to the project have already been taken by the petitioners including the Rights of Forest dwellers and the order of the Tribunal dated 16.01.2014 in O.A. No. 167 of 2013 has not been challenged by the petitioners herein and, therefore, it has attained the finality and present petition is barred by Resjudicata. It is also their submission that the project is of great public interest initiated in the year 1980 by the State Government with Central assistance with a cost of Rs.1288 crores approximately out of which Rs.1202.391 crores approximately has already been spent till February 2014. Besides, the petitioners have no locus standi to file and maintain the present petition as those petitioners who are affected by the project have already taken compensation.

It is their further submission that the project was cleared by the Planning Commission, Govt. of India before the enactment of FC Act and the State Government submitted the proposal on

03.01.1988 for forest clearance for the project. The Chief Conservator of Forest (Central), Govt. of India visited the project area for site inspection on 26.05.1989 and site inspection/survey of the forest area involved in the project was done during 16-17 December, 1989 and report was submitted by Divisional Forest Officer on 03.02.1990. The first Rehabilitation and Resettlement Plan (in short R&R Plan) was prepared and approved by the State Government in 1990 and a high level committee under the chairmanship of the Chief Minister of Manipur State was constituted on 07.08.1992 for monitoring and reviewing R&R Plan of the project. On 19.06.1993 a memorandum of agreement with terms and conditions for Rehabilitation and Resettlement programmes for the affected villages and rate of compensation for the forest and non-forest land affected by the construction of the project was signed between the Chief/Headman of the villages and representatives of the Govt. of Manipur, specifying the rates/cost prices of various classes of lands and other terms and conditions of the R&R. After this exercise the said forest land was

purchased from the villagers after payment of land cost. The Memorandum of Agreement was approved by the Ministry of welfare, Govt. of India and the Compensation of the Land to be submerged after the construction of the project had been paid in instalments during 1996-2003. Out of the total amount of compensation of Rs.20,75,70,555/-, an amount of Rs.20,00,04,530/- has already been paid. The Environment clearance was granted on 13.12.2005. During December 2007, the R&R Programme for Louphong and Phayang villages as implemented as per 1990 R&R Plan was reviewed and additional packages were also paid. The State Government also revised the R&R programme for Lamlai Khullen as Ramrei Phase-I (95 families) during 2008 resettling them at higher altitude and R&R packages for Lamlal Mongbung (Kuki) village (86 families) were also settled in 2009. However, the R&R programme for remaining two villages, Chandong and Lamlai Khunou could not be implemented due to the objection of the revised R&R package by the Mapithel Dam Affected Villages Organization (in short MDAVO).

The MoEF accorded prior in principle (Stage-I) approval of the Central Government for the diversion of 595 ha of forest land during March, 2010. The cost of compensatory afforestation and its maintenance over double the degraded forest land amounting to Rs.560.40 lakhs was deposited on 12.03.2011 in adhoc CAMPA account and amount of NPV of 4585.10 lakhs was deposited in adhoc CMPA account on 22.08.2013. After submission of compliance of all Stage-I clearance conditions the MoEF accorded Stage-II clearance on diversion of the 595 hectare forest land for the project to which Govt. of Manipur accorded final approval on 15.01.2014.

The Government respondents also denied many of the allegations made by the appellants. They would submit that the case of Vimal Bhai Vs. Union of India & Ors. in Appeal No. 7 of 2012 is not similar to the present case, the construction of the project was started in 17th August, 1980 after the approval by the Planning Commission in May 1980 vide work order No. EDD/THGWC/Work/80/1-8 dated 2nd August, 1980, only six

villages are to be submerged out of which R&R programme in respect of four villages are already implemented, the interim order dated 25.04.2012 passed in WP(C) No.211 of 2012 cannot be enforced due to recent High Court's order dated 23.09.2012 passed in Contempt Case (C) No. 7 of 2013, there was no scope to upload the Forest Diversion proposal under Forest (Conservation) Rule, 2003 as there was no website during the period but Forest Diversion approval letter as well as Govt. of Manipur order were uploaded in the website of Manipur Forest Department, the site inspection was done on 16-17, December 1989, the mandatory prior consent of affected villages has been already complied to settle the rights and claims of affected villagers through an agreement signed on 19.06.1993 and FR Act 2006 is not applicable to the present project etc.

They would further submit that the hill areas under the State of Manipur is under 5th Schedule of the Indian constitution and village Authority is the equivalent of Gram Sabha. The Manipur (village Authority in Hill Areas) Act, 1956 (in short Hill Act)

has been enacted to cater to the interest and rights of Scheduled Tribes inhabiting the hill districts of Manipur. The village Authorities have been constituted under Section 3 of the said Act. As the forest area of the project is community land, the duly constituted village Authority sold the land in question after taking the consent of the tribal villagers and the land now belongs to the State of Manipur. The Deputy Commissioners have issued necessary certificate in this regard.

B. The MoEF, the Respondent No.2, in their reply in opposition would submit that being an ongoing project, there is no provision for granting Environmental Clearance under EIA Notification 1994 and the Forest Advisory Committee after examining the Forest Clearance proposal recommended clearance in principle (Stage-I clearance) for diversion of the said forest land and MoEF accorded in principle approval on 10th January, 2010 & 12th March, 2010. After submission of compliance report to conditions stipulated in Stage-I clearance under FC Act and after examining the compliance report the MoEF observed that it does not

contain some documents and requested Govt. of Manipur vide letter dated 13th September, 2013 to submit the following documents for further action:-

“11.

- (i) Undertaking to comply with the condition stipulated in the stage-I approval that “compensatory afforestation shall be raised in consultation with Chief Wildlife Warden of the State due to use of chain linking fencing in the proposal, if required”;
- (ii) Report from the Regional Office, Shillong regarding Catchment Area Treatment (CAT) Plan as stipulated in condition No.3 in the in-principle approval; and
- (iii) Report on settlement of rights in accordance with the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (‘FRA 2006’, in short) on the forest land proposed to be diverted along with documentary evidence stipulated in the MoEF’s letter No.11-9/98-FC(pt.) dated 3rd August, 2009.”

The State Government in their letter of reply dated 30th September, 2013 & 3rd October, 2013 to MoEF letter of 13th September, 2013 stated that the settlement of rights in accordance with the provisions of FR Act, 2006 is not applicable to the project land as the land covered under the project was already

acquired by the State Government in 1993 in accordance with the Memorandum of Agreement dated 19.06.1993 signed with the villagers and R&R packages are also included in the project for the affected villages. Necessary steps for compensating the villagers for the lands and standing properties have taken place. After examining the reply received from Govt. of Manipur the MoEF sought opinion of Ministry of Tribal Affairs (in short MoTA), the Nodal Ministry for implementation of FR Act, 2006 vide O.M. dated 24.10.2013. The opinion sought was on the specific point whether documentary evidence in respect of settlement of rights in accordance with the provision of the FR Act, 2006 on the forest land proposed to be diverted needs to be submitted by the Government of Manipur or not.

D. In reply to MoEF's said O.M. dated 24.10.2013, the MoTA vide O.M. dated 2.12.2013 informed the MoEF inter-alia that FRA, 2006 is already in operation as on date and is very much applicable to the instant project land and in the event of not applying FR Act, 2006 to the instant project land, historical

injustice done to the forest dwellers will, inter-alia, continue, which is not desirable and it will be violation of FR Act. Accordingly the MoEF vide letter dated 12th December, 2013 requested Manipur Government to submit report on settlement of rights in accordance with provisions of FR Act on the forest land proposed to be diverted along with documentary evidence stipulated in MoEF letter dated 3rd August, 2009.

E. The MoTA in their subsequent O.M. dated 18th December, 2013 informed the MoEF in reference to the earlier letter of O.M. dated 2nd December, 2013 which reads as under:-

**"F.No. 23011/21/2013-FRA
Government of India
Ministry of Tribal Affairs**

**Shastri Bhawan, New Delhi
Dated 18.12.2013**

OFFICE MEMORANDUM

Subject:- Settlement of Rights in accordance with the Provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (in short FRA, 2006) on the forest land diverted for non-forest purpose.

The undersigned is directed to refer to this Ministry's OM of even number dated 02.12.2013 on the above captioned subject. The matter of giving Stage II Forest Clearance for diversion of 595 ha of forest land for the Thoubal Multipurpose Project in Ukhrul District has been reviewed by this Ministry and in continuation of finding/comments indicated earlier, it is informed that-

- (i) The forest dwellers and other inhabitants in the area under question have already been provided with the requisite rehabilitation and reallocation package at the appropriate point of time in the past (at the time of stage 1 clearance of the project). The provisions of Section 4(1) as communicated to the MoEF provide that recognition and verification procedure is complete in respect of forest dwelling Scheduled Tribes or other traditional forest dwellers before their eviction or removal from the forest land under their occupation. In the instant case, due acquisition process has been followed by the State Government in 1993 in accordance with the Memorandum (dated 19/6/1993) of Agreed Terms and Conditions signed with the villagers and the Rehabilitation and Resettlement Package included in the Project for the affected villages. Necessary steps for compensating the villagers for the land and the standing properties have already been undertaken. As per the State Government, the land in question has been purchased by the Government of Manipur from the affected villagers through their duly elected Village Authorities (equivalent of Gram Sabha) and the rights of any fresh dwellers residing in the project affected area have already been settled as per law. The spirit of the Act seems to have been followed in the instant case.
- (ii) This would, therefore, be a unique isolated case vis-a-vis the provisions of the FRA and the circumstances

leading to the acquisition in the instant case which cannot and should not be treated as a precedent in future.

2. The Ministry of Environment & Forests are requested to consider the matter accordingly.

(Gopal Sadhwani)

Deputy Secretary to Government of India

Tel: 23383965

Email:sadhwani.gopal@nic.in

Shri H.C. Choudhary,
Assistant Inspector General of Forests,
Ministry of Environment & Forests,
CGO Complex, Lodhi Road,
New Delhi-110 003.”

F. Thus MoTA in the said O.M. of 18th December, 2013 requested the MoEF to consider the matter accordingly. The MoEF considering the view of MoTA accorded Stage-II approval under FC Act, 1980 for diversion of 595 hectares of forest land for the Project. As the user agency has already executed the work on forest and non-forest land the MoEF while granting Stage-II clearance stipulated following additional penal conditions:-

(i) State Government shall assess the year-wise details of the area of forest and non-forest land utilised for execution of project before and after the grant of stage-I approval under the FC Act for diversion of the forest land required for the project;

(ii) State Government shall raise penal compensatory afforestation from funds to be realized from the user agency, over degraded forest land double in extent to the forest land utilized for non-forest purpose without obtaining final approval under the FC Act;

(iii) State Government shall raise penal compensatory afforestation from funds to be realized from the user agency, over degraded forest land equal in extent to the non-forest land utilised for construction of the project before obtaining stage-I approval under the FC Act for diversion of the forest land required for the project;

(iv) State Government shall realise from the user agency penal NPV @ 20 % of the rates applicable on the date of grant of the stage-I approval, of forest land utilized for non-forest purpose without obtaining final approval under the FC Act for each year or fraction thereof. **(Explanation:** In case a patch of forest land has been utilized for non-forest purpose without obtaining approval under the FC Act for 3 years, penal NPV to be realised in respect of such forest land will be at the rate of 60 % of the rates applicable on the date of grant of stage-I approval.);

(v) The concerned Regional Office of the MoEF shall initiate appropriate proceedings under Section-3 A and Section-3 B of the FC Act against persons prima facie found guilty of violation of the FC Act, and

(vi) The State Forest Department shall initiate appropriate proceedings under relevant sections of the Indian Forest Act, 1927 and the local Forest Act against persons prima facie found guilty of violation of these Acts.”

The MoEF has stated that all matters relating to the project which were placed before the FAC after the order dated 29th February, 2012 of Central Information Commission (in short CIC) have been uploaded on website of the MoEF. But the proposal seeking prior approval of Central Government under the FC Act for diversion of 595 hectares of forest land of the project was placed before the FAC before the order was passed by CIC. But there was categorical admission by MoEF as revealed from paragraph 7 that no site inspection has been carried out by the concerned Regional Office of MoEF. MoEF also opposed to the prayer for interim relief by the appellant.

G. The Respondents No. 1 and 3 in their additional affidavit filed on 27.05.2014 controverted the averment of Respondent No.2 (MoEF) in respect to their admission that no site inspection has been carried out by the concerned Regional Office of the MoEF. They would submit that in their earlier affidavit they have referred to the fact that inspection had been carried out by the

Regional Office of MoEF. In this connection they have annexed few documents to support their claim that site inspections were conducted on 26.05.1989. The Respondent No.2, the MoEF & CC has also admitted to this fact in their supplementary affidavit filed on 21.07.2015.

H. The Respondent No. 4, the Ministry of Tribal Affairs, Govt. of India in their reply affidavit have restricted their submission only to the FR Act, 2006 as fact relating to FC Act 1980, the Environment(Protection Act) 1986 and other legislations are not in the domain of the Answering Respondent. While discussing the historical context of the Forest Rights Act and how the FR Act is an example of constitutionally protected protective legislation under Article 15(4) of the Constitution of India empowering the State to make special provision of scheduled castes, scheduled tribes and socially and educationally backward classes of citizens for their advancement, it states that compliance of FRA is a mandatory requirement before forest land can be diverted. Failure to do so would be a violation of law. They would further submit that the

order dated 18.12.2013 was passed by the Respondent No.4 relying upon the submissions made by the Respondent No.1, the State Government regarding the consent having been already obtained from the affected forest dwellers & villagers to the forest diversion for the project as well as R&R package. They further state that they do not have any statutory power or mechanism, being a Ministry of the Central Govt., for verification of such submission by the State Government.

I. The Appellants in their rejoinder to the affidavit of Respondent No. 1&3 vehemently contest the issue of res-judicata as in the O.A. No. 167 of 2013 the impugned order of 15th January, 2014 was never challenged until the State Government passed the final order on 15.01.2014 there was no occasion to raise the issue of rights of forest dwellers. They have also stated in the rejoinder that Hill Areas of Manipur do not fall under Schedule V of the Constitution as stated by the State respondents and the Memorandum of Agreed Terms and conditions (MoATC) of 1993 has nothing to do with the mandatory compliance of Forest Rights

Act. In their rejoinder to the affidavit filed by MoTA, the Respondent No.4, the Appellants would submit that the OM dated 18th December, 2013 is in violation of Principle of natural justice. In their additional affidavit with regard to the status of Writ Petition filed in Gauhati High Court regarding rehabilitation and resettlement of project affected persons, the Appellants would submit that on 25th April, 2012 Hon'ble High Court of Gauhati, Imphal Bench passed an order in favour of the petitioners and the operational part of the order is as follows:-

“Considering the submission of learned counsel for the petitioners and also on perusal of the records it appears that there is a prima facie case for passing interim order. In the interim it is provided that the impugned order dated 22/07/2011(Annexure A/9) and the said agreement dated 24/09/2011(Annexure A-11) shall not be given effect to. In other words, the impugned letter dated 22/07/2011 and agreement dated 24/09/2011 shall remain stayed until further order.”

The Contempt Petition, bearing case No. 7 of 2013 filed by the petitioners for defying the order of the Hon'ble Court by the respondents, was disposed of on 23.09.2013 and the operational part of the order is reproduced below:-

“After having heard learned counsel for the parties, I am inclined to dispose this contempt petition by granting liberty to the parties to approach writ court in pending writ petition No. 211 of 2012 for appropriate relief either in the form of modification of the interim order or it’s confirmation or for its setting aside as the case may be rather than to prosecute the contempt application.

It is with this liberty the contempt application is disposed of.”

It is submitted by the appellants that the stay order dated 25.04.2012 is still continuing. They would further submit that the petition filed in Gauhati High Court has nothing to do with the present Appeal before the Hon’ble Tribunal challenging the forest clearance granted to the project. The Writ Petition is restricted to quashing of the impugned order dated 22.07.2011 for constituting a bogus committee in the name of “Mapithel Thoubal Dam Multipurpose Project Displace Village Committee (MTDMPDVC) and thereafter the State Government entering into an agreement with the bogus Committee on 24.09.2011.

5. During the course of hearing the Id. counsel appearing for the appellants would submit on 16.02.2015 that

the work of the dam is in progress and pray for an interim order staying the construction work of the project as operation of the dam will inundate the areas of the nearby locality jeopardising the livelihood of the local tribal people. This was vehemently opposed by the Ld. counsel appearing for the State of Manipur contending inter-alia that the work was cleared by the Planning Commission of India as well as by all competent authorities by way of Forest clearance and the project is scheduled to complete by 31.03.2015. It was further contended that the dam construction has already been completed and it will be in operation as soon as earth-filling work is over.

Hearing both the parties we did not pass any interim order at this stage with an observation that the work is subject to the result of this application. On a subsequent date i.e. 6th July, 2015, the Ld. counsel Mr. Ritwick Dutta appearing for the appellants pressed for grant of an injunction on further construction of the Dam on the ground that village Chadong is on the verge of submersion and paddy fields, banana

plantation etc. are already submerged. He produced the news paper report published in Pune edition of Times of India dated 28th June 2015 and some photographs in support of his prayer. Considering the documents filed on submergence of village Paddy field, banana plantation etc. we granted liberty to the appellants to file appropriate application seeking injunction.

6. The Appellants filed one M.A. No. 155/2015/EZ with a prayer for engagement of Court Commissioner having experience in the field of Hydro-Electric Project. It was their contention in the M.A. that the Project Proponent has resumed the construction of Mapithel Dam Project and due to closing of diversion channel since 10.01.2015 of river Thoubal, surrounding areas are being gradually submerged. The village Chadong is on the verge of submersion. It was also submitted that there was agitation by affected people. As the Ld. Counsel appearing for the project proponent did not have objection to such prayer we appointed Er. Jaya Prakash Chand, National Construction Management Engineer in the Deptt. of Water

Resources, Bhubaneswar, Odisha, a highly qualified Engineer having expertise in Water Resource Management and earth dam as Court Commissioner to visit the Dam site, make a survey and submit a report answering to the following points:-

(1) Whether the submergence/gradual submergence of the village Chadong and other agriculture lands near the village is due to diversion of water of river Thoubal from Dam site or due to other natural factors like heavy monsoon leading to flood of other rivers.

(2) If the submergence is due to water diversion to facilitate further construction of the dam, whether it is possible to stop the construction work.

(3) Whether the contention of the State of Manipur is true that If construction of the dam is stopped, there will be catastrophe in the down stream villages. Whether there is any alternate strategy to halt submergence of the village without stopping the construction work.

The relevant portion of the report of the Court Commissioner answering to the three points framed by the Tribunal is reproduced below:-

“1. Closure of the Diversion Channel was done on 10.1.15 to take up the gap closure portion of dam Earth Work. The bottom portion had a length of 40m, which at dam top is 158m. The stripped level was around 816m (COT bottom level). The dam is being built up in this portion & should reach the TBL of 886m at the earliest.

The cause of submergence has two components, both contributing simultaneously.

Component I: Perennial Flow

Once diversion channel was closed & earth dam was built up, the perennial flow of about 50 Cumecs to 15 Cumecs during January 2015 to June 2015 (as reported on dam top by AE/EE/SE/CE on 17.7.15), entering the reservoir made the water level to rise, causing gradual submergence.

Component II: Rainfall

The rainfall data for January to July 2015 of the Rain Gauge Station at the dam site was reviewed & the gist is as under:-

Rain Fall Analysis at Dam Site

| Sl. | Month of the year 2015 | No. of Rainy days during the | Total rainfall during the month | Max. Rainfall with date & quantity |
|------------|-------------------------------|-------------------------------------|--|---|
|------------|-------------------------------|-------------------------------------|--|---|

| | | Month | in mm. | in mm |
|----|--------------------------------------|-----------|---------------|--|
| 1. | January | 3 | 34.00 | 10.01.15-17.00 |
| 2. | February | 0 | 0.00 | |
| 3. | March | 1 | 1.60 | NA |
| 4. | April | 5 | 79.20 | 6.4.15-26.00 |
| 5. | May | 4 | 22.20 | 24.5.15-8.80 |
| 6 | June | 17 | 178.10 | 12.6.15-29.00 |
| 7 | July (up to 17.7.15) | 11 | 133.80 | 10.7.15-28.40 |
| | Total of year (up to 17.7.15) | 41 | 508.90 | Av. Annual Rain fall is 1467.50 |

The rain fall in Catchment will drain in to the reservoir & the water level will rise. Since the above data indicates only average type rainfall so far (not heavy to very heavy), there is less inflow into the reservoir, causing gradual submergence of land. Further flood of other River will not enter to this Dam, it is confined to catchment of River Thoubal, where its tributaries are also included.

2. The gap closing work of a dam is a critical item. Once diversion channel is closed, the dam has to be completed at the earliest, or else there will be threatening of dam breach due to flood flow, which is not a well- come situation. The spillway capacity is fixed as per flood frequency of 1 in 100 years / 500 years, which may occur even this year, in such a case, the reservoir will rise very fast & the flood water will be released through the Spillway.

In case of Mapithel Dam, as observed at site on 17.7.15, the Spillway work with EDA is almost completed, the approach channel work is completed and the out fall channel is completed.

The earth dam for a length of 916m ($1074-158=916$) has been fully completed & in rest 158m truncated earth dam section has been adopted, in which the u/s dam section has gone upto safe level of 876m, against spill level of 874.75m. But the truncated section must be made to design section to avoid failure due to piping, in case the phreatic line (4:1) touches the on-progress slope of earth dam. So accelerated work is the need of the hour. Under such a situation, there is no possibility to stop the work.

3. Suppose the present construction is stopped. With entire monsoon months ahead, the flood run off will build up the Dam at heavy rain fall time till reaching RL 874.75m, when flood can pass in the Spillway. At this situation, the dam section though is not to withstand a water pressure of 70m ($886-816=70$), as for a designed section but will withstand water head of 58.75m ($874.75-816=58.75$), for the truncated section. To be safe within 4:1 Hydraulic gradient, the section has to cover the phreatic line. At the present case, attempt is being made to bring the truncated section to safe level.

If work is stopped, the dam is likely to fail in overtopping & piping too. Once the dam breaches due to either

overtopping or Piping or both, dam breach Super flood flow will run downstream in 8 to 10 times speed of normal flood flow and will damage land/houses/public infrastructures/property/take many lives of man/ animal. So catastrophe is bound to occur, in case of a dam breach.

4. Construction work is to continue. In rare cases, alternate strategy like putting up protective bund / Ring Bund around the habitat is made to reduce the submergence partly, sacrificing some live storage of the project.

Of course a High Level Reservoir peripheral inspection road is under construction, 41.55 km out of 67 km is completed. This will be a Protective bund, though it may not be able to reduce submergence to large extent, but it will ease out communication issues.

In the instant case, LA Compensation, R&R Packages has been given to village Chadong. As per version of CE, out of 394 families, 289 have taken R&R package and another 85+ will take in July 2015, making it 374. Another 20 are left, who are reported to be staying at much higher elevation than the maximum submergence level. CE further informed at site that, earlier due to protest by villagers of Chadong, the High Level periphery road work was held up. Now on 14.7.15, they have requested in writing to complete the road work.”

Thus the Court Commissioner recommends continuation of construction of work because if the work is stopped at this stage, the dam is likely to fail in overtopping and piping too. Once the dam is breached due to overtopping or piping or both, super flood flow will run down stream in 8 to 10 kms speed of the normal

flood flow damaging land/houses/public infrastructures/property/lives of people & animal resulting in a catastrophe. The Commissioner has also offered some suggestion to reduce the submergence partly, sacrificing some live storage of the project.

7. After going through the report of the Court Commissioner, Mr. Bikash Ranjan Bhattacharya, Ld. counsel appearing for the State of Manipur submits that nothing remains in the interim application and would further submit that the State of Manipur will follow the suggestion with regard to construction of the Protective bund. In view of the submission made by the Ld. Counsel of the State of Manipur, we directed the State of Manipur to follow the suggestion of the Court Commissioner as made in the report.

8. Mr. Ritwick Dutta, Ld. Advocate for the appellants on referring to the report of the Court Commissioner would frankly submit that at the present moment there is no scope to demolish

the dam as construction work has been completed up to more than 80% and pray for a relief being restricted to the compliance of the conditions stipulated in the order dated 15.1.2014 which is under challenge in this appeal. In the said order granting permission to use forest land by the Governor, in exercise of powers conferred u/s 2 of the FC Act, 1980, on the basis of prior approval by the Central Government it is clearly stated that the land could be diverted for non-forest purpose only after the conditions stipulated in the impugned order dated 15.01.2014.

The order dated 15.1.2014 reads as such:-

“GOVERNMENT OF MANIPUR
SECRETARIAT: FORESTS & ENVIRONMENT DEPARTMENT
ORDERS BY THE GOVERNOR: MANIPUR
Imphal, the 15th January, 2014

No. 57/68/2006-For & Evt.:- In pursuance to the letter No.F.8-98/88-FC(pt.) dated 31st December, 2013, Govt. of India, Ministry of Environment & Forest(FC Division), New Delhi, the Governor of Manipur is pleased to accord final approval to the diversion 595 hectares of forest land for Thoubal Multipurpose Project, Ukhrul, Manikpur subject to the fulfilment of the following conditions:-

- (i) Legal status of the diverted forest land shall remain unchanged.

- (ii) Compensatory Afforestation shall be raised and maintained over degraded forest land twice in extent to the area of forest land diverted from funds realised from the user agency;**
- (iii) Compensatory Afforestation shall be raised in consultation with Chief Wildlife Warden of the State due to use of chain linking fencing in the proposal;**
- (iv) The State Government shall realise additional amount of the NPV of the diverted forest land, if any, becoming due after finalisation of the same by the Hon'ble Supreme court of India and transfer the same to the ad-hoc CMPA under intimation to the Ministry;**
- (v) State Government shall implement the Catchment Area Treatment Plan in accordance to the approved CAT plan for the purpose, from funds realised from the user agency;**
- (vi) State Government shall assess the year-wise details of the area of forest and non-forest land utilised for execution of project before and after the grant of stage-I approval under the Forest (Conservation) Act, 1980 for diversion of the forest land required for the project;**
- (vii) State Government shall raise penal compensatory afforestation from funds to be realised from the user agency, over degraded forest land double in extent to the forest land utilised for non-forest purpose without obtaining final approval under the Forest (Conservation) Act, 1980.**
- (viii) State Government shall raise penal compensatory afforestation from funds to be realised from the user agency, over degraded forest land equal in extent to the non-forest land utilised for construction of the project before obtaining stage-I approval under the Forest (Conservation) Act, 1980 for diversion of the forest land required for the project;**

- (ix) State Government shall realise from the user agency penal NPV @ 20% of the rates applicable on the date of grant of the stage-1 approval, of forest land utilised for non forest purpose without obtaining final approval under the Forest (Conservation) Act, 1980 for each year or fraction thereof. (Explanation in case a patch of forest land has been utilised for non-forest purpose without obtaining approval under the Forest (Conservation) Act, 1980 for 3 years, penal NPV to be realised in respect of such forest land will be at the rate of 60% of the rates applicable on the date of grant of stage-1 approval);**
- (x) The concerned Regional Office of the MoEF shall initiate appropriate proceedings under Section-3A and Section-3B of the Forest (Conservation) Act, 1980 against persons prima facie found guilty of violation of the Forest (Conservation) Act, 1980;**
- (xi) The State Forest Department shall initiate appropriate proceedings under relevant sections of the India Forest Act, 1927 and the local Forest Act against persons prima facie found guilty of violation of these Acts;**
- (xii) The funds received from the user agency in compliance with the conditions stipulated at Sl. No. (vii) to (ix) above shall be transferred in concerned saving bank account of the Adhoc-CAMPA in Corporation Bank, CGO Complex, New Delhi-110003.**
- (xiii) Felling of trees in the forest area, so diverted, shall be only as per the actual requirement and with prior permission of the competent authority;**
- (xiv) The forest land diverted shall not be used for any purpose other than that specified in the proposal;**
- (xv) User agency shall make arrangements for free supply of fuel-wood, preferably alternate energy source, to**

- labourers and staff working on the project site so as to avoid any pressure on the adjacent forest areas;
- (xvi) User agency shall provide free water from the Project for all forestry related activities;
 - (xvii) User agency shall comply with all the conditions stipulated by the PCCF, Manipur in his specific recommendations at the time of submitting the proposal to the Central Government.
 - (xviii) User agency shall take up canal side plantations on both sides of the canals as per the schemes prepared by the Forest Department, at the Project cost. The wildlife may be promoted in these plantations at the user agency's cost.
 - (xix) User agency shall ensure that there shall be no damage to the wildlife in the area.
 - (xx) The approval under the Forest (Conservation) Act, 1980 is subject to clearance under the Environment (Protection) Act, 1986, if required;
 - (xxi) The user agency shall submit annual report on status of compliance to conditions stipulated in this approval to the State Government and the concerned Regional Office of the Ministry and
 - (xxii) All other conditions under different rules, regulations and guidelines including environmental clearance shall be complied with before transfer of forest land.
- Forest land shall not be diverted before the compliance of the above conditions.

**By Orders & in the name of Governor,
(Kengoo Zuringla)
Deputy Secretary to the Govt. of Manipur"**

9. The Ld. counsel appearing for the State of Manipur Mr. Bhattacharya would submit that already all the conditions

stipulated in the order under appeal have been complied with. We directed the Chief Secretary, Govt. of Manipur to file an affidavit confirming that all the conditions stipulated in the impugned order have been fulfilled giving detailed particulars of how and in what manner the conditions have been fulfilled item-wise annexing the relevant documents.

10. Mr. Ritwik Dutta appearing for the appellants alleged that before the impugned order was passed, forest land was diverted and construction started for the said project. Such allegation was seriously opposed by the Ld. Counsel Mr. Bhattacharya. In view of such dispute we directed the Addl. P.C.C.F., Regional Office, MoEF & CC Shillong to file an affidavit to answer whether forest land has been diverted prior to the compliance of the conditions stipulated in the order dated 15.01.2014 as well as the date from which the forest land has been submerged with present status.

11. In compliance to our order dated 04.08.2015, the Chief Secretary, Govt. of Manipur would respectfully submit that all the conditions stipulated in the order dated 15.01.2014 as imposed by MoEF for divergence of the forest land of 595 hectares have been substantially and practically complied with by the user Agency and concerned Departments in letter and spirit. He would further submit that the conditions which required to be complied forthwith have been fulfilled and conditions which were required to be fulfilled in due process have also been complied with. The details of the item-wise compliance of the 22 conditions stipulated in the impugned order has also been provided in the affidavit.

12. However, the Additional Principal Chief Conservator of Forest (Central) in the North Eastern Regional Office of the MoEF&CC affirmed, in his affidavit filed on 26.08.2015, in compliance to our order dated 04.08.2015, that the forest land has been diverted prior to the compliance of the conditions stipulated in the order dated 15.01.2014 as the forest land was

broken since 1993 in connection with the construction of the project. He would further affirm that date of submergence started with effect from 10.01.2015 and till date 49.66 ha of forest area has been submerged.

13. The contention of the MoEF that there was diversion of forest land for non-forest use before the Stage-II forest clearance as well as approval by the Governor in the order dated 15.01.2014 was denied by the Respondent No.1&3 in their affidavit filed on 19.9.2015 contending that the MoEF&CC misinterpreted the letter dated 12.8.2015 of the Chief Engineer, IFCD, Govt. of Manipur written to the Regional Office, Shillong. It is their submission that the MoEF&CC ought to have appreciated that the condition No. 'X' was not dropped but no effect was given till then, by its Regional Office itself. Diversion, therefore, was never made by the Govt. of Manipur before the compliances to be made by them. However, they have not denied to the position that the user Agency, had, as early as 1993, started breaking a small area of the forest land for

construction of the Project and this has already been taken into account by the MoEF by imposing penalties in the form of Penal CA(Rs.18,33,912/-) for using non-forest land and Penal CA (Rs.31,31,764/-) for using forest land. Besides a sum of Rs.,6,31,89,613/- being the Penal Net Present value for utilizing 35 hectares of forest land has also been realized from the User Agency. These conditions are stipulated in the Stage-II/Final approval of the Central Government dated 31.12.2013.

The answering respondent would further submit that the conditions outlined in the letter of approval dated 31.12.2013 accorded by the Central Government have to be complied with but it does not mean that only after complete compliance of the said conditions the project can commence.

The conditions which are required to be complied forthwith have to be complied first and other conditions are to be fulfilled in due process by initiating the same. In the instant case some conditions have been complied forthwith and others have been complied in due process.

14. In their additional affidavit filed on 30.10.2015, the Appellant would submit that as the project could not be demolished at this stage, as per the observation of the Court Commissioner, since more than 80% of the work has been completed, the project proponent should ensure that in the interest of justice and exercising the principle of sustainable development, the environmental impact of the project is minimized, there is proper management plan of the project area and operation of the project and the persons affected by the project are given adequate relief as per the provisions of the law in letter and spirit, particularly in respect to compliance of the conditions in the order dated 15.1.2014, implementation of FR Act 2006, implementation of the guidelines under the FC Act, 1980, conduct & appraisal of EIA as per EIA Notification, 2006 and acquisition of land after assessment of environmental impact. They have prayed to maintain status quo and continue the downstream release of water till the compliances mentioned supra are met, otherwise the entire relief sought will

be rendered meaningless. The Respondents 1 & 3 have negated each and every submissions of the Appellant in their additional affidavit.

Discussion on Merit

15. Heard Id. counsel for the parties at length. Perused the pleadings, documents annexed by the parties, and notes of submission meticulously. Considered the submissions of all the Id. counsel diligently. Having regard to the pleadings and documents as referred to the following points emerged for our adjudication:-

1(a). Having regard to the conduct of the appellants viz. Joseph Phungthar, appellant No.3, Samuel Zimik, appellant No.4 and Standhope Kashung, appellant No. 8 who have accepted the compensation on account of wet paddy fields and submergence of their village viz. Ramrei and Chadong due to construction of the project, the question arises whether appeal is maintainable by them applying the doctrine of estoppel and the principle of approbate and reprobate and doctrine of election.

1(b) Having regard to the admitted fact that appellant No.1 viz. Themrei Tuithung and appellant No. 2 viz. Samuel Longva of Thoyee village of Ukhrul District are not affected due to the construction of the present project as they have no agricultural land, particularly paddy fields in their name which have been submerged, similarly the Appellant No.5 viz. David Shiro and appellant No.6 viz. Shimdhar Jajo both belong to Riha village which is not affected due to the construction and operation of the project and the above two appellants do not either possess or own any paddy field in their names, whether they will be considered as party aggrieved due to forest clearance by order of the State of Manipur passed under Section 2 of the Forest (Conservation) Act, 1980.

(2) Whether the appeal filed by the applicants could be dismissed on application of principle of res-judicata?

(3) Whether the Project Proponent requires Environmental Clearance under EIA Notification 2006?

(4) Whether FR Act 2006 is applicable in the instant case?

(5) Whether there is violation of the FC Act to the extent that there was diversion of Forest land for non-forest purpose before the grant of Stage-II (Final Clearance)? And

whether Forest Clearance has been granted without site inspection?

(6) The scope and applicability of sustainable development concept and its principle as developed by International Conference held at Rio De Janeiro and by the apex Court judgments in catena of judgments.

16. **For brevity point No.1(a) and 1(b) as referred to above have been taken up together for consideration:-**

It is settled principle of doctrine of election that after taking advantage under an order a party may be precluded from saying that it is invalid and asking it to set aside. The view was expressed by the Apex Court in the case of **R.N. Gosain Vs. Yashpal Dhir**, reported in 1992(4)SCC 683 and in the case of **Mohd. Karim Khan and Ors. Vs. Shyam Sunder Shrivastava and Ors.**, reported in 1987(Supp) SCC 244. The said principle is applicable against the appellants aforesaid who have taken money under R&R package relating to the construction of the dam and as such they cannot assail forest clearance issue under Section 2 of the FC Act, 1980 and FRA 2006 and they are

estopped to raise any grievance on that score in the present appeal.

The approbate and reprobate principle is also applicable herein. The said principle is the species of estoppel principle and it is an intermediate principle in between principle of estoppel of record and principle of estoppels by pais. In this connection to appreciate the principle laid down in Halsbury's Law of England, 4th Edn. Vol. 16 para 1508 is referred to. The principle is that a person cannot approbate and reprobate based on two propositions viz.

- i) That the person having choice between the two courses of conduct, is to be treated as having made an election from which he cannot resile.
- ii) That he will not be allowed to reprobate, in general at any rate, as having so elected he has taken the benefit under or arising out of the courses of

conduct which he had first persuaded and with which subsequent conduct is inconsistent.

Doctrine of approbate and reprobate and its conceptual idea and jurisprudential concept, doctrine of election, doctrine of representation and also the principle of blowing hot and cold, were considered by the apex Court recently in the judgment passed in the case of **State of Punjab and Ors.(2 judges) Vs. Dhanjit Singh Sandhu**, reported in 2014(15)SCC 144 wherein the issue was considered in paragraphs 22, 23, 24 and 25 of the said judgment. Those are reproduced as under:-

- iii) 22. The doctrine of “approbate and reprobate” is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (vide *C.I.T. vs. Mr. P. Firm Maur*, AIR 1965 SC 1216).
- iv) It is settled proposition of law that once an order has been passed, it is complied with,

accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide *Maharashtra State Road Transport Corporation vs. Balwant Regular Motor Service, Amravati & Ors.*, AIR 1969 SC 329). In *R.N. Gosain vs. Yashpal Dhir*, AIR 1993 SC 352, this Court has observed as under:-

- v) “Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.”
- vi) 23. This Court in *Sri Babu Ram Alias Durga Prasad vs. Sri Indra Pal Singh (Dead) by Lrs.*, AIR 1998 SC 3021, and *P.R. Deshpande vs. Maruti Balram Haibatti*, AIR 1998 SC 2979, the Supreme Court has observed that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The

doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

- vii) 24. The Supreme Court in *The Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond and Gem Development Corporation Ltd. and Anr.*, AIR 2013 SC 1241, made an observation that a party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.
- viii) 25. It is evident that the doctrine of election is based on the rule of estoppel the principle

that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.

The conceptual idea and jurisprudential concept of those of the aforesaid doctrines as discussed within the ambit of equitable principle is squarely applicable in the instant case against the appellants who had taken the R& R package due to construction of the Mapithel Dam (Thoubal Multipurpose project).

The aforesaid appellants who received R&R package as compensation due to the injury suffered for the project had their choice not to accept the package and to challenge the same before the Court of law which they purposely did not and after accepting the R&R package, the equitable principle which is the nucleus of the principle of estoppels will debar them to

approach this Tribunal in appeal as per statutory provision under NGT Act, 2010. Reliance is placed to the judgment passed in the case of **Lissenden C.A. Vs. Bosch & Anr.** 1940 Appeal case page 412 and 429 delivered by Lord Atkin.

Since appeal has been filed under Section 16 sub Section (e) of the NGT Act, 2010, the person concerned must satisfy the Tribunal that he is person aggrieved when a statutory appeal is filed by pleadings on the issue as to why he is aggrieved. In this appeal as filed by the aforesaid appellants who earlier moved the original application under Section 14 unsuccessfully registered as original application 167/2013 before the Principal Bench of NGT, did not disclose that they had received package as compensation for their injury and as such they are debarred to agitate any issue raising that question due to their conduct of accepting the money. Leave granted in the original application with a rider that action could be brought by the parties aggrieved to work out their remedy in the manner known to law. When the word 'Known to law'

was used and the word aggrieved was used by the tribunal, the appellants who received R&R package must satisfy this Tribunal that doctrine of election, principle of approbate and reprobate and the doctrine of estoppels which are the known principles of the law would not debar them to approach this Tribunal by detailing appropriate pleadings on that issue which is absent in the memoranda of appeal. Having regard to the pleadings as such, and appellants' earlier conduct they could not be considered as party aggrieved applying the principle of estoppels, approbate and reprobate and doctrine of election.

So far as the other appellants are concerned, who are not at all affected due to construction of the project as their villages are not affected, no appeal lie against the order passed under Section 2 of the FC Act by the State of Manipur upon clearance from the Central Government through the MoEF and Ministry of Tribal Affairs relating to the project which is an old project started long back even before coming into

effect of the Forest Rights Act, 2006. The points No.1 & 1(a) accordingly stands answered.

17.The Point No.2 on the principle of res-judicata:

Admittedly, the appeal was filed on 12.2.2014 invoking the jurisdiction under NGT Act, 2010. The present appellants had approached the National Green Tribunal vide application No. 167/2013 challenging the illegal construction of the Thoubal Multipurpose Project without forest clearance under the Forest (Conservation) Act, 1980. Pursuant to this the Hon'ble Tribunal had granted stay order on 12.11.2013. The Hon'ble Tribunal disposed of the said application on 16.01.2014 after the grant of Stage-II (Final) forest clearance granted by the MoEF dated 31.12.2013 and issuance of the order by the State Government dated 15.01.2014 diverting forest land for the Thoubal Multipurpose Project under the FC Act 1980. The order of the Hon'ble Tribunal passed on 16.1.2014 has been quoted earlier in para 2D.

18. Thus the challenge in the O.A. No. 167/2013 is against the illegal construction of the Project before the grant of Final (Stage-II) Clearance which is a violation of the Forest (Conservation) Act, 1980. The relevant provision (Section 2) of FC Act is reproduced below:-

“2. Restriction on the dereservation of forests or use of forest land for non-forest purpose.

Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing-

- i. that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;
- ii. that any forest land or any portion thereof may be used for any non-forest purpose;
- iii. that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government;
- iv. that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation.

Explanation - For the purpose of this section, "non-forest purpose" means the breaking up or clearing of any forest land or portion thereof for-

(a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants;

(b) any purpose other than reforestation; but does not include any work relating or ancillary to conservation, development and management of forests and wildlife, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purposes.”

The instant appeal has been filed with the prayer to quash the impugned order dated 15.01.2014 i.e. the Stage-II(Final) forest clearance granted to the project under the FC Act, 1980 contending inter-alia that it is in violation of National Forest Policy, 1988, proposal being examined without site inspection, acquisition of forest lands prior to forest clearance and no Environment Clearance has been granted under EIA Notification, 2006 etc.

19. It is also the categorical observation of the Hon'ble Tribunal that it will be open to the parties, aggrieved, to work out their remedy in the manner known to law.

20. Therefore, we are of the view that Appeal is not barred by res-judicata. Besides such, as earlier observed on referring to

different orders and the material pleadings of the Application No. 167/2013 and the Misc. Application as filed thereof, the issue though is not barred by res-judicata in view of leave to agitate the issue in accordance with law but the issue has now been a dead issue, though in the strict sense principle of resjudicata as per Section 11 of the CPC is not applicable as no categorical finding made on the grievance raised relating to breach of Forest Rights Act and the Forest(Conservation) Act, 1980.

21. **Point No. 3 on Environmental Clearance:**

On the issue of requirement of Environmental Clearance under EIA Notification 2006, admittedly the Mapithel Dam of the Project was originally approved by the Planning Commission in 1980. Construction of the barrage began in 1982 and of the Dam in 1989. The Environmental Impact Assessment (in short EIA) Notification came into force with effect from 1994 much after the commencement of construction of the project. It is also a fact that the User Agency prepared the Environmental Impact Assessment and

Environment Management Plan and submitted the proposals to the MoEF for grant of Environmental clearance as revealed from the letter of December 13, 2015 sent by Dr. S. Bhowmik, Additional Director, MoEF, Govt. of India.

The EIA Notification 1994 under section 2 clearly stipulates that prior Environmental clearance is a mandatory requirement for new projects, for project proposing expansion etc. But not for the existing projects.

The relevant portion of EIA Notification 1994 reads as under:-

“2. Requirements and procedures for seeking environmental clearance of projects:-

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

The application shall be made in the proforma specified in Schedule II of this notification and shall be accompanied by a project report which shall, inter alia, include an Environmental Impact Assessment Report/Environment Management Plan prepared in accordance with the guidelines issued by the Central Government in the Ministry of Environment and Forests from time to time.”

Accordingly MoEF returned the proposal to the user Agency with the observation that there is no provision for granting environmental clearance for an ongoing project. Although no mandatory Environmental Clearance is required for any ongoing project for which the MoEF returned the proposal, the User Agency time and again made wrong submissions that Environmental Clearance has been granted for the project (vide Paragraph 3(xx) of the affidavit filed on 25.08.2015 as well as on 16.12.2015 filed by the Chief Secretary, Govt. of Manipur. However, in **Om Dutt Singh Vs. State of Uttar Pradesh and Ors.** in O.A.No. 521 of 2014, the Principal Bench of National Green Tribunal in their judgment dated 7th May, 2015 observed that projects of vast magnitude and impact should be appraised in terms of its environmental impact. The relevant portions of the judgment are extracted as under:-

“We are of the considered view that even if the project is treated to be an ongoing project, even then, its impact on environment, ecology and biodiversity of the area is required to be considered objectively and in its correct perspective. We have already noticed that it is not a site oriented project but is a huge project, which will have diverse impacts on a very large area and number of villages

falling in the territory of the three States namely Uttar Pradesh, Jharkhand and Chhattisgarh. Nature of the project involves tunneling, making of canals, roads, bridges and other concrete works which all would, in the normal course of events have an impact on the environment.”

Xxxx xxxx xxxx xxxxx

“If the project of similar scale was proposed in the times when actual construction work had started after transfer of the required lands, it would have required serious considerations from various environmental perspectives and much harsher conditions would have been imposed on the project proponent.”

As revealed from the records, the EIA & EMP reports were prepared and submitted in three volumes, vide letter No. CE/IFC/11-294/34 dated 4th April, 1998 which was returned by MoEF as the project does not come under the purview of EIA Notification 1994 and its subsequent amendments. It has been submitted by the User Agency that MoEF had made certain observations regarding Environmental Management Plan in their letter dated 10.08.1998 & 17.08.1998 which was complied and sent to MoEF on 25.10.2005.

It is our considered view that although obtaining Environmental Clearance is not a mandatory requirement for this project for which MoEF returned the proposal, since the project

proponent has undertaken the exercise of preparing EIA & EMP report, the same will be implemented during the construction and post construction stage of the project.

22. **Point No.4, the Applicability of FR Act, 2006 now is dealt**

with:

On the issue of applicability of FR Act, it is the contention of the appellants that as part of the process, while submitting the forest diversion proposals under FC Act, the consent of the affected communities is required to be complied with under the Forest Right Act and it is an integral part of the forest clearance. The Forest Advisory Committee considered the proposal in the absence of the consent of the affected communities. The User Agencies vehemently opposed to the contention of the appellants on the applicability of FR Act 2006 as the land covered by the project was already acquired by the State Government in 1993 in accordance with the memorandum dated 19.06.1993 of Agreed Terms and conditions

signed with the villagers and Rehabilitation and Resettlement package included in the project for the affected villages.

At the first instance, to a query of MoEF the MoTA vide their O.M. dated 2.12.2013 informed to MoEF inter-alia that FRA, 2006 is already in operation as on date and is very much applicable to the instance project land and in the event of not applying FRA, 2006 to the instant project land, historical injustice done to the forest dwellers will, inter-alia, continue, which is not desirable and it will be violation of FRA, 2006.

But later on the basis of subsequent OM of MoTA dated 18th December, 2013 to MoEF as described in paragraph 4E of this Judgment, the Stage II approval was granted.

It is our considered view that as the project has commenced since 1980 when FR Act was not born and Agreed Terms and Conditions have already been signed and Rehabilitation and Resettlement packages have been provided to the affected people, the FR Act should not come as a hindrance at this stage and as

observed by the MoTA, this should be an exception as 80% of the construction is over.

23. Point No.5 on violation of FC Act, 1980.

On the issue of violation of FC Act, 1980, it is an admitted fact that there is diversion of forest land prior to the grant of final stage forest clearance. The Ministry of Environment and Forest in their reply affidavit filed on 12.05.2014 have categorically stated in paragraph 5 of para-wise reply at page 143 that MoEF while according Stage-II approval under the FC Act for diversion of the said forest land has taken note of the fact the User Agency has already executed work on forest and non-forest land pending grant of Stage-II approval under FC Act for diversion of forest land required for the project and stipulated additional penal conditions in the Stage-II approval.

The Respondent Nos. 1&3 in their reply affidavit dated 16.12.2015 have stated in paragraph 7 that the User Agency had as early as 1993 started breaking forest land for construction of the

Project which was considered by the MoEF who imposed penalties against such violation. Thus the user agency has breached the FC Act for which user agency has already been penalised. Regarding site inspection it is now clear that there was site inspection as affirmed by MoEF in the affidavit filed on 21.07.2015.

After the report of the Court Commissioner was available Ld. Advocate Mr. Dutta appearing for the Appellants very frankly submitted that at the present moment there is no scope to demolish the dam as construction work had progressed up to more than 80%. He pressed for the compliance of the conditions stipulated in order dated 15.01.2014, which is under challenge, as a great relief to the appellants. In the impugned order issued by the Governor of the State of Manipur on the basis of the Stage-II (final) approval for forest clearance, it is clearly stated that the conditions should be fulfilled first after which land could be diverted for non-forest purpose. Although Mr. Bhattacharya, Ld. Sr. Advocate appearing for the User Agency would submit that all conditions stipulated in the order under challenge have been complied with, we directed the

Chief Secretary to file a detailed affidavit on the issue. We also directed the Additional PCCF, MoEF & CC, Shillong to file an affidavit categorically stating whether forest land has been diverted prior to compliance of the conditions and whether any forest land has been submerged before the issuance of the said impugned order.

The affidavit filed by the Additional Principal Chief Conservator of Forests(Central), MoEF & CC clearly state that the forest land has been diverted prior to the compliance of the conditions stipulated in the order of the Govt. of Manipur in as back as 1993 when forest land was broken. This has also been admitted both by User Agency as well as MoEF earlier for which there was penal provision imposed by MoEF. But the answer to the other query about the date of submergence of forest land due to construction of the dam was with effect from 10.01.2015 which was after Stage-II approval.

The Chief Secretary would submit in compliance with our order dated 4.8.2015 that the conditions stipulated in the order

dated 15.1.2014 have been substantially and practically complied with. Item-wise compliance has been provided indicating the issues where compliances have already been made and for others it is in the process. We are also of the view that it is not practically possible to comply to all conditions stipulated before diversion of forest land and the line "Forest land shall not be diverted before the compliance of the above conditions" stipulated in the impugned order could not be considered as a condition stipulated by MoEF while granting Stage-II approval, particularly possible to be complied with in view of the Commissioner's report that 80% of the project has already been completed and there is no way to turn around and as the project is for the benefit of the people of the State of Manipur relating to providing electricity, water supply for irrigation and also for supply of drinking water and the balancing factor of sustainable development concept will have an edge.

24. **Point No. 6 on Sustainable Development Concept and applicability:**

The concept of sustainable development having its origin in the Rio de Janeiro Summit held in June 1992 at Brazil taking note of the issue about the economic development for growth. In the National Green Tribunal Act, 2010 there is statutory provision under section 20 to apply principle of sustainable development while adjudicating any dispute. Section 20 of the said Act reads as such:-

“20. Tribunal to apply certain principles.-The Tribunal shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pay principle.”

In the aforesaid statutory provision the word ‘shall’ has been used and it is the wisdom of the legislature to apply the sustainable development principle to balance establishment/construction of any project qua the environment of the area in question. In the instant case this project is a big one to provide electricity, water for irrigation and supply of drinking water to the people of the locality living thereby and which is also their right envisaged under Article 21 of the Constitution of India for development and progress. The balancing factor accordingly is to be considered by this Tribunal on

considering the sustainable development principle and jurisprudential concept thereof. The Apex Court in the case of **Dahanu Taluka Environment Protection Group and Anr. Vs. Bombay Suburban Electricity Supply Company Ltd. and Ors.**, reported in 1991(2) SCC 539 has dealt with the issue of clearance for construction of Thermal Power Plant wherein the Apex Court applied the sustainable development principle by granting clearance of the construction to the Thermal Power Plant in an ecological fragile area situated 25 kms of tropical forest on considering immense public interest at large on environment in that particular thermal Power project. The Apex Court tried to make a balance between the two namely, environmental concern and the developmental issue. In the case of **Indian Council for Enviro-Legal Action Vs. Union of India and Ors.**, reported in 1996(5) SCC 281 popularly known as 'Coastal Zone Protection Case', the principle of sustainable development was applied and it was held that while it is true that economic development should not be allowed to take place at the cost of ecology or by causing widespread environment

destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. It has been held thereof that both development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of environment.

In the case of **K.M. Chinnappa Vs. Union of India**, reported in AIR 2013 SC 724 it is held by the Apex Court that no development is possible without some adverse effect on the ecology and environment and the project of Public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment and a balance has to be struck between the conflicting interests - it is further held that where commercial venture or enterprise would be brought in for the benefit of the masses, difficulty of a small number of people has to be by-passed; and as such the comparative hardship have to be

balanced and the convenience and benefit of a larger section of the people has to get priority over comparatively lesser hardship.

In the case of **Essar Oil Ltd. Vs. Halar Utkarsh Samiti and Ors.,** 2004(2) SCC 392 the Apex Court held that “in the present socio economic perspective, it has been the sole aim to find balance between economic and social needs on the one hand and environmental consideration on the other, notwithstanding the fact that each of the development project is an environmental threat, since all the environmental laws speak for harmony between development and environmental protection- as it appears from the following observation:-

“ the objective of all laws on environment should be to create harmony between the two, since neither of them can be sacrificed at the altar of the other.”

25. The principle of sustainable development was highlighted further on considering the Rio declaration by the Apex Court in the case of **Intellectuals Forum, Tirupathi Vs. State of A.P. & Ors.,** reported in 2006(3) SCC 549 by holding “ while economic

development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of environment.”

Having regard to principle of sustainable development and considering the ground reality of the present situation of the project that already 80% works have already been completed and the Court Commissioner opined that there was no way out to demolish the construction as that may cause disaster by flooding several villages at downstream and having regard to the cost as already incurred from the public exchequer and the development issue for providing the drinking water and the water for irrigation and the electricity for running the different units and workshop and consumption by the people, at the present case sustainable development principle is

applicable to allow the completion of the project, however, subject to the beneficial package viz. Rehabilitation and Resettlement package (R&R) issue and the other issue as compensatory of rights under Forest Rights Act as has been discussed in the affidavit filed by the Chief Secretary highlighting the different environmental projects.

26. **Conclusion and order:**

In view of the discussions made in the preceding paragraphs and keeping the principle of sustainable development in the forefront we are not inclined to allow the appeal to the extent of quashing the impugned order.

It is noted that the User Agency by earlier order was directed to comply with all the conditions stipulated in the order dated 15.1.2014 impugned herein. As State of Manipur agreed to implement the suggestions of the Court Commissioner and also Environmental Management Plan, they will file a compliance report to the Registry of National Green Tribunal within six months for record. The appellants are granted liberty to approach the Tribunal

in case of non-compliance of the conditions by the User Agency within six months, in accordance with law.

27. Thus the appeal is dismissed on merit recording agreed submissions and subject to paragraph 26 above. Consequently, all the connected M.As stand dismissed. No order as to costs.

.....
Justice Pratap Kumar Ray, JM
.....

Prof.(Dr.) P.C.Mishra, EM

Dated : 26th February, 2016

NGT