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

**ORIGINAL APPLICATION NO. 183 ($T^{HC}$) / 2013**

**AND**

**(M.A. NOS. 707 OF 2013, 1056 OF 2013 & 191 OF 2014)**

**IN THE MATTER OF:**

1. Ajay Kumar Negi, s/o Shri Tej Bahadur Singh
   r/o Village and post office Rispa, Tehsil Moorang
   District Kinnaur

2. Bhuvneshwar Negi s/o Shri Kirti Rathore
   r/o Village and post office Rispa, Tehsil Moorang
   District Kinnaur .....Applicants

Versus

1. Union of India
   Through Secretary Ministry of Environment
   and Forests, New Delhi

2. State of Himachal Pradesh
   Through Chief Secretary,
   Shimla

3. Principal Secretary Forests,
   Government of Himachal Pradesh

4. Chief Conservator of Forests,
   Government of Himachal Pradesh

5. Principal Secretary Panchayats Raj
   Government of Himachal Pradesh

6. Deputy Commissioner
   Kinnaur at Rekong Peo.

7. Conservator of Forests,
   Rampur Forest Circle
   Rampur District, Shimla.

8. M/s Nuziveedu Seeds Limited
   Power Generation (P) Ltd., Site Office
   Palam house, Do Nallu, Rekong Peo,
   District Kinnaur (HP)

9. HP State Pollution Control Board
Through Member Secretary,
New Shimla.

.....Respondents

**COUNSEL FOR APPLICANT**:

Mr. Anand Sharma, Advocate

**COUNSEL FOR RESPONDENTS:**

Mr. Vikas Malhotra and Mr. M.P. Sahay, Advocates for Respondent No. 1.
Mr. Suryanarayan Singh, AAG and Ms. Kanupriya, Advocate for Respondent Nos. 2, 5 & 6.
Mr, A.D.N. Rao and Mr. Sudipto Sircar, Advocates for Respondent No. 8.
Mr. Anil Kumar Chandel, Advocate for Respondent No. 9.

**JUDGMENT**

**PRESENT:**

**Hon'ble Mr. Justice Swatanter Kumar (Chairperson)**
**Hon'ble Mr. Justice M.S. Nambiar (Judicial Member)**
**Hon'ble Prof. A.R. Yousuf (Expert Member)**
**Hon'ble Mr. Bikram Singh Sajwan (Expert Member)**

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**Reserved on: 14th May, 2015**
**Pronounced on: 7th July, 2015**

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

**JUSTICE SWATANTER KUMAR, (CHAIRPERSON)**

A Writ Petition (Civil Writ Petition No. 8171 of 2011) was filed before the High Court of Himachal Pradesh at Shimla with the following prayers:

i. "That the respondent no. 3 may be directed to prepare comprehensive damage report caused to the forest land, trees and other forest wealth.
ii. That the Memorandum of Understanding dated September 23, 2004 signed between the respondent

state and respondent no. 8 may be quashed and set aside.

iii. That the Environmental Clearance dated September 9, 2007may be ordered to be quashed and set aside.

iv. That the respondent no. 1 may be directed to cancel the Tidong-I Hydro Electric Project.

v. That an inquiry may be ordered against the official department who forwarded the proposal for forest diversion to the respondent no. 1in violation of the provisions Panchayat (Extension to Scheduled Areas) Act, 1996. That the Hon'ble Court may be pleased to monitor the inquiry.

vi. That an inquiry may be ordered into the acts of omission and commission against the officer of the various department who failed to initiate appropriate action against the respondent no. 8 for executing the Tidong-I HEP in violation of the laws.

vii. That the official and Board of Directors of the Company (respondent no. 8) responsible for execution of the Tidong-I HEP in Kinnaur in gross violation of the laws may be order to be prosecuted in accordance with law.

viii. That applying the principle polluter pays petitioners and other who have suffered a perpetual loss of livelihood may be ordered to be compensated by the respondents.

ix. That the entire record may be called for.

x. That the petition may be allowed with exemplary costs and further any other relief deemed fit and proper may also be granted in favour of the petitioners."

2. We may concisely notice the facts as averred by the applicant limiting to the above prayers. A Memorandum of Understanding (for short, 'MoU') was signed between the State of Himachal Pradesh, respondent no. 2 and M/s. Nuziveedu Seeds Power Generation Pvt. Ltd., respondent no. 8 on 23rd September, 2004. The MoU stated that respondent no. 8 is desirous of setting up a Tidong - I Hydro Electric Power Project (100 MW) in District Kinnaur of Himachal Pradesh on River Tidong. This proposal was accepted by respondent no. 2 and they were also permitted to conduct an investigation under the MoU. The company was also required to submit a Detailed Project Report for establishing Techno

Economic Viability within a period of eighteen months which the government was to examine and process within a maximum period of 90 days from the date of its submission. Upon acceptance of the said Techno Economic Viability report and after being convinced that all statutory clearances could be obtained from the Competent Authorities, an Implementation Agreement was to be signed between the Company and the Government. Thereafter the company was to commence its project and it was to be allotted to the company for a period of 40 years from the date of commercial operation of the project. Various steps were taken by respondent no. 8 and finally on 28th July, 2006, Implementation Agreement was signed between the parties. On 15th March, 2007, the proposal for grant of Environmental Clearance was sent from State Government to the Ministry of Environment, Forest and Climate Change (for short 'MoEF') in reference to which Environmental Clearance was granted in favour of respondent no. 8 for the project in question on 7th September, 2007. Even Forest Clearance for the project was granted on 18th June, 2008. Undated representation of protest was also submitted by the petitioner against the illegal execution of the Tidong–HEP. Respondent no. 8 wrote a letter to the President, Gram Sabha, wherein the said respondent admitted that they had not obtained No Objection Certificate (for short 'NOC') from the Gram Sabha, Rispa. Still the respondent no. 8 constructed the road from Up-mohal of Ruwang, Gram Panchayat, Moorang. On 28th March, 2009 the Vice President of Gram Panchayat, Rispa passed a resolution to issue the NOC with the concurrence of the Gram

Sabha to allow the project. On 10th June, 2009, the District Panchayat Officer, Kinnaur submitted an enquiry report with the remarks that the resolution passed by the Gram Sabha, Rispa was null & void and is in contradiction with the provisions of the Himachal Pradesh Panchayati Raj Act, 1994. On 8th May 2009, the Range Forest Officer, Morang at Akpa issued a fresh enumeration of 4815 trees likely to be damaged during execution of work in addition to the already sanctioned 1261 trees in the Forest Clearance. Against this, the petitioner submitted a representation to the official respondents bringing to their notice that large tracts of forests have been damaged by respondent no. 8 while constructing the road to the surge shaft site. The representation also stated that respondent no. 8 has violated terms and conditions of the Environmental Clearance & Forest Clearance granted to the respondent. There was huge damage caused to the Chilgoza trees which is an endangered species. On 2nd December, 2009, Range Forest Officer issued a letter to respondent no. 8 to stop the construction work in the compartment no. 192 and 193 till the final spot report is sent by the committee headed by the Additional District Magistrate, Pooh, failing which legal action was contemplated to be taken against respondent no. 8. However, despite such a direction, the Project Proponent continued with the construction activity. Additional District Magistrate, Pooh submitted a report to the Deputy Commissioner, Kinnaur intimating him about the gross violation of the forest laws in execution of Tidong-I HEP by respondent no. 8. He was thereafter

directed by respondent no. 6 to ensure that respondent no. 8 does not take up any construction activity or developmental work till the time land is not given on lease to the company. A damage report was issued, quantifying the damage caused to the forest area to be Rs. 77,11,033/- and Rs 5,82,420/- as damage bill for illegal dumping of muck. On 3rd April 2010, a representation was moved by the residents to the Chief Minister of Himachal Pradesh praying that the clearances should be revoked for the execution of the project as it is causing extensive damage to the forest and the residents of the village are being deprived of their right to livelihood. On 24th May, 2010 a meeting was held under the Chairmanship of the Additional District Magistrate, Pooh between the residents of the village Rispa and respondent no. 8. The respondent no. 8 therein took a stand that the work was executed strictly as per the MoU and various other permissions granted. At one point of time, respondent no. 8 partially complied with the directions by stopping the construction work in the areas where the residents of Gram Panchayat, Rispa protested. Again in June, 2011, the Project Proponent started construction work and caused extensive damage to the forest areas situated in the Gram Panchayat, Rispa. The primary grievance of the petitioner in their petition to the Chief Minister was related to the construction of the project in that area. It was further averred that the construction work was being carried on and the construction debris were being dumped in violation of the permissions and were causing serious damage to the environment and ecology of the area. There was heavy blasting and

the construction of road was done in an unscientific manner, the environment was getting polluted and causing loss of livelihood to the applicants as the Chilgoza trees, which fetch high income to the residents, were being damaged indiscriminately. The applicant had a specific grievance against respondent no. 8 that it had been carrying on construction activity despite orders from the authorities to stop the construction. Various reports had also indicated that construction activity was undertaken without any forethought on the part of the authorities and the proposal for forest diversion was prepared without keeping the topography of the project area in mind and this has resulted in massive damage to the forest area.

3. The petitioner *inter alia* primarily challenged the project on account that it was in violation to the environmental laws and was causing serious damage to the forest wealth. The Project Proponent has violated the conditions of the Environmental Clearance and Forest Clearance. It is the case of the applicant that the regional office of respondent no. 1 is under an obligation to monitor the project activity and that the proposal for diversion of forest land was prepared without proper application of mind. There were procedural and other legal infirmity committed by the authorities concerned by granting the Environmental Clearance and Forest Clearance. The applicants have made specific reference to the damage being caused to the Chilgoza trees. Firstly, the trees now being proposed to be felled has gone up to more than 4000 in number while the Forest Clearance granted to the Project Proponent was only for felling a maximum of 1261 trees. Furthermore in

addition to the felling of trees, because of improper and indiscriminate dumping of construction material and debris, huge damage has been caused to the Chilgoza trees in adjoining forest land. According to the applicant even the Environmental Impact Assessment Report had specifically stated that out of 30 species of trees present in the project area of Tidong, Chilgoza is a rare species, which is economically very important. Therefore, an effort should be made to cause minimum damage to the Chilgoza trees. Scanning of the status of shrubs present in the project area it has been found that one shrub species (Zanthoxylum alatum) is of threatened category and eight species (Berberis aristata, B. lyceum, Desmodium dichotomum, Hypericum choisianum, H. lysimachioides syn H. dyeri, Olea ferruginea, Rosa serice and Salix hastate) of shrubs are rare. It was further felt that an Environmental Management Plan for the protection and rehabilitation of these rare and threatened species should be prepared. The loss of biomass was expected to affect an area of 39.2 ha and there would be wood loss also. For dealing with muck generation, it was stated that, nearly, 6,41,000 cu.m. muck is estimated to be generated from the project activities, out of which 45 per cent shall be used for backfill and other construction works. The remaining quantity of muck shall be disposed at pre-identified sites. The EIA report further provided that the disposal sites if not designed and managed properly may cause mass movement of soil, blocking the natural drainage and causing other sequential problems. There should be proper transportation of muck and

construction material. According to the petitioner, there has been violation of these conditions thus, resulting in great damage to the environment and ecology and particularly to the Chilgoza trees. Different set of respondents have filed their replies to the Writ Petition No. 8171 of 2011.

4. Respondent no. 1 in its reply has taken the stand that it is the sole responsibility of the State to ensure compliance to the conditions incorporated in the Forest Clearance accorded by the Ministry. It is stated that during the consideration of the project on 16th July, 2007 by the Expert Appraisal Committee, it was noted that only one season data was collected while conducting Environment Impact Assessment (for short 'EIA') study and the Project Proponent was asked to submit three season data. Revised information was provided by the Project Proponent on 7th August, 2007, which was again considered and finally grant of Environmental Clearance was recommended by EAC on 16th August, 2007. A project proposal for diversion of 39.0546 ha of the forest land in favour of the Project Proponent had been approved by the Northern Regional Office of the MoEF at Chandigarh under Forest Conservation Act, 1980 and accepted by the MoEF vide its letter dated 18th June, 2008. The petitioners were given an opportunity to raise objections in the public hearing held on 21st July, 2006 near diversion weir in village Lumber, Moorang and near powerhouse site in village Rispa, Moorang. The grant of the permission according to MoEF does not suffer from any infirmity and hence the application should be dismissed.

5. A joint reply had been filed on behalf of respondent no. 3, 4 & 7. They had taken a preliminary objection that National Green Tribunal Act, 2010 having been come into force and National Green Tribunal having been established under this Act, the Writ Petition is not maintainable and deserves to be dismissed. The forest land in question belongs to the State and for that reason no acquisition proceedings were undertaken and there is no law which provides for grant of compensation to right holders of forest in lieu of their rights, hence the petitioners are not liable to be compensated on that account.

On merits, it is stated that the Government of India, MoEF vide letter dated 18th June, 2008 has accorded its approval that minimum number of trees and in any case not more than 1261 trees will be removed. As per the directions of Conservator of Forests, Rampur dated 22nd December, 2008, the Range Forest Officer, Moorang had reported that 4815 trees are likely to be damaged during the construction of road to surge shaft and conveyed to him on 15th July, 2009 and the Conservator of Forests, Rampur had stopped the construction of road in compartment no. 192 and 193. On 14th December, 2009 the Divisional Forest Officer, Forest Range at Akpa, requested the S.H.O., Police Station, Moorang to lodge an F.I.R in relation to the damage to the trees by and against the erring company. The Conservator of Forests, Rampur vide its endorsement dated 11th December, 2009 reported the details of damage caused to trees, illegal dumping and that damage realization from the erring company has been initiated. He

reported that the user agency has damaged total 636 number of trees during the construction of road to the surge shaft and a bill for Rs. 1,70,62,733/- has been raised to user agency against which an amount of Rs. 77,11,033/- has been realized and a detailed report to this effect was also submitted. It has been stated that no extra trees except 1261 trees has been removed during said construction of the road. The trees likely to be damaged are expected to be 4815, out of which 636 has already been damaged. The department has to take an action on illegal dumping and penalize the user agency. It was stated that whenever the user agency was found violating the conditions of approval of Government of India, it was being penalized. The company had been permitted to remove not more than 1261 trees but the damage report for 636 trees damaged during the construction of the road has been issued out of total 4815 trees, which are likely to be damaged. Later Project Proponent was permitted to raise the construction, by the Principal Chief Conservator of Forests, Himachal Pradesh, vide its letter dated 3rd December, 2010 to the Conservator of Forests, Rampur and in compliance of which a Dy. Ranger was also deputed to monitor the construction of the project.

6. A separate reply was filed on behalf of respondent no. 5 and 6, who submitted that land acquisition proceedings were initiated in accordance with the provisions of the Land Acquisition Act, 1894 and there is no violation of the Scheduled Tribes and Other Traditional Forest Dewellers (Protection of rights) Act, 2006 that has come to the notice of said respondents. The complaints have been

received from the Gram Panchayat, Rispa, on the basis of which, District Panchayat Officer, Kinnaur inquired the matter and wherein it was reported that the company had agreed to compensate the affected villagers with Rs. Two crores, Rs. Three lakhs for repair and maintenance of Temple and installation of 20 street lights, the demands for which were put forth by the Gram Sabha, in return for Gram Sabha to withdraw all old demands. NOC had been issued by the Gram Panchayat, Moorang on 1st April, 2009 for the project in question. They have stated that as and when the complaints were received, an enquiry was conducted and reports were submitted to the Competent Authority. With the approval of the Government of India, land admeasuring 34-62-26 ha was released in favour of the company for construction of 100 MW Tidong Hydro Electric Project vide letter dated 12th October, 2010.

7. Respondent No. 8, filed a detailed reply before the High Court. It was submitted that the project envisaged the construction of an un-gated Spillway, gated Under-sluice, Head Regulator, Desilting Basins, Storage Reservoir and a 8.46 km long Head Race Tunnel (HRT) culminating in a surge shaft. A pressure shaft partly inclined and partly horizontal will convey the water to the Pelton Turbines to generate 100 MW of power in surface Power House. No displacement of human population is involved in acquisition of 3.2011 ha of private land and diversion of 39.0546 ha of forest land for construction of the project. Out of 11.80 Kms total length of road involved for various project components, 9.8 Kms had been

constructed leaving a balance 2 Kms road to Adit-2 of HRT, which is at present under construction. The construction work of this project is progressing very well. The excavation for diversion channel is complete and part of concreting has been done. The construction of tunnel would start in full swing as major equipment for excavation like Boomer, Schaeff Loader & Crushing Plant as well as Batching & Mixing Plant and Alimak Raise Climber amounting to Rs. 10 Crores had already been ordered and would be delivered shortly. Similarly, equipment costing to Rs. 10 Crores has been deployed at site and Tidong-I was scheduled for commissioning in September, 2014. The cost of the project was as per the approved DPR in 2007, was above Rs. 543.15 Crores and the company had already incurred an expenditure of about Rs. 168 Crores and paid to the various Government Departments amounting to Rs. 27.71 Crores. This amount had been paid on account of compensation, afforestation, catchment of area treatment work, cost of trees to various Government Departments for the development of damaged sites and payment to various Gram Panchayats.

It was also stated by the respondent no. 8 that forest area has been demarcated by fixing Boundary Pillars and the enumerated 1261 trees standing thereon have been checked and enumerated by the department. The private land measuring 3.2011 ha was acquired and the possession was taken after the payment of compensation of Rs. 258.291 Lac to the interest holders through the Government. 39.0546 ha of forest land has been diverted by MoEF vide its letter dated 18th June, 2008. The consultations of

Gram Sabha and Gram Panchayats were complied with and consent of Gram Sabha for conversion and diversion of forest land have been obtained. Gram Panchayat, Rispa and Tidong Valley Environment Conservation Development Samiti in its note dated 5th January, 2007 had put forth exorbitantly high demands for Rs. 6 Crores for issuance of NOC and the respondent therein asked for justifications of the same vide letter dated 1st February, 2007 to which, the Gram Panchayat failed to furnish any details thereto. After numerous meetings, an agreement for issuance of NOC was signed with the Gram Panchayat on 30th March, 2009, wherein the main demand of Rs. 2 Crores was accepted and accordingly NOC was issued by the Gram Panchayat, Rispa on 5th April, 2009. A Social Impact Assessment study was required to be carried out in the project affected area, which involved involuntary displacement of 400 or more family enmass in plain area, 200 or more family enmass in tribal hilly area as per clause 4.1 of National R&R Policy, 2007 but since the present project involved only 29 project affected families, none of them were displaced or adversely affected and therefore, the Social Impact Assessment study was not applicable for the project. The R&R Plan was submitted to the Government of Himachal Pradesh on 17th March, 2007 and the same was received back with certain objections in August, 2007. They were again reported to the Government on 22nd March, 2010 and finally on 28th June, 2011, the approval of which is still awaited. Public hearing for the project was fixed on 21st July, 2006 in village Rispa but the Gram Panchayat boycotted the hearing. The Project Proponent

made a payment of Rs. 1.68 Crores towards the cost of 1261 trees to the Forest Department on August 12, 2008. The company claims that it was constrained to take up the construction on 21st June, 2009 of the approach road to surge shaft in the portions where there were no trees and consequently some unavoidable damage to adjoining trees occurred due to very tough and steep terrain for which the Project Proponent has already deposited an amount of Rs. 83.934 Lakhs against six damage bills so far raised by the Forest Department. An FIR was filed on 7th January, 2010 stating damage to another 217 trees mainly relating to construction of top most flank of road, after which Project Proponent stopped construction activity on 28th October, 2009 and the damage report thereto, has still not been supplied to the answering respondent. It was further averred that, a massive landslide took place from the region above top most flank of the road on 27th September, 2009 damaging about 50m portion of constructed road as well as the trees down below and the rolling boulders had hit the opposite bank of Tidong Khad and completely crushed a tractor-trolley with narrow escape for three laborers sleeping inside a hutment. After a lot of persuasion of Government / Forest Department levels work got resumed on 9th December, 2010 under the directions of Principal Chief Conservator of Forests, Himachal Pradesh vide his letter dated 3rd December, 2010. The Project Proponent has also averred that it has undertaken almost all precautions by resorting to well controlled blasting under the supervision of the Deputy Ranger deputed by the Forest Department and excavated muck is

being properly disposed at the dumping sites located at the foothill by means of excavator and tippers. At best, 460 trees will be damaged which is even less than 10 per cent of the estimated figure of 4815 trees projected by the forest department, as well as wrongly contested by the petitioners, which according to the Project Proponent is totally baseless. This respondent denied the receipt of the letter dated 3rd April, 2010 from the Environment and Forest Conservation Samiti, Rispa and also denied that it had violated the existing laws or the conditions of Environmental Clearance & Forest Clearance. The muck was being dumped properly at the designated dumping sites mechanically. Further according to the Project Proponent, the Gram Panchayat had already been given more than adequate benefits i.e. demand of Rs. 2 Crores each to the Gram Panchayat, Rispa and Thangi and another sum of Rs. 1 Crore to Gram Panchayat, Moorang which had already been paid by the Project Proponent in three installments, compensation for private land acquired had been paid in 2009, preference in employment was also given to the persons of project affected Panchayats by employing 53 persons. Preference in awarding works including PRW's for main work was also given to the local contractors of the project affected Panchayats and preference to locals had already been given in various activities.

8. Respondent no. 9 – Himachal Pradesh State Pollution Control Board (HPPCB) has also filed a separate reply. The Board has not dealt with the major part of the petition but had primarily confined its reply to the averments of pollution resulting from the muck

storage and transportation and that due public hearing was provided to the applicants herein to enable them to raise their objections. According to the Board, the muck disposal in proper protected dumping areas has to be ensured and in this regard it has directed adequate protection measures and this is being monitored by the Board. The muck dumping sites have been identified and earmarked by the Forest Department. The Forest Clearance is also subject to stipulation for proper muck disposal at the Designated Sites. The concerned Regional Officer of the State Board monitors that adequate protection measures are provided and the same is being monitored through physical inspection and pictorial power-point presentation based on photo monitoring and whenever any violation is observed the same is communicated to the Project Proponent and appropriate action is taken. So far as public hearing is concerned, according to the State Board it had conducted public hearing on 21st July, 2006 as per the provisions of the Notification of MoEF, Govt. of India, No. SO-318(E) dated 10th April 1997, at Lumber village, Tehsil Moorang, District Kinnaur and near village Rispa for the proposed/upcoming respondent project. It was to integrate the public suggestions, views, comments and objections from the interested persons on the proposal with a view to have maximum public participation. The notices for public hearing were also published in two Hindi and two English newspapers. It is denied that no efforts were made to bring affected people on board. The Rispa Panchayat, besides others, was specifically informed vide letter dated 19th June, 2006 about the

public hearing that was being organized on 21st July, 2006. Therefore according to the Board, the petitioners had ample opportunity to forward their objections and views at the time of public hearing. Vide letter dated 1st September, 2006, the public suggestions, views, comments and objections recorded during public hearing were sent to the State Government for taking further action. The recommendations of SEIAA and Monitoring Committee were forwarded by the State Government to the MoEF vide letter dated 15th March, 2007 for consideration of Environmental Clearance.

It has been specifically denied that respondent Board has not carried its responsibilities and duties in accordance with the prescribed procedure in terms of the Notification of 1994 in so far as it has discharged its obligation to conduct public hearing in accordance to the Notification. Lastly, it is submitted that the project sites near intake and powerhouse sites were monitored and dust level and SPM (Suspended Particulate Matter) were found within the prescribed limit. The alleged damage to the agricultural and horticulture produce was to be looked into and assessed by the Committee constituted by Deputy Commissioner, Kinnaur for payment of compensation. The Pollution Control Board had also filed certain photographs showing the dumping sites and the site of the project in question.

9. The applicant has filed rejoinder to all the replies filed by the respective respondents. In the rejoinder, the applicant *inter alia* has raised the specific plea that the execution of the project is

illegal and in violation of the mandatory conditions. Firstly, the condition requires that the debris will not be allowed to roll down the slopes of the mountains and secondly, that no damage would be caused to the adjoining forests. From the documents on record and even pleadings of the parties, it is clear that both these conditions have been violated. Respondent no. 8 has used heavy and unscientific blasting and has rolled the debris along with boulders downhill, causing extensive damage to the trees in the slope of the mountains and no details have been supplied in relation to the settlement of community or individual claims required to be settled under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Tribes) Act 2006. The respondents have not provided adequate mechanism to prevent the ecological damage and for compensation and afforestation of the anticipated damage of 4815 trees, in addition to the trees mentioned in the Forest Clearance. It is also averred by the applicant that majority of the land required for surface activity is situated in the protected forest and that from the documents placed on record, it is clear that respondent nos. 3, 4, 7 were aware of the facts that the trees likely to be damaged in execution will be much more than the number of trees enumerated. Yet, they still allowed the user agency to continue with the illegal execution of the project. The forest wealth lost or damaged includes rare and endangered trees of Pinus gerardiana also known as Chilgoza pine which is a pine native to the North Western Himalaya and grows at elevations between 1800–3350 meters. According to the applicant, the EIA report of the

project prepared by Rites Ltd. states that 39.2 hectares of forest land is required by the Project Proponent and that on an average nearly 355 trees per hectare of the land will be affected. It would mean that 13,916 trees would be damaged during the execution of the activities of the project in the forest area. Whereas, the Forest Clearance only required 1261 trees to be felled and there is no explanation as to the difference in the project requirement and the clearance granted, which also explains the resultant damage to the trees during the execution and construction of the project, to the tune of 5000 to 6000 trees. Since NOC was not obtained according to the provisions of the law therefore, they are invalid and therefore, the agreement dated 5th January, 2007 between the Gram Panchayat, Rispa and Project Proponent is also invalid. According to the applicant, the Project Proponent had even submitted wrong information in order to secure various clearances. It is further averred that damage to 50 trees in a 2 km stretch as stated by respondent no. 8 in his reply, is an ample proof of lack of application of mind and likely damage to ecology. There was complete lack of comprehensive planning and foresight. The EIA/EMP were defective and even the land of the site was handed over by the State without executing proper conveyance deed. It is further alleged that various violations which were committed by the Project Proponent were also noticed by the One Man Committee in furtherance to the direction passed in Civil Writ Petition No. 24 of 2009 before the Hon'ble High Court of Himachal Pradesh.

10. We may notice here that the Project Proponent had filed an M.A. No. 707 of 2013 for placing on record before the Tribunal, subsequent facts and developments as had happened after the transfer of the Writ Petition No. 8171 of 2011 to the Tribunal, which was allowed.

11. We may notice here that M. A. No. 191 of 2014, was filed by the applicants before us for appointing a Commission to conduct local investigation for the purpose of enumeration/assessment of the loss of the forest wealth as well as impacts of the loss and damage to the livelihood of the locals and to suggest measures for restoration of damage to the ecology and to mitigate the losses suffered by the local residents.

To this, the Project Proponent has filed a reply affidavit on 20th August, 2014. In his reply the Project Proponent has stated that during the construction of the approach road to the surge shaft and Adit-I, a few trees in the forest land adjacent to the road alignment and on valley side got damaged inadvertently due to rolling down of the debris from the construction activity. Then the company had stopped construction activity for a year. It is only after taking necessary precaution to mitigate loss of trees and any further damage to environment, that it had started the work again. A representation had been made by the Kalyan Samithi to the Deputy Commissioner, Kinnaur on 15th July, 2011, and a Committee was constituted therein to assess and evaluate the number of damaged trees and loss of income. After conducting extensive survey and inspections on 18th & 21st July, 2011 and 11th August, 2011, the

Committee submitted a final report on 28th August, 2012. After due negotiations between both the parties, the Company formally vide its letter dated 30th October, 2012 agreed to compensate the loss of income for 40 years as per the accepted productivity figure for fully damaged trees on an annual basis. This affidavit has a clear admission for damage to the trees and loss to ecology by the Project Proponent.

12. Another M.A. being M.A. No. 1056 of 2013 had also been filed by the applicant for placing additional documents on record with respect to Writ Petition No. (PIL) 24 of 2009 which was taken up by the Hon'ble High Court of Shimla, *suo moto*, acting on a news item published in Indian Express Newspaper in August, 2009. The news item pertain to damage to large tracts of forests / trees attributable to the construction of number of Hydro Electric Projects in the State of Himachal Pradesh.

We may notice here that M.A. No. 707 and M.A. No. 1056 were allowed in as much as the additional documents were permitted to be placed on record and arguments heard with reference to such documents. In fact, the order of the Tribunal dated 3rd December, 2014 dealt with these applications. Consequently, both M.A.'s 707 and 1056 of 1056 stands allowed. However, M.A. No. 191 of 2014, application for appointing a local Commissioner and for certain other directions does not survive for separate consideration in view of the operative part of this judgment. Resultantly, M.A. No. 191 of 2014 is disposed of as having become infructuous.

13. Having noticed the contents of the case advanced by the respective parties before us in their pleadings, and before we deliberate upon the issues involved on merits, we may notice that this Tribunal *stricto sensu* would have jurisdiction to grant or refuse the prayer nos. (i), (iii) and (viii) made by the applicant. The other prayers would fall beyond the jurisdiction of the Tribunal. When the proceedings were pending in Writ Petition No. 8171 of 2011 before the Hon'ble High Court, the parties were directed to complete their pleadings. Upon completion of such pleadings, this Writ Petition No. 8171 of 2011 came to be transferred to this Tribunal vide order dated 15th July, 2013 and upon transfer was registered as Original Application No. 183 of 2013.

14. First and foremost, we should notice one important fact that the Hon'ble High Court of Himachal Pradesh taking note of the news article titled "Legalised plunder: Hydel projects erase 10 lakh green trees in HP" published in Indian Express on 18th November, 2009, *suo moto* issued notice to the State of Himachal Pradesh and other concerned authorities. In this Writ Petition, it was noticed that various important environmental issues have arisen and one such major issue amongst them is that most of the projects have not made adequate provisions for discharging of 15% of the mean annual flow as environmental flow into natural bed of the rivers / streams and therefore, the penalty for deviation from this requirement should be very high. There should be compensatory afforestation atleast 10 times of the number of trees damaged and the Project Proponent should be directed to pay maintenance of this

new plantation for atleast five years. The Court also noticed the recommendations of the Committee appointed by it in the Writ Petition No. 24/2009 that the present practice of indiscriminately allotting hydel projects all over the State by the State Government without any consideration of their larger impacts on the environment - which mere EIAs/EMPs cannot address – is short sighted, unplanned and could result in serious depletion of the State's natural resources in the long run. After noticing various observations of the Committee, the court also observed that on some rivers, one project after other is being set up without any linear distance left between the tail race of one project and intake of the next. While accepting the recommendations of the Committee, the Court further directed the learned Advocate General and Assistant Solicitor General to ensure that appropriate steps are taken by the concerned authorities and it also issued notice to the newly added respondents, *viz.* CAMPA, and other authorities of the State Government and MoEF. It is worth mentioning here that the project in question was a subject matter of that Writ Petition. Various other orders were passed in this Writ Petition No. 24/2009 on different dates and the Hon'ble High Court vide its order dated 22nd June, 2012 even noticed that very little attention is paid to the negative economic impacts of the projects as opposed to the minimum benefit of the project. It again emphasized the need for wider impact studies and to consider the other adverse effects on the social lifestyle of the people of the project affected area. On 20th

May, 2013, the Hon'ble High Court disposed of the Writ Petition by passing the following order:

> "In view of the latest affidavit filed by the Chief Secretary dated 2nd April, 2013, coupled with the assurance given by the learned Advocate General across the Bar that the State Government would take all necessary measures to take the recommendation made by the one man Committee forward after due examination by the board based Committee of experts constituted by the State Government, nothing more requires to be done in this petition. The assurance given by the State through the learned Advocate General is accepted. The petition is disposed of. The Court expresses a word of gratitude for the able assistance given by the learned amicus curiae.
> 2. The pending applications, if any, are also disposed of."

15. At this stage, it will be relevant to refer to the findings recorded in the report of the One Man Committee which was directed to monitor environmental compliance of various hydel projects in the State of Himachal Pradesh. Tidong Hydroelectric Project being one of the projects for consideration of the Hon'ble High Court, One Man Committee had submitted the following observations about the project:

> **"Tidong-I (100MW), Kinnaur**
>
> This project, situated in the remote Charang khad 10 kms. beyond Thangi, was visited on 17.06.2010. Its environment clearance was received on 7.9.2007 and forest clearance on 18.6.2008. The total forest land approved for diversion is 39.05 ha., not including the land for the transmission line, which case is yet to be finalized. The total number of trees to be felled/removed is 1261, of which as many as 807 fall in the alignment of the road to the surge-shaft. 751 trees belong to the Chilgoza species which is now almost an endangered species in this district, the only area in the state where this tree is found.
>
> The project is compliant in making timely and full payment of the various amounts required to be deposited under various clearances. It has deposited the entire amounts for CAT Plans, CA, NPV, Cost of trees, and reclamation of dumping sites totaling Rs. 14.78 crore. Since this money was deposited in CAMPA it was not actually available for spending till last year hence no expenditure has been incurred either under CAT plan or CA heads. The forest deptt. has made no provision for expenditure in the current year also. This is surprising and not acceptable as funds from CAMPA have now started flowing to the state and Rs. 36.00 crore has been released to the state forest deptt. The Principal CCF should review this matter and provide at least Rs. 25.00 lakhs for CA and Rs. 50.00 lakhs under CAT Plan in the current year keeping in view the fact that the project is slated for completion in 2013.

Our physical inspection of the whole project site starting from the intake to the powerhouse has revealed that there is a major problem of muck dumping in this project. The unscientific manner in which excavation and cutting is being done on the surge shaft road as well as the road to Adit-I, and the callous manner in which the resultant debris is being dumped in the forest areas, is taking a huge toll of trees, and will ultimately lead to soil erosion on a large scale. (It is surprising that this has not been noted, let alone acted upon by either the Regional Office of MoEF or the State PCB during their inspection). According to the project estimates the total quantity of muck to be generated will be 4.14 lakh cu.m. of this 1.43 lakh cu.m. is expected to be utilized and 2.70 lakh cu.m. to be dumped in 4 DSs. Of this 3 DSs have been developed so far and are in use, while the fourth DS (near the power house) shall be developed later. Our inspection of the three DSs revealed that none of them have adequate protection structures-they all need to have proper RCC toe walls of sufficient height and also have to be developed in benches with inter mediate retaining walls. The debris from the cutting of road form intake to Adit-I has also been rolled down to the stream bed indiscriminately, and even where a dumping site has been developed (DS-2) the protection provided is very skeletal and totally incapable of preventing spillage into the stream.

The much bigger problem which we observed, however, is the unscientific construction of the two roads and the indiscriminate rolling down of the huge quantities of debris leading to damage to uprooting of hundreds of trees outside the diverted areas. The road to Adit-I has been completed, and 1.8 km of the 6.2 km surge shaft road has been carved out. **In the process 590 additional trees not approved for felling have been irretrievably damaged.** The DFO Kinnaur has taken cognizance of this gross violation and has raised six damage reports against the company levying a penalty of 83.39 lakhs (which has been paid), and has also registered an FIR on 7.1.2010 against the management in the court of the CJM Kinnaur under relevant provisions of the Indian Forest Act. He has also stopped any further construction of the surge shaft road on 2.12.2009. This last has been done primarily **because an assessment carried out by his staff has resulted in the enumeration of an additional 4815 trees which are likely to be damaged if construction of the surge shaft road continues. Of this number as many as 2803 are Chilgoza trees which, as already noted, are highly endangered.**

The issue confronting the project and the state govt. here is one of massive environmental implications. The damage already caused by road cutting, and the even more damage likely to be caused in the future, is environmentally unsustainable and unacceptable. To recapitulate, the project has approval to fell 1261 trees (in itself a very large number). It has already illegally destroyed 590 more trees and in the assessment of the deptt. will inevitably destroy another 4815 trees; in other words it shall destroy 5405 more trees than what has been approved-400% more than the sanctioned number! This makes a mockery of the original DPR of the project or the FCA application. It also raises the question whether the deliberately understand the number of trees in their application in order to get FCA approval- had the govt. or the forest deptt. been aware that the number of tees involved was 6666 rather than 1261 it may not have given approval for the project at all.

I have not slightest doubt that this kind of terrain-hardly any top soil, loose soil cover, extremely steep slopes-cannot sustain

> the loss of tree cover on such a massive scale. Even if the assessment of the forest deptt. is reduced by fifty percent it is still sustainable. In the normal course the committee would have recommended that the approval for the project should be reviewed with a view to canceling it; however, this may not be practical considering the work already done on it and the investment already made (about Rs. 50.00 crore according to the GM of the project). **Therefore, the committee instead recommends that (a) approval for the surge shaft road (and the forest land and trees diverted for it) should be withdrawn as the damage it is causing and will cause is just too massive; and (b) the company should be directed to install a rope-way instead for accessing the surge shaft and HRT. This is already being done by some hydel projects in the state and is technically feasible. It will probably delay the project commissioning by a few months and push up costs, but this is a small price to pay for preserving what remains of this pristine and fragile environment. And in any case the project developers are themselves responsible for this situation by not preparing a proper DPR and by adopting environmentally hostile road cutting practices.**

16. It appears that despite the above recommendations, the authorities did not consider it appropriate to enforce the condition of ropeway as suggested by the Committee and permitted the industry to construct the road for carriage of material or muck. There is nothing on record before us to show that any of the recommendations of the Committee had been complied with.

Be that as it may, the fact of the matter is that this Project Proponent was permitted to carry on its construction and allied activities. It now has progressed considerably. The reply affidavit has been filed by the respondent no. 8 in 2011 and now further period of more than 4 years have gone by, during which the construction of the project has substantially progressed. Respondent no. 8 claims that the recommendations made by the One Man Committee have been taken care of. The Project Proponent filed a further affidavit being M.A. No. 707 of 2013, before the Tribunal stating the subsequent events. They are as follows:

"The status of the progress of the Tidong Hydroelectric Project (100 MW) is as under:

a. At Diversion intake site where Spillway, Undersluices, Intake Structure, Desilting Chamber and Reservoir are loated, excavation of 270,000 cum has been finished and concreting of 13,500 cum has been done in Diversion Channel, Spillway & Undersluices.
b. Out of the total length of 8.54 km of Head Race Tunnel, 3.6 km has already been excavated.
c. 800 m of Pressure Shaft out of the total length of 1176 m has also been excavated.
d. In Power House complex, excavation of 86,000 cum has been completed and now concreting is in progress. 2250 cum out of 9600 cum of concreting has also been done.
e. The Transmission line work is in progress and detailed survey has already been completed.
f. Against the approved cost of Rs. 543.15 crores as per the detailed project report, the expenditure till the end of June, 2013 is Rs. 332.64 crores.
g. The cost of the Project is, however under revision due to the delays that have occurred in its execution."

17. In relation to the prayers for setting aside the Forest Clearance and Environment Clearance, the plea raised by the applicant is that there was no public hearing done, no application of mind in granting clearance to the project and incorrect information being furnished by the Project Proponent to the authorities in relation to the project. So far as the question of public hearing is concerned, it is the mandate of the Notification of 1994. According to the Pollution Control Board, it had issued due notice for holding of the public hearing which was published even in the newspapers. According to the District Administration, a letter in that behalf had also been issued, requiring the concerned Gram Panchayat to participate in the public consultation and raise their views and objections for establishment of the project. This hearing was proposed to be held on 21st July, 2006. However, particularly, the Gram Panchayat, Rispa had boycotted the public hearing. This has also been specifically averred by the respondents in their reply which has been admitted in the rejoinder filed by the applicant.

Thus, there is no merit in this contention of the applicants. Furthermore, the application is entirely vague in relation to how the authorities have not applied their mind while granting Environmental Clearance and Forest Clearance. It is not disputable and authorities have also pleaded that the procedure contemplated under the Notification of 1998 as issued under the Forest (Conservation) Act, 1980 has been followed and appropriate permission with due safeguards has been issued. Similarly, no particulars have been stated or alleged relating to incorrect or false information being furnished by the Project Proponent to the authorities concerned. There appears to be some ambiguity in relation to the trees likely to be affected; the trees which are required to be felled for the purposes of the project in the forest land (their number being 1261) and the trees which are likely to be damaged because of the project activity (their number being 4815). According to the Project Proponent only 398 trees have been damaged. The Department anticipated damage to 4815 trees while according to the Project Proponent, not more than 1261 trees are likely to be damaged because of the construction activity of the project. There appears to be some drawback on the part of the concerned authorities in clearly visualizing this aspect and providing due safeguards and cautions that the Project Proponent is required to take and what remedial measures are required to be taken for remedying and restituting the damage done to the environment and ecology. Similarly, there seems to be an error on the part of the authorities in exactly contemplating the extent of

muck that would be generated from the tunneling, making of the road and other construction activities at the site. They have also not exactly dealt with the carriage of this muck/construction debris, its transportation, dumping and maintenance thereof. Photographs have been placed on record to show that these dumping sites are not being adequately maintained by the Project Proponent. These two defects which are post the grant of the Environmental Clearance and the Forest Clearance would not vitiate *per se*, the grant of Environmental Clearance to the Project Proponent, particularly in light of the fact that subsequently work of the project has already been completed incurring huge costs and largely due to the fact that damage to environment and ecology has already been done. What actually is required at this stage are remedial and restitution steps which should be taken by the concerned authorities, the State Government and the Project Proponent for completely preventing any further damage to the environment, ecology and forest area and also to the lives of the people at the project site. The Project Proponent should be called upon to pay all such amount that would be needed for such purpose.

18. Now, we must examine the worse environmental and ecological impacts that have appeared during the progress of the project and post grant of Environmental Clearance. It appears that these impacts and there extent probably was overlooked by concerned authorities at the initial stage. Either way, the damage to the ecology, particularly upon the forest area comprising of rare and endangered species of Chilgoza trees and on the livelihood of the

people living in the vicinity of the project sites, cannot be disputed and is quite serious. Firstly, looking into the damage to the trees, it cannot be disputed that Chilgoza pine is a rare species and is facing a threat to its existence even in that area. It is a plant which comes at a height of 1800 – 3350 meters and takes years to grow. The Forest Department had given Forest Clearance to the Project Proponent for felling 1261 trees in total and that too with the condition of afforestation of ten times the felled trees. There is no evidence before us that this condition has been complied with by the Project Proponent. The Department seems to be quite ignorant of compliance to the conditions of the Forest Clearance and to add fuel to the fire, to the indiscriminate dumping of muck and boulders down the slope as a consequence of heavy blasting which has damaged large number of trees of the adjoining forest. According to the Project Proponent, it has only damaged 398 trees. This figure does not find support from the official respondents. According to the official respondents, the number of trees likely to face the damage as a result of construction of the project and its allied activities, would be near about 4815, which is clear from the enumeration done by Range Forest Officer, Moorang. According to the applicant more than 13000 Chilgoza trees and other rare species trees are likely to be destroyed and/or damaged as is also evident from the EIA report of the project. The case of the applicant to some extent finds support from the admission of the Project Proponent as well as by the official respondents. It is admitted on record that on various occasions, penalty and remedies have been

imposed upon the Project Proponent for damaging the trees and the ecology of the area. On some occasions, amounts were also paid for the damage bills raised by the concerned authorities. According to the Project Proponent, he has paid a sum of Rs. 83.31 Lakh on this account. Other authorities have also stated that damage has been caused due to non-maintenance of proper dumping sites and rolling down of the boulders, which obviously have been thrown into the flood plain as well as in the Tidong river.

19. Another serious aspect is with regard to the damage being done by construction of the road, as already noticed by the One Man Committee which recommended before the Hon'ble High Court the construction of a ropeway for the remaining part of the project for reducing the damage to the ecology and environment by construction of roads, which would include felling and damaging the trees. Sadly, it found no favour from the State Authorities and the Project Proponent continued with the construction of the road with the consent of the authorities concerned. Firstly, we fail to understand why the concerned authorities did not alter or change the conditions of the Environmental Clearance and even of the Forest Clearance for that matter, particularly in view of the changed circumstances.

Referring to the contents of the One Man Committee report which we have already reproduced above, it has been clearly pointed out that out of 1261 trees that have been permitted to be felled; nearly 751 trees belong to the Chilgoza species, which are endangered species of trees. The report also refers to unscientific

manner in which the excavation work is being done on the road to the surge shaft as well as road to Adit-I and the callous manner in which the resultant debris is being dumped in the forest areas which has taken a huge toll on trees. Debris from cutting of the road from the intake of Adit-I has also being rolled down to the stream bed indiscriminately and even at DS-2 the protection provided is very skeletal and totally incapable of preventing spillage into the stream. The Project Proponent had been asked to stop further construction work of the surge shaft road on 2nd December, 2009, which was for the reason that there was enumeration of additional 4815 trees which were likely to be damaged (out of which 2803 trees were Chilgoza trees), if the constructions of surge shaft road continued. An important feature of the ecological damage that has been referred to by the One Man Committee is that keeping in view the kind of the terrain-hardly any top soil, loose soil cover, extremely steep slopes - it cannot sustain the loss of tree cover on such a massive scale. Even if the assessment of the Forest Department is reduced by fifty percent, it is still unsustainable. None of the 3 DSs have adequate protection structures-they all need to have proper RCC toe walls of sufficient height and also have to be developed in benches with intermediate retaining walls. The Committee besides pointing out the defects, made general recommendations, particularly made comments in relation to basin-wide EIA study for all river basins where hydroelectric projects were likely to come up and some minimum riparian distance (atleast 5 km) to be maintained between the projects.

The above details of the One Man Committee report demonstrates beyond doubt that there have been serious adverse impacts upon the environment and ecology, particularly upon the Chilgoza trees which are endangered species of trees. It cannot be disputed that plantation and growing of Chilgoza trees is a difficult and time consuming process.

20. The above state of affairs is largely attributable to the Project Proponent and the callousness adopted by the Company in carrying on its various activities. It can also not be said that the regulatory authority and the supervising authority over the project, including the various departments of the Government of Himachal Pradesh, have discharged their duties and responsibilities with utmost care, caution and sincerity. The casual supervisory approach of the authorities is evident from the records before the Tribunal. It was expected of the regulatory authority to impose much more severe conditions in the interest of environment and ecology and ensure that no damage was done, particularly from the manner and method in which the construction activity of the project was going on. Having stopped the work on 2nd December, 2009, the authorities should have ensured that all precautionary steps have been taken by the Project Proponent before permitting it to restart its construction activity. Wherever the authorities opted to impose some conditions, they were more on paper rather than on practice at the project site. It is an eco-sensitive area at a quite high altitude and this area requires greater attention of the authorities concerned and more stringent supervisory roles. A road is not built in days or

weeks. It is unquestionable before us that the cutting of hills for the purpose of construction of road caused serious damage to the ecology and particularly to the Chilgoza trees. Where 1261 trees were required to be felled for the entire project for which the Forest Clearance was granted, there, the anticipated damage in addition to such trees was 4815 (i.e. nearly four times). For repeated faults and damage to the trees and to the ecology, the company has been directed to pay penalties and damages from time to time. On most of the occasions payments had even been made by the Company. We really wonder if the penalties imposed by the authorities upon the respondent company are sufficient for the damage caused and for restoration. A very serious question arises is whether the damage caused is at all capable of being restored or restituted. The top soil having been widely eroded all over the hill, whether plantation of trees particularly Chilgoza pine trees is at all possible now? Destruction of nature and ecology at this level is easy but restoration thereof is not only difficult but in most cases could even be improbable. As we have already noticed, substantial damage has already been done, huge amount of money have been spent on the projects and major construction activity including concretization and construction of tunnels are more or less complete. In these circumstances, it would be very difficult for the Tribunal to arrive at the conclusion that the Environmental Clearance granted to the project should be recalled and the project activity be closed. It obviously would lead to tremendous wastage of public money, while damage to the nature and ecology will still persist. Thus, applying

the Principle of Sustainable Development and Precautionary Principle, we have to adopt a balanced approach. In the facts of the present case, the relevancy of the Precautionary Principle has been considerably reduced. Major part of the project has already come up and serious environmental damage has already occurred but even at this stage, it is an appropriate case where we should bring into service the Precautionary Principle to grant completion of the remaining work of the project, as to a larger extent, it is a case of *fait accompli.* Precautionary Principle is a pro-active method of dealing with the environment, based on the idea that if costs of the current activities are uncertain but are potentially both high and irreversible, then society should take action before the uncertainty is resolved. The intent is to avert major environmental problems before the most serious consequences and side effects would become obvious. It works as "do-no-harm" principle s*tricto sensu*. It is difficult for the society to carry on development activity, which is one of its essential needs, without some kind of damage to nature environment and ecology. The Precautionary Principle is a tool for making better health and environmental decisions. It aims to prevent harm from the outset rather than manage it after the fact has occurred. In common language, this means "better safe than sorry". The Precautionary Principle denotes a duty to prevent harm, when it is within our power to do so. Even the Rio-declaration from the 1992 United Nations Conference on Environment and Development in its declaration states:

> "There are two widely referred definitions of the Precautionary Principle. One of the most important

expressions of the Precautionary Principle internationally is in the Rio Declaration from the 1992 United Nations Conference on Environment and Development, also known as Agenda 21. The declaration stated: '*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation*'.

'Precautionary Principle' plays a significant role in determining whether developmental process is sustainable or not. 'Precautionary principle' underlies sustainable development which requires that the developmental activity must be stopped and prevented if it causes serious and irreversible environmental damage. The emergence of Precautionary Principle marks a shift in the international environmental jurisprudence- a shift from assimilative capacity principle to Precautionary Principle.

**Assimilative Capacity to Precautionary Principle – A Shift:** The uncertainty of scientific proof and its changing frontiers from time to time have led to great changes in the environmental concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. A basic shift to the approach to environmental protection occurred initially between 1972 and 1982. Earlier the concept was based on the assimilative capacity rule as revealed from Principle 6 of the Stockholm Declaration. So, Precautionary Principle is a principle which ensures that a substance or activity posing threat to the environment is prevented from adversely affecting it, even if there is no conclusive scientific proof lining that particular substance or activity to the environmental damage. The words 'substance' and 'activity' imply substance or activity introduced as a result of human intervention."

21. Under environmental jurisprudence, the Precautionary Principle is statutorily recognized. Section 20 of the National Green Tribunal Act, 2010, obliges the Tribunal to decide cases and settle disputes while applying the three well known principles of environmental jurisprudence i.e. Sustainable Development, Precautionary Principle and Polluter Pays Principle. As a result thereof, to all environmental laws in India these principles would have to be unavoidably applied. Restitution and restoration again

as part of the environmental jurisprudence would be applied, in aid to the Precautionary Principle where the circumstances, like the present case, demands. 'Restitution' is an act of making good or giving the equivalent for any loss, damage or injury while 'restoration' is the act of restoring, renovating or re-establishing something close to its original condition, like restoring a damaged habitat.

22. In the recent times a serious challenge that has appeared before the courts more often than not, is the basis on which the Precautionary Principle is to be applied. While making such decisions, best possible scientific information, analysis of risk, ecological impacts and indication of costs, are the factors to be considered. A person who does not take precaution to protect the environment can be called upon to pay for restitution. All these ingredients are conspicuous by their very absence on the records before us, particularly in relation to the point of time when the clearances for the project were granted.

The liability of a Project Proponent to make good the loss is not a matter *res integra* any longer. Various judgments of the Hon'ble Supreme Court of India as well as of this Tribunal has not only declared but applied the Polluter Pays Principle. The Polluter Pays Principle takes within its ambit the cost of restitution and restoration of environment and ecology as well. In the case of *M.C. Mehta v. Kamal Nath and Ors.,* (2000) 6 SCC 213, the Hon'ble Supreme court held as under:

> "12. "POLLUTER PAYS PRINCIPLE has also been applied by this Court in various decisions. In Indian Council for

Enviro Legal Action v. Union of India [1996] 2 SCR 503, it was held that once the activity carried on was hazardous or inherently dangerous, the person carrying on that activity was liable to make good the loss caused to any other person by that activity. This principle was also followed in Vellore Citizens Welfare Forum v. Union of India and Ors. AIR 1996 SC 2715 which has also been discussed in the present case in the main judgment. It was for this reason that the Motel was directed to pay compensation by way of cost for the restitution of the environment ecology of the area. But it is the further direction why pollution fine, in addition, be not imposed which is the subject matter of the present discussion.

24. Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner. Unfortunately, notice for exemplary damages was not issued to M/s. Span Motel although it ought to, have been issued. The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded. While withdrawing the notice for payment of pollution fine, we direct a fresh notice be issued to M/s. Span Motel to show cause why in addition to damages, exemplary damages be not awarded for having committed the acts set out and detailed in the main judgment. This notice shall be returnable within six weeks. This question shall be heard at the time of quantification of damages under the main judgment."

We may also refer to the judgment of the Tribunal in the case of *Krishan Kant Singh v. National Ganga River Basin Authority,* 2014 ALL (I) NGT Reporter (3) (Delhi) 1, where the Tribunal took a view that besides penal liability of the polluter, some civil consequences are bound to flow, particularly in relation to restitution, restoration

and remedying the damage caused by the pollution. The Tribunal held as under:

> "51. It is not possible to assess exact environmental damage and the cost of restoration thereof in view of the long period involved in the present case and the fact that the statutory Boards empowered to prevent and control pollution have not performed their statutory duties in accordance with the spirit and object of the environmental Acts and jurisprudence. This unit is responsible for causing great environmental pollution of different water bodies including Phuldera drain, the Syana Escape canal, the River Ganga and even the groundwater in and around the area of this industrial unit. Besides scientific data of inspection by the Expert teams, officers of the Pollution Control Board, analysis report and the fact that the water in the Phuldera drain had turned brown, even to the naked eye, demonstrates the extent of pollution caused by this unit. Considering the magnitude of the pollution caused by the unit, its capacity and prosperity, responsibility of the unit to pay compensation cannot be disputed on any plausible cause or ground. The Supreme Court in the case of *Sterlite Industries (India) Ltd. v. Union of India & Ors.* (2013) 4 SCC 575, enunciated the principle that a company which has caused the damaged to the environment and for operating the plant without valid renewal of consent for a fairly long period would obviously be liable to compensate by paying damages. While relying upon the judgment of the Constitution Bench of the Supreme Court in the case of *M.C. Mehta v. union of India* (1987) 1 SCC 395, the Court further stated that the plea of reasonable care and that the damage to environment occurred without specific negligence on the part of the unit is not a sustainable defence to a direction for payment of compensation for causing environmental damage. The court further held that magnitude, capacity and prosperity of the unit are the relevant considerations for determining the extent of the liability in such case. Applying these principles to the facts of the present case, there can hardly be any dispute that it is a polluting unit. It is also beyond controversy that this unit has operated without consent of the Boards from 1974 till the year 1991, thereafter, it committed default in compliance of the conditions of the consent right up to the year 2000. Even thereafter, it did not strictly comply with the conditions and directions issued by the respective Boards. This unit is a direct source of polluting River Ganga.
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> The unit is a profit making unit. No record has been produced before the Tribunal to establish anything to the contrary. Though, it may not be possible to determine with exactitude the exact amount of

compensation payable on account of damage to environment because of the long period involved and also for the reason that even scientifically the extent of damage and amounts required for restoration and restitution thereof cannot be determined at this stage now. Cleaning and removal of sludge from Phuldera drain, treatment of other pollutants flowing in the said drain, preventing any discharge into the Syana Escape Canal and making River Ganga pollution free are the basic needs which require attention of the Expert bodies particularly, in the facts and circumstances of this case. We fix a compensation of Rs 5 crores which shall be deposited with the UPPCB and shall be spent for that purpose alone by and joint team of CPCB, UPPCB, MoEF including for removal of sludge and all pollutants in the Syana Escape Canal till it joins river Ganga. This amount shall also be used for preventing ground water pollution.

The unit has caused serious pollution persistently. There is sufficient material before the Tribunal to establish both direct and indirect pollution being caused by this unit. The unit has even intentionally failed to comply with the directions and conditions of the consent order passed by the respective Boards. Not even submitting an application to the Board for obtaining consent to operate shows complete disregard towards law and its statutory obligations by the unit. It is not a only case where it is a threat to cause environmental pollution but is a case of causing environmental pollution, in fact. Right to carry on business cannot be permitted to be misused or to pollute the environment so as to reduce the quality of life of others. Risk to harm to environment or to human health is to be decided in the public interest according to 'a reasonable person's test'. The man's perception with reference to the facts of this case cannot return a finding any different than the one recorded by us."

Reference can also be made to another judgment of *Rayons-Enlighting Humanity & Anr. v. Ministry of Environment & Forests,* 2013 ALL (I) All India NGT Reporter (2) (Delhi) 79, held as under:

"44.1 Thus, we have no hesitation in holding that both the Respondents No. 4 and 5 have violated the orders of the Tribunal and thus have committed offence which would invite the rigours of Section 26 of the NGT Act read with Order XXXIX, Rule 2-A of the CPC. The violation of the orders of the Tribunal has resulted in environmental degradation, health hazards and prejudice to the public health at large. Another very important aspect of this case is the restitution of environment at the site in question and

its surroundings. Adverse impacts of this municipal solid waste have been dealt with by us in great detail in the judgment dated 18th July, 2013 as well as in this order. Before it results in irretrievable damage to environment and public health, we must also take recourse to passing certain directions with reference to the 'precautionary principle' aspect. In other words, the Tribunal must not only punish the person violating the orders but also should direct taking all measures which are necessary for the purpose of restoration of environment and precautions which would help in preventing further degradation of environment and damage to public health. Still another aspect of the case is that the polluter should pay for the pollution caused by him and for the period during which such pollution was caused. Contamination of water, pollution of ambient air, release of pungent smell and breeding of flies and other vectors resulting in various diseases are the inevitable after-effects of violation of the orders of the Tribunal by the respondents-authorities as well as their actions, which were indirect conflict with the orders of the Tribunal. These included dumping of municipal solid waste on the national highway-24 and digging of pits in a most unscientific way as afore-stated. Consequently, the respondents must incur the liability for violation non their part in relation to these three aspects. This is the very premise and scheme of sections 15 and 17 read with section 26 fo the NGT Act.

44.2 Environmental Pollution has been caused, is an undisputable fact. However, its extent may lose its significance in view of the admitted position on record. A polluter must pay for its acts and deeds, resulting in pollution. As already held above, the permission as required under law was not obtained by the Respondent - Nigam (consequently, by the respondent nos. 4 and 5). The dumping of municipal waste was being done in a most unscientific manner and had commenced the construction of the plant and dumping of municipal waste without prior permission even of the Pollution Control Board. We have also found that grant of permission by the Board at a subsequent stage was an arbitrary exercise of powers. Thus, for causing pollution over the long period and particularly when it was in violation to the orders of the Tribunal, we must hold the Nigam liable to pay compensation for restitution and restoration of the environment. The amount so directed should be used for remedying the wrong as well as to prevent future damage. The report of the local commissioner also clearly establishes the pollution resulting from the activity carried out by the respondent nos. 4 and 5 to contamination of ground water and other environmental pollution. At this stage, it may be appropriate for us to refer to a recent judgment of the Hon'ble Supreme Court in the case of M/s

Sterlite Industries India Ltd. v. Union of India & Ors. (2013)1 All India NGT Report page-35), Where the Hon'ble Supreme Court having found that the Sterlite had operated without renewal of the consent of the Tamil Nadu Pollution Control Board for a fairly long period and having polluted the environment held the Sterlite Industries liable for payment of compensation to the extent of Rs. 100 Crores. We follow this principle and apply it to the present case without any legal impediment. Following this principle, we are of the considered view that a sum of Rs. 1 Lakh per day would be an appropriate direction for restoration of the site to its original condition as well as on account of preventing further damage to the environment. For this purpose, we would also appoint a Committee which shall ensure compliance and proper spending of the amount so deposited."

23. In the present case, it is not only the case of the applicant, but even the Project Proponent has admitted to the damage to the environment and ecology. According to the Project Proponent, it was unintentional and *bonafide* and he even does not dispute that a number of trees have been damaged as a result of construction of the road, which are beyond 1261 trees in the forest area for which he had obtained permission to fell.

As already discussed above, the Precautionary Principle may lose its material relevancy where the projects have been substantially completed and even irreversible damage to environment and ecology has already been caused. The situation may be different when invoking this principle in cases of partially completed projects, where it would become necessary to take immediate remedial steps for the protection of environment without any further delay.

In the present case, it may still be possible to take steps at this stage, while any further delay would render them absolutely impracticable. The Precautionary Principle is a proactive method of

dealing with the likely environmental damage. The purpose always should be to avert major environmental problems before the most serious consequences and side effects would become obvious. In some cases, this principle may have to be applied with greater rigor, particularly when the faults or acts of omission and/or commission are attributable to the Project Proponent. The Principle of Sustainable Development by necessary implication requires due compliance to this precautionary principle as well as to the doctrine of balancing. It is only such an approach that could really protect the interest of environment and ecology.

24. As a cumulative result of the above discussion, while declining to quash the Memorandum of Understanding dated 23rd September, 2004 and the Environmental Clearance dated 9th September, 2007 we are still of the considered view that it is necessary for the Tribunal to issue certain directions to protect the environment and ecology of the concerned area, particularly in regard to its restoration and restitution, as well as collection of relevant data and material, before Project Proponent could carry its activity any further, in the facts and circumstances of the case. We, therefore, pass the following orders and directions:

1. We hereby constitute an Expert Committee of:

   (a) Additional Chief Secretary, Environment & Forest, State of Himachal Pradesh.

   (b) Member Secretary, Himachal Pradesh State Pollution Control Board.

(c) An Officer not below the rank of Director in the relevant field as nominated by the MoEF.

(d) A representative of Himalayan Forest Research Institute, Shimla.

(e) Director and/or his nominee from the concerned field from the Punjab Engineering College, Chandigarh.

(f) Principle Chief Conservator of Forest or his nominee not below the rank of Chief Conservator of Forest, State of Himachal Pradesh.

2. The above Committee shall visit the project site and submit a comprehensive report to the Tribunal within 45 days from the date of passing of this judgment.

3. The Committee shall specifically comment on the adequacy or otherwise of maintaining 15% flow of the river as environmental flow and if there is need for any variation in that regard.

4. The Committee in its report shall bring out clearly whether the conditions stated in the Forest Clearance and in Environmental Clearance have been strictly complied with or not by the Project Proponent. Progress in that behalf and particularly with regard to biodiversity conservation and management plan, compensatory afforestation, setting up a Musk Deer Farm and implementation of the CAT Plan shall also be reported.

5. How many trees have been felled / cut by the Project Proponent from the forest area? The number of trees that have been otherwise damaged by the construction activity of the project and if the figure of 4815 trees likely to be damaged from construction

activities as given by the Forest Department, is correct or not in that regard.

6. What are the damages, specifically to environment, ecology and other damage caused by the construction activity of the project? What part of such damage is capable of being restored and how much damage is irreversible?

7. Its recommendations with regard to restoration, restitution of the damage already done.

8. It will also make recommendations on what are the adverse economical impacts on the life and livelihood of the people around the site area and also has there been compliance of the R&R Policy?

9. The Project Proponent shall deposit a sum of Rupees Five Crores with the Forest Department, Government of Himachal Pradesh as an initial deposit for environment conservation subject to final adjustments. We also make it clear that the Project Proponent shall also be entitled to the adjustment of the amounts paid for destruction of trees, so far upon final settlement of accounts, as per orders of the Tribunal. These amounts shall be utilized exclusively for restitution and restoration of environment and ecology and for such other purposes as may be directed by the Tribunal. This amount shall also be utilized for the purposes of payments to people who have lost income because of divestment of the Chilgoza Trees because of road construction or other project activities, further directions would depend upon the submission of the report by the committee.

This amount should be deposited within four weeks from the date of pronouncement of the Judgement.

10. The Project Proponent shall not carry out any construction activity for a period of 45 days or till the inspection is completed by the Expert Committee, whichever is earlier.

11. After the expiry of the 45 days, the Project Proponent can carry-out construction activity in accordance with law, unless otherwise directed to stop such activity by the Tribunal.

12. The Project Proponent shall carry on its activity after the expiry of 45 days only in accordance with and upon taking such remedial measures as are suggested by the Committee afore-stated and the orders of the Tribunal as may be passed in future.

13. It is undisputed that the Project Proponent is obliged to plant at or around the project site at least ten-times of the uprooted/damaged trees. The forest department along with the Project Proponent and a representative from the Himalyan Forest Research Institute, Shimla shall ensure and be responsible of the afforestation of the trees and the plants of local species or other recommended species particularly Chilgoza Tress. They shall be responsible to maintain and protect the plants so planted. The time-bound action plan shall be prepared by these persons and submitted to the Tribunal within 30 days from passing of this Judgement.

14. The Additional Chief Secretary, State of Himachal Pradesh shall be the Nodal Officer for compliance of this order. We direct the Officer to take immediate steps for compliance of this order.

15. The MoEF, within three days from today, shall inform its nominee to the Additional Chief Secretary, State of Himachal Pradesh. All expenses of the Committee shall be borne by the Project Proponent.

16. The Committee shall submit its report to the registry of the Tribunal within 45 days from today which then shall be placed before the Tribunal by the registry for issuance of such further directions as the Tribunal may deem fit and proper in the circumstances of the case.

25. With the above directions, the Original Application No. 183/2013 and M.A. No. 191 of 2014 stand partly allowed and M.A. Nos. 707 of 2013, 1056 of 2013 stand allowed without any orders as to costs.

**Justice Swatanter Kumar**
**Chairperson**

**Justice M. S. Nambiar**
**Judicial Member**

**Prof. A.R. Yousuf**
**Expert Member**

**Mr. Bikram Singh Sajwan**
**Expert Member**

**New Delhi**
_____ July, 2015