IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

WRIT PETITION (PIL) NO. 21 of 2013
With
SPECIAL CIVIL APPLICATION NO. 2621 of 2013
With
CIVIL APPLICATION NO. 9694 of 2013
In WRIT PETITION (PIL) NO. 21 of 2013
With
CIVIL APPLICATION NO. 3558 of 2013
In SPECIAL CIVIL APPLICATION NO. 2621 of 2013
With
CIVIL APPLICATION NO. 4639 of 2013
In SPECIAL CIVIL APPLICATION NO. 2621 of 2013
With
CIVIL APPLICATION NO. 4823 of 2013
In CIVIL APPLICATION NO. 3558 of 2013

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA
and

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GAJUBHA (GAJENDRASINH)BHIMAJI JADEJA & 3....Applicant(s)

Versus

UNION OF INDIA THRO JOINT SECRETARY & 20....Opponent(s)

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Appearance:

WRIT PETITION (PIL) NO.21 of 2013:

MR AJ YAGNIK, ADVOCATE for the Applicant(s) No. 1 - 4
MR PERCY KAVINA, SR.ADVOCATE with MR ABHISHEK MEHTA for M/S TRIVEDI & GUPTA, ADVOCATE for the Opponent(s) No. 12
MR PS CHAMPANERI, ADVOCATE for the Opponent(s) No. 6
MR MIHIR JOSHI, SR.ADVOCATE with MR SHAMIK S BHATT, ADVOCATE for the Opponent(s) No. 10 , 14, 15 , 17 , 19
MR MIHIR THAKORE, SR.ADVOCATE with MS AMRITA M THAKORE, ADVOCATE for the Opponent(s) No. 11 , 16 , 18 , 21
MS DHARMISHTA RAVAL, ADVOCATE for the Opponent(s) No. 7
NOTICE SERVED BY DS for the Opponent(s) No. 1 - 5 , 8 - 9 , 13 , 20
MR DUSHYANT DAVE, SR.ADVOCATE with MR SANDEEP SINGHI for SINGHI & CO, ADVOCATE for the Opponent(s) No. 8
MR PARTH BHATT, ASSISTANT GOVERNMENT PLEADER.

WRIT PETITION (PIL) NO.2621 of 2013:

MR GOPAL SUBRAMANIAM AND MR.MIHIR JOSHI, SR.ADVOCATES with MS SHALLY BHASIN AND MR SALIL THAKORE, ADVOCATES for the Applicants.
MR PS CHAMPANERI, ADVOCATE for the Opponent(s) No. 1
MR SANDEEP SINGHI for SINGHI & CO, ADVOCATE for the Opponent.

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA**
and
HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 13/01/2014

CAV JUDGEMENT

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

Since common questions of law and fact are involved in both the captioned petitions, those were heard together and are being disposed of by this common judgment and order.

The petitioners of Writ Petition (PIL) No.21 of 2013, residing at village Navinal, Mundra Port and Special Economic Zone, Kutch, have prayed for the following reliefs in public interest :

> "*(A) To direct respondents and respondent nos.10 to 21 in particular to immediately stop further development of the units and business operations in particular from their respective units situated within respondent no.8 Mundra Port and Special Economic Zone till environmental clearance is granted by respondent Ministry of Environment and Forests in favour of respondent no.8 Mundra Port and Special Economic Zone;*
>
> *(B) To direct respondents and respondent nos.10 to 21 in particular to completely dismantle and demolish the construction put up on their respective units and remove all and entire development upon the same to the extent of status quo ante;*
>
> *(BB) To direct respondent nos.1,2,3 and 4 and respondent no.5 to take over complete control, administration and supervision of respondent no.8 Mundra Port and Special Economic Zone, looking to the grave violations of Environmental Impact Assessment Notification, 2006;*
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> *(C) To direct the respondent nos.1 and 2 to take all civil, criminal and corrective action against respondent nos.8, 10 to 21 for violating Environmental Impact Assessment Notification, 2006;*
>
> *(CC) To direct respondent nos.1, 3 and 4 to consider permanently refusing grant of environmental clearance to respondent no.8 Mundra Port and Special Economic Zone for grave violations of Environmental Impact Assessment Notification, 2006 in the context of subject*

matter of the present petition;

(D) To direct respondent nos.1 and 2 to constitute an independent team of expert to decide the extent of collusion and involvement of statutory, public and Government authorities in assisting respondent nos.8, 10 to 21 in violating the Environmental Impact Assessment Notification, 2006 and thereby develop the land in question and put up construction thereupon and be further pleased to direct taking of civil, criminal and departmental action against erring officers;

(E) To direct the respondents and particularly respondent nos.5, 7 and 9 to prepare panchnama of the land allotted to respondent nos.10 to 21 and extent of development of the very land and construction thereupon so far put up by respondent nos.10 to 21 and place the same on record;

(F) During pendency and/or final disposal of the present petition be pleased to direct the respondents and respondent nos.8, 10 to 21 in particular to immediately stop further development of the units and business operations from respective units and file an undertaking before this Hon'ble Court in this regard AND be further pleased to direct respondent no.5 Development Commissioner, Mundra Port and Special Economic Zone to ensure that no further development in the respective units take place and business operations are undertaken in any manner whatsoever;

(FF) During the pendency and/or final disposal of the present petition to direct respondent nos.1,2,3 and 4 and respondent no.5 to take over complete control, administration and supervision of respondent no.8 Mundra Port and Special Economic Zone, looking to the grave violations of Environmental Impact Assessment Notification, 2006;

(G) To award the costs of this petition;

(H) To pass such other and further prayer/s in the interest of justice be granted."

The petitioner of Special Civil Application No.2621 of

2013, an industrial unit engaged in the manufacturing of Advanced Turbine & Generators and Heat Exchanger Equipments for Power Plants at the Mundra Special Economic Zone, has prayed for the following reliefs :

> "*(i) Issue a writ, order or direction declaring that since APSEZ i.e. Respondent No.2 has obtained a deemed clearance under Clause 8(iii) of EIA Notification, 2006, there is no impediment against the petitioners in continuing to establish their respective projects in land situated in Mundra SEZ, being part of Revenue Survey No.295/1 and part of Revenue Survey No.225 of Mouje Village Siracha and Navinal, Taluka Mundra, District Kutch, Gujarat, in view of the fact that the petitioners have already obtained statutory clearances inter alia from Gujarat Pollution Control Board;*
>
> *(ii) Issue a writ of mandamus commanding the respondent to forbear from interfering in the remaining construction and completion of the separate projects of the petitioners at their respective lands in the Mundra SEZ;*
>
> *(iii) That pending the hearing and final disposal of this petition, this Hon'ble Court be pleased to allow the petitioners to recommence their construction activities on their respective lands at the Mundra SEZ in order to complete their projects;*
>
> *(iv) For ad-interim reliefs in terms of prayer (iii) above;*
>
> *(v) Pass any other appropriate order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.*"

The case made out by the petitioners of Writ Petition (PIL) No.21 of 2013 may be summarised as under :

The petitioners are residents of village Navinal situated within the Mundra Port and Special Economic Zone territory

(for short, 'the MPSEZ'). They are all farmers and earn their livelihood through agricultural operations.

It is the case of the petitioners that without obtaining a mandatory prior environmental clearance from the Ministry of Environment and Forests, Union of India, as required under the Environmental Impact Assessment Notification, 2006, the respondent no.8 MPSEZ owned by the Adani Group at Mundra, District Kutch, has conferred leasehold rights in favour of the respondent nos.10 to 21, and on the strength of such leasehold rights conferred by the MPSEZ as the lessor in favour of the respondent nos.10 to 21 as the lessees, the respondent nos.10 to 21 have developed their respective plots of land and setup their industrial units.

It is the case of the petitioners that the respondent nos.10 to 21 have been operating their units since 2008 in the absence of the environmental clearance in favour of the MPSEZ.

It is the case of the petitioners that Entry 7(c) in the Schedule attached with the environmental clearance under the Environmental Impact Assessment Notification, 2006 (for short, 'EIA Notification') issued under Rule 5 of the Environment (Protection) Rules, 1986 and Section 3 of the Environment (Protection) Act, 1986, provides a list of projects which requires prior environmental clearance before making them operational.

According to the petitioners, the respondent no.8 MPSEZ does not have the prior environmental clearance to setup a

port based multipurpose special economic zone at Mundra and until the clearance is granted by the respondent no.1, the Ministry of Environment and Forests, no developmental activities including that of setting up of infrastructural facilities to provide basic amenities and facilities to the unit holders within SEZ can take place.

According to the petitioners, such issue was raised in the past by way of a Writ Petition (PIL) No.194 of 2011, decided by this very Bench *vide* judgment and order dated 9th May 2012, by which this Court held that, so long as the environmental clearance is not granted by the Central Government in favour of the MPSEZ for creation of infrastructural facilities on the land so allotted and consequent to such permission such facilities have been actually created by the allottee, the lessor cannot lease out the right of enjoyment of the infrastructural facilities to its lessee.

According to the petitioners, in Writ Petition (PIL) No.194 of 2011 only two units were joined as the party respondents, namely, (1) Alstom Bharat Forge Power Limited, and (2) Kalyani Alstom Power Limited. The other units, namely, the respondent nos.10 to 21 in the present petition were not the party respondents in Writ Petition (PIL) No.194 of 2011.

According to the petitioners, since this Court has already held while deciding the Writ Petition (PIL) No.194 of 2011 that the MPSEZ could not have lawfully leased out the right of enjoyment of the infrastructural facilities to its lessee, namely, (1) Alstom Bharat Forge Power Limited, and (2) Kalyani Alstom Power Limited, i.e. the respondent nos.10 and 11 of Writ

Petition (PIL) No.194 of 2011, the same principle would apply even in the cases of the present respondent nos.10 to 21.

However, according to the petitioners, although there is a clear pronouncement of this Court about the right of creation of infrastructural facilities over the land allotted by the MPSEZ prior to the grant of environmental clearance, the respondent nos.10 to 21 have continued to operate their respective units in flagrant violation and disregard of the Environmental Impact Assessment Notification, 2006 as well as the dictum of law laid down by this Court in Writ Petition (PIL) No.194 of 2011.

It has been averred in the petition that the public hearing for grant of environmental clearance in favour of the MPSEZ was held on 5th September 2010. At the same time, the Ministry of Environment and Forests, Government of India, has issued a show-cause notice to the MPSEZ in connection with the violation of the provisions of the CRZ Notification, 1991. Till this date, the mandatory prior environmental clearance has not been granted by the Ministry of Environment and Forests under the EIA Notification and, therefore, no developmental activities can take place within the SEZ.

It is stated in the petition that the petitioners herein learnt about the judgment rendered by this Court in Writ Petition (PIL) No.194 of 2011, wherein only two units were party respondents, namely, Alstom Bharat Forge Power Limited and Kalyani Alstom Power Limited. At a later stage, the petitioners could find out that there are other units also operating within the SEZ, i.e. the respondent nos.10 to 21, without any environmental clearance granted by the Union in

favour of the MPSEZ.

In such circumstances, the petitioners thought fit to file this petition in public interest, praying for the reliefs which have been aforenoted.

On notice being issued to the respective respondents, they have appeared and opposed this petition.

I. Stance of the Respondent No.8 - MPSEZ :

According to the respondent no.8, the petitions deserve to be rejected on the ground of suppression of material facts. The petitioners are guilty of projecting a false impression as if nothing has happened after the judgment and order dated 9th May 2012 was pronounced by this Court in Writ Petition (PIL) No.194 of 2011.

According to the respondent no.8, the Expert Appraisal Committee (EAC), constituted by the Ministry of Environment and Forests, considered the issue of grant of environmental clearance in its meetings held on 16th-17th April 2012, 4th-5th June 2012 and 9th-10th July 2012 respectively. The EAC recommended to the Ministry of Environment and Forests for grant of environmental clearance subject to certain terms and conditions.

In such circumstances referred to above, the following has been averred in the affidavit-in-reply, which is as under :

"*5. I state and submit that the respondent no.8 had*

submitted an application dated 15.12.2008 to MoEF-the respondent no.1 for grant of Environmental and CRZ clearance to the respondent no.8 for its project, namely, SEZ, as required under the said notification. I state that pursuant to the preparation of Environmental Impact Assessment (EIA) study including Environment Management Plan, a public hearing for the project was conducted on 5.10.2010. Subsequent to the public hearing, the EAC-respondent no.3, constituted by MoEF, in its meeting held on 16th-17th April 2012 recommended the proposal for clearance of SEZ project after receipt of the information as stipulated during the said meeting. The respondent no.8 submitted the requisite details to MoEF as sought for in the meeting of EAC.

6. In the meantime, this Hon'ble Court vide its judgment and order dated 9.5.2012 passed in Writ Petition (PIL) No.194 of 2011, inter alia, directed the respondent nos.10 and 11 to the said writ petition not to proceed ahead in implementation of their project and not to undertake any further construction work till the respondent no.8 is granted environmental clearance.

7. Subsequent to the passing of the aforesaid judgment and order dated 9.5.2012 by this Hon'ble Court, after due compliance with the minutes of the meeting dated 16th-17th April 2012 by respondent no.8, the matter was further considered by the EAC at its meeting on 4th-5th June 2012. EAC in its meeting held on 4th-5th June 2012 recommended the proposal of the respondent no.8 for environmental and CRZ clearance with the conditions as stipulated in the said meeting of EAC held on 4th-5th June 2012. The said minutes are available on the official website of MoEF which is within public domain and is a public document. Thereafter, EAC in its meeting held on 9th-10th July 2012, inter alia, corrected the minutes of the meeting held on 4th-5th June 2012 by reading the notified area as 8481.2784 ha. instead of 5920 ha. mentioned in the minutes of the meeting held on 4th-5th June 2012. Even the said minutes of the meeting held on 9th-10th July 2012 is available on the official website of MoEF which is within public domain and is a public document.

8. In terms of paragraph 8(i) of the said notification, the

MoEF was required to consider the recommendations of EAC and convey its decision to the respondent no.8 within 45 days of the receipt of such recommendations of EAC. No decision of MoEF was communicated to the respondent no.8 within 45 days of the receipt of the aforesaid recommendations of EAC. MoEF, in terms of paragraph 8(ii) of the said notification, has neither disagreed with the recommendations of EAC nor has requested EAC for its reconsideration and no such intimation in this respect has been received by the respondent no.8. As no decision of MoEF was communicated to the respondent no.8 within 45 days of the receipt of the recommendations of EAC, the respondent no.8, in terms of paragraph 8(iii) of the said notification, proceeded that the environment/CRZ clearance sought for has been granted by MoEF in terms of the final recommendations of EAC dated 4th-5th June 2012 and corrections made on 9th-10th July 2012.

9. At this juncture, it would be material to place on record the guidelines dated 29.4.2009 issued by MoEF for time bound issue of environmental clearances. The said guidelines were issued to remove the general perception that there are delays in processing of the proposals after their recommendations by EAC. Under the said guidelines, necessary instructions were issued that final view for environmental clearance is required to be taken within 15 days of the recommendations of EAC and that the environmental clearance thereafter would be displayed on MoEF's website immediately. The respondent no.8 based on the said notification and the guidelines dated 29.4.2009 proceeded that it has been granted necessary environmental/CRZ clearance in terms of final recommendations of EAC dated 4th-5th June 2012 and corrections made on 9th-10th July 2012.

10. Continuing with the sequence of events, I state and submit that one of the terms of the environmental/CRZ clearance granted by MoEF to the respondent no.8, pursuant to paragraph 8(iii) of the said notification, which is evident from the minutes of the meeting of EAC held on 4th-5th June 2012, stipulated that there shall be no allotment of plot in CRZ area to industries except the port and harbor and the activities which require foreshore facilities. In order to ensure compliance of the terms of the said environmental/CRZ clearance granted

to the respondent no.8, MoEF addressed letter dated 26.10.2012 to Gujarat Coastal Zone Management Authority (GCZMA) seeking details about the factual position about the SEZ area falling outside CRZ area.

11. The respondent no.8 vide its letter dated 29.10.2012 and 1.1.2013 submitted the requisite details, as sought for by MoEF vide its letter dated 26.10.2012, to GCZMA. The respondent no.8 through the said letters once again reiterated that it will carry out only the permissible activities in the CRZ area as per the CRZ notification as applicable. Government of Gujarat, Forests and Environment Department through Member Secretary, GCZMA vide its letter dated 9.1.2013 provided necessary details to MoEF as sought for by MoEF vide its letter dated 26.10.2012.

12. In light of the aforesaid facts, I state and submit that the respondent no.8 has been granted requisite environmental/CRZ clearance for its SEZ and that the judgment and order dated 9.5.2012 passed by this Hon'ble Court would not be applicable as sought to be contended by the petitioners in their petition. I state and submit that the petitioners have suppressed the EAC recommendations dated 4th-5th June 2012 and 9th-10th July 2012 though the said documents are within public domain. In the circumstances, I submit that the petition is required to be dismissed with exemplary cost.

13. Without prejudice to the aforesaid, I state and submit that the authorities have not considered that there is any bar either under the said notification or otherwise for an individual unit, being setup within the SEZ, to operate, even if it has obtained requisite environmental clearance and/or consent/authorisation from the Pollution Control Board, till the time the SEZ is granted environmental clearance. I submit that it is not even the case of MoEF that any individual unit cannot operate within SEZ, though having requisite environmental clearance and/or consent from the Pollution Control Board, till the time SEZ is granted environmental clearance. The same would also be evident from the stand of MoEF taken before this Hon'ble Court during the course of hearing of Writ Petition (PIL) No.194 of 2011. On the contrary, MoEF has granted environmental clearances to the individual unit/s to be setup in the SEZ though the environmental

clearance for the said SEZ was pending before it. The same would be evident in the case of Dahej SEZ, near Bharuch, Gujarat, developed by Gujarat Industrial Development Corporation (GIDC). One of the units within the Dahej SEZ, namely, M/s.Indofil Chemicals Company was granted environmental clearance by MoEF on 19.8.2008 while MoEF had granted environmental clearance for Dahej SEZ to GIDC only on 17.3.2010 during which time it is learnt that the aforesaid unit was carrying out its manufacturing activities. From the aforesaid, it appears that there may be several other such environmental clearances which may have been granted by MoEF. The respondent no.8 is not aware of the same, and that the MoEF would be in a better position to clarify the position in this regard.

14. I state and submit that the respondent nos.10 to 21 have setup or are in the process of setting up the units or have proposed to setup their units within the SEZ of the respondent no.8 pursuant to the relevant permissions being granted to them by the respondent no.5 under the provisions of the Special Economic Zone Act, 2005 and the rules framed thereunder. The said units would be required to obtain necessary consent/clearance from the appropriate authority based upon the nature of their activities. The only relief for an individual unit, which requires environmental clearance for its project under the said notification, is that the said individual unit would be exempted from public hearing in cases where the SEZ as a whole has undergone public hearing. I submit that the appropriate authorities would not have granted consents and/or clearances to the individual units if there would have been any bar to give such consent and/or clearance in the absence of environmental clearance being granted to SEZ. In light of the aforesaid, I submit that the present petition is not maintainable and is liable to be dismissed. Even otherwise, the present petition is not maintainable in view of the provisions of National Green Tribunal Act, 2010 read with order dated 9.8.2012 passed by the Hon'ble Supreme Court of India in Writ Petition (C) No.50 of 1998.

15. At this juncture, it is pertinent to mention that the port facility which is setup by the respondent no.8 and in operation, pursuant to environmental/CRZ clearances granted to it earlier by MoEF, is not the infrastructure

facility provided for or covered under the environmental/CRZ clearance applied for and granted by MoEF for the SEZ of the respondent no.8."

Thus, from the aforenoted stance of the respondent no.8 - MPSEZ, it is evident that it has pleaded in its defence the deemed environmental clearance in terms of clause 8 of the Environmental Impact Assessment Notification, 2006. Therefore, according to the respondent no.8 - MPSEZ, the position has completely changed on grant of the deemed environmental clearance, which was not the position when this Court decided the Writ Petition (PIL) No.194 of 2011.

In such circumstances referred to above, according to the respondent no.8 - MPSEZ, the Writ Petition (PIL) No.21 of 2013 need not be entertained and should be rejected only on the ground that in view of the deemed environmental clearance the respondent nos.10 to 21 can operate their respective units within the Special Economic Zone.

II. Stance of the Respondent Nos.10 to 21 :

By and large the stance of the respondent nos.10 to 21, i.e. the unit holders, is the same as that adopted by the respondent no.8 - MPSEZ. In addition to the grant of the deemed environmental clearance, the stance of the respective unit holders is that they are operating within the SEZ since 2008 and, by now, they have invested crores of rupees in the development of their projects.

According to the respondent nos.10 to 21, the provisions

of the EIA Notification make it abundantly clear that the environmental clearance is required to be obtained by only those projects which are listed in the Schedule thereto and not otherwise. According to them, if a SEZ does not get an environmental clearance, that by itself would not be a bar for setting up of an industrial unit inside the SEZ if the unit itself has the necessary environmental clearance for its project.

The sum and substance of the stance of the respondent nos.10 to 21 is that each one of them have obtained the necessary permission to setup their units from the Gujarat Pollution Control Board under the provisions of the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986.

All the units operating within the SEZ have received the consent and authorisation under the provisions of the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981 and the Hazardous Waste (Management, Handling and Transboundry Movement) Rules, 2008 for the use of outlets and discharge of trade effluents due to operation of the plant.

It is also the stance of the unit holders that under Section 14 of the National Green Tribunal Act, 2010, it is the tribunal alone which has the jurisdiction to decide cases of the present nature where a substantial question relating to environment is raised.

The issues raised in the present petitions are directly

related to the Notification dated 14th September 2006 issued under the provisions of the Environment (Protection) Act, 1986. In such circumstances, it is the National Green Tribunal alone which would have the jurisdiction to try and entertain the issues raised in the present petitions. Thus, what has been pleaded in defence of these petitions is the alternative remedy available to the petitioners.

It is also the stance of the respondent nos.10 to 21 that the petitions should not be entertained on the ground of delay and laches. According to them, the units are in operation past almost more than five years and the petition has been filed in the year 2013. Such being the position, the principle of delay and laches would also be applicable to the petition filed in public interest.

In the circumstances referred to above, the respondent nos.10 to 21 have prayed that there being no merit in the Writ Petition (PIL) No.21 of 2013, the same deserves to be rejected.

III. Stance of the Respondent no.5 - Development Commissioner, MPSEZ :

The Development Commissioner, in its affidavit-in-reply has made the following averments :

> *"3. In the background of the aforesaid facts and circumstances, I state and submit that the preamble of the Special Economic Zones Act, 2005, states that, "an Act to provide for the establishment, development and management of the Special Economic Zones for the*

promotion of exports and for matters connected therewith or incidental thereto". In the background of the aforesaid facts and circumstances, the provisions contained in Chapter IV of the Act, enumerates the appointment and functions of the Development Commissioner. To achieve the object and legislative policy, the speedy development of SEZs and promotion of exports from such SEZs are the essence for achieving the object behind the legislation. In the background of the aforesaid facts and circumstances, I state that the provisions contained in Chapter III of the Act deals with the procedure for making a proposal to establish SEZ as contemplated therein and for the purpose of considering the same, the provisions have been made in Chapter III constituting the Board of Approval, their duties, powers and functions. Chapter V of the Act provides for constitution of approval committee, the powers and functions of the Approval Committee, setting up of units, power of cancellation of letter of approval and for other matters enumerated therein in the said Chapter. Chapter VI deals with the exemption, drawbacks and concessions as stipulated therein in the said provisions and the provisions relating to the direct taxes, etc. The provisions contained in Chapter VII provides for constitution of SEZ authority, its functions etc.

4. In the background of the aforesaid facts and circumstances, I state and submit that for the purpose of carrying out the provisions of the Act, the provisions contained in Section 55 of the Act, empowers the Central Government to frame Rules by notification for carrying out the provisions of the Act and such Rules may in particular and without prejudice to generality of such Rules making power, such Rules may provide for all or any of the matter enumerated therein in the said provisions of Section 55(2) of the Act. In the background of the aforesaid facts and circumstances, I state and submit that the letter of approval granted to the respondent no.8 contains one of the conditions that the developer shall conform to the environmental requirements. It is in this behalf submitted that one of the words by the petitioner in the beginning of para as "without mandatory prior environmental clearance from the respondent Ministry of Environment and Forest ...." is not a part of letter of approval. The letter of approval to the Developer is issued as per Rule 6 of the SEZ Rules,

2006 by the Central Government on recommendations of the Board of Approval. It is further submitted that likewise letter of approval to the co-developer is also issued by the Central Government on the basis of the recommendations of Board of Approval in respect of the proposal in terms of the provisions of Section 3(11) and (12). It is further submitted that the letter of approval to the units located in SEZ is issued by the Development Commissioner after approval of the proposal of the unit by the Unit Approval Committee (UAC) in terms of the provisions contained in Section 15(3) and (9) of the Act. It is further submitted that the letter of approval issued to the Developer/co-developer or the unit is subject to the terms and conditions imposed by the Board of Approval and/or the Unit Approval Committee, as the case may be.

5. So far as the contention of the petitioners to the effect that the front doors are kept closed and all cosmetics exercise undertaken by the respondent nos.10 to 21 from outside, is not correct, inasmuch as the fact is that the production of goods and its subsequent clearance from the SEZ area takes place through the "Entry and Exit Gates" as prescribed under the SEZ Act and Rules. It appears that the petitioners are not having clear idea about the functions of the units situated in the SEZ area.

6. In regards to the order dated 14.2.2013 passed by this Hon'ble Court in the above mentioned writ petition is concerned, immediately on receipt of the said order, the respondent no.5 and the office of the respondent no.5 instructed/directed all the units to comply with the order of the Hon'ble High Court immediately. Thus, with regard to the allegations, contentions, submissions and facts contained in para 1 of the above writ petition, the data as aforesaid has been placed on record before this Hon'ble Court.

8. In reply to the allegations, contentions and submissions raised by the petitioners in paragraph no.4.1 are concerned, I state and submit that the contentions raised therein by the petitioners are not justified. The submission made by the Ministry of Environment and Forests may be relied upon as far as the contraventions of the EIA Notification, 2006 by the Developer is concerned.

As far as the order dated 9.5.2012 of the Hon'ble High Court of Gujarat in PIL No.194/2011 is concerned, it does not stop functioning of all the running units. Hence the inference drawn while forming the above contention is not only wrong but also misleading. The said order dated 9.5.2012 is as under and the same was in respect of two units i.e. Alstom Bharat Forge Power Ltd. being respondent no.10 to the PIL No.194/2011 and Kalyani Alstom Power Ltd. being respondent no.11 to the PIL No.194/2011 :

> *"...We dispose of this writ petition with a direction to respondent nos.10 and 11 not to proceed ahead in implementation of their project and not to undertake any further construction work, whether preliminary or otherwise, till the MPSEZ is granted environmental clearance. The writ petition to that extent is allowed."*

The said order dated 9.5.2012 is applicable to the abovenamed units. However, the respondent no.5 immediately on receipt of the said order dated 9.5.2012 issued directions to the Developer/Co-Developer and Units to comply with the order in full and stop the construction activities immediately. The contention that the Central and State Authorities have illegally and unconstitutionally allowed or by turning their attention away permitted respondent nos.10 to 21 to setup their respective units within MPSEZ, put up construction thereupon and thereafter do business from the very respective units, is not correct as the respondent no.5 immediately took the steps to implement the order of the Hon'ble High Court and directed the affected parties i.e. respondent no.10 and respondent no.11 of the PIL No.194 of 2011 to stop their development related activities including construction activities.

Under the SEZ Act and rules framed thereunder, the units are leased the land in the processing area of the SEZ by the Developer on the basis of Letter of Permission issued by the Unit Approval Committee and to complete the compound wall for the whole available land of the SEZ area is the responsibility of the Developer. The units, to whom the land/space is leased by the Developer, are, in turn, required to obtain the applicable Environmental

Clearance separately as may be applicable to them. All the units situated in this SEZ may not be required to obtain prior Environmental Clearance which depends upon the category in which they are falling."

IV. Submissions on behalf of the Petitioners:

Mr.Anand Yagnik, the learned counsel appearing for the petitioners, submitted that it is only after the counter was filed by the respondent no.8 MPSEZ to his petition, his clients learnt that the environmental impact assessment committee had recommended to the Ministry of Environment and Forests, Government of India, to grant environmental clearance in terms of Clause 8 of the Notification, 2006, subject to certain terms and conditions, but as the Ministry of Environment and Forests failed to consider such recommendations by the Experts Appraisal Committee within the stipulated period of time, by the deeming fiction provided in Clause 8, a deemed clearance is said to have been granted in favour of the MPSEZ.

According to Mr.Yagnik, the question of deemed environmental clearance has arisen in view of the failure on the part of the regulatory authority, namely, the Ministry of Environment and Forests, to respond to and take an appropriate decision upon the recommendations of the Expert Appraisal Committee within a period of 45 days.

Mr.Yagnik submitted that such a failure is conscious and *mala fide* only with a view to benefit the respondent no.8 MPSEZ in seeking the environmental clearance.

Mr.Yagnik submitted that in such a serious matter the

respondent no.1 - Ministry of Environment and Forests, Government of India, has not thought fit even to file a formal reply so as to make its stance clear before the Court.

Mr.Yagnik submitted that the deeming fiction so far as the grant of environmental clearance on expiry of 45 days from the date of the recommendations of the EAC is concerned, would apply only in cases in which the project or the activity undertaken is strictly in accordance with law. In the present case, according to Mr.Yagnik, there has been a flagrant violation and disregard of the terms of the Notification, 2006, and in such circumstances, the respondent no.8 cannot take shelter of the deemed clearance said to have been granted in their favour.

Mr.Yagnik submitted that the whole defence of the respondent no.8 and the other unit holders as regards the grant of deemed environmental clearance is completely misconceived because not only the respondent no.8 MPSEZ but the individual unit holders have violated the terms of the Notification, 2006 by proceeding ahead with the development in the absence of any environmental clearance. In short, the sum and substance of Mr.Yagnik's submissions is that having committed the illegality the same would not get condoned by a fiction of law, which provides for a deemed environmental clearance.

Mr.Yagnik submitted that the essence of EIA Notification is that unless a prior environmental clearance is granted, the project proponent has no right to put up any construction whatsoever on the land of the proposed project. In the present

case, the respondent nos.10 to 21, on the strength of the so-called leasehold rights conferred by the respondent no.8 MPSEZ in the absence of any environmental clearance granted in their favour, proceeded to complete their individual projects and are operating the same full-fledged past five years. At this stage, now they cannot take the shelter of the deemed clearance by a fiction of law.

Mr.Yagnik submitted that the issue which he has raised in the petition has been substantially answered by this Court in its decision rendered in the case of Ranubha Rajmalji Jadeja and others v. Union of India and others, Writ Petition (PIL) No.194 of 2011 decided on 9th May 2012.

Mr.Yagnik submitted that from the language of the Minutes dated 5th June 2012, it appears that the EAC had no idea that the respondent no.8 MPSEZ had substantially undertaken the work of development and construction to provide infrastructure to the individual unit holders within the SEZ and that the MPSEZ had already made allotment of plots on lease, and on the strength of such leasehold rights, the respondent nos.10 to 21 had fully developed their individual plots by putting up the construction. According to Mr.Yagnik, if the recommendations are final, then only in such circumstances, the question of grant of deemed environmental clearance would arise in the event the regulatory authority fails to respond and take a decision within 45 days thereafter.

Mr.Yagnik would submit that the Minutes of the meeting does not suggest that the recommendations are final and this could be clarified only by the EAC of the Ministry of

Environment and Forests, Government of India.

Mr.Yagnik laid much stress on the fact that the Ministry of Environment and Forests, Government of India, thought fit to appoint Sunita Narain Committee on 14th September 2012 in view of the complaints received from the Kheti Vikas Sewa Trust regarding severe impact upon the environment safety and integrity in MPSEZ committed by M/s.Adani Port and Special Economic Zone Limited.

In such circumstances, the respondents should not be permitted to take shelter of such a deemed environmental clearance as that would frustrate the very object of seeking a prior environmental clearance before undertaking any work of construction on the Special Economic Zone.

Mr.Yagnik placed reliance on the following decisions in support of his submissions :

(1) A Division Bench decision of the Bombay High Court in the case of Gram Panchayat Navlakh Umbre through Navlakh Umbre Parisar Paryavaran Vikas Sangh v. Union of India and others, Public Interest Litigation No.115 of 2010 decided on 28th June 2012;

(2) A Division Bench decision of this High Court in the case of Raj Mineral through Proprietor Sharad L.Vyas v. State of Gujarat, 2011(3) GLH 257;

(3) Commissioner of Municipal Corporation, Shimla v. Prem Lata Sood and others, (2007)11 SCC 40;

(4) Mansinghbhai Kahalsingbhai and others v. Surat Municipal Corporation and others, 2000(2) GLH 269;

(5) Aneeta Hada v. Godfather Travels and Tours Private

Limited, (2012)5 SCC 661;

(6) Modern Dental College and Research Centre and others v. State of Madhya Pradesh and others, (2009)7 SCC 751;

(7) Bharathidasan University and another v. All-India Council for Technical Education and others, (2001)8 SCC 676;

(8) Union of India and others v. All India Children Care and Educational Development Society, Azamgarh and another, (2002)3 SCC 649;

(9) Kalidas Umedram and others v. State of Gujarat and another, (1996)7 SCC 635;

(10) Mansingbhai Kahalsingbhai v. Surat Municipal Corporation, AIR 2001 Guj. 44;

(11) Pravinkumar Maganlal Patel v. Surat People's Co-op Bank Limited, 2008(3) GLH 770;

(12) T.N.Godavarman Thirumulpad v. Union of India and others, (2012)11 SCC 415.

V. Submissions on behalf of the Respondent No.8 MPSEZ in Writ Petition (PIL) No.21 of 2013 and Respondent No.2 in Special Civil Application No.2621 of 2013..

Mr.Dushyant Dave, the learned senior advocate appearing for Singhi & Company raised the following preliminary contentions as regards the maintainability of the Writ Petition (PIL) No.21 of 2013 filed by the villagers :

The petitioners are guilty of suppression of material facts. The petitioners have suppressed the fact that the Expert Appraisal Committee has recommended the environmental

clearance in respect of the Adani Port & Special Economic Zone Limited *vide* minutes of the meeting dated 04/05.06.2012 and minutes of the meeting dated 09/10.07.2012 both of which were available on the official website of Ministry of Environment and Forests. When the petitioners approached this Court on the premise that APSEZ did not have an environmental clearance, it was duty bound to disclose that the EAC had recommended the project and the requisite period under Clause 8(i) and (ii) had already expired resulting in environmental clearance being granted to APSEZ for its SEZ in terms of EIA Notification, 2006 before the petition was filed, particularly when the petitioners appear to be otherwise very well informed. They knew about the Environment Impact Assesment Report of SEZ, the Sunita Narain Committee Report, the earlier judgment in Writ Petition (PIL) No.194 of 2011 and various circulars of MoEF downloaded from the official website of MoEF, etc.

The individual units were setup from 2010 onwards and the petitioners being residents of the village, in the vicinity of which the units have been setup, would have been aware of the fact that the units are being setup in the SEZ. The units are being setup since 2010 and have also thereafter been commissioned. The petitioners have approached this Court after the commissioning of units and more than three years after they were aware of the units being setup.

Even at the time of public hearing for environmental clearance for the SEZ, which took place on 05.10.2010, the petitioners/villagers were aware of the fact that 20 units are being setup as is evident from the objection raised by

Dharmendrasinh Jadeja, President Samaghoga/Baraya Gram Vikas Samiti vide letter dated 05.10.2010 addressed to the Chairman of the Public Hearing Committee.

The petitioners have not made any averment in the petition in respect of the clearance granted to the SEZ pursuant to clause 8(iii) read with clause 8(i) and (ii) of the EIA Notification, 2006 and yet have made oral submissions in respect of the same, which cannot be taken into consideration by this Court. Proper pleadings are a prerequisite for any writ petition including a public interest litigation.

The petitioners have neither challenged the vires of Clause 8(iii) of the EIA Notification, 2006 nor have they have challenged the decision of the Expert Appraisal Committee. The petitioner cannot be permitted to raise such contentions by making mere oral submissions.

Some of the residents of village Navinal had filed Writ Petition (PIL) No. 194 of 2011 seeking relief against two units, which were under construction. When such petition was filed, the petitioners therein would have been aware of the existence of the units of Respondent nos.10 to 21 herein and could have sought relief against the said Respondents in Writ Petition (PIL) No.194 of 2011. They having failed to do so, the present Public Interest Petition through other villagers is barred on the principles of constructive *res judicata*. Different parties/ residents cannot be permitted to approach this Court time and again by filing PILs and seek relief against different units. Such action apart from being barred on the principles of constructive *res judicata* is also an abuse of the process of the Court.

The present petition is not a bona fide public interest litigation, but should be more appropriately termed as a political interest litigation. This is evident from the fact that the petitioners have suppressed material facts, not disclosed the source of their funds to proceed with the present litigation and having come to the Court after a considerable delay.

All parties concerned namely the MoEF, Ministry of Commerce & Industry, Gujarat Pollution Control Board, APSEZ and the units were *bona fide* of the view that no environmental clearance of the SEZ was necessary for individual units to come up in the SEZ till the judgment was delivered in Writ Petition (PIL) No. 194 of 2011 on 09.05.2012. No industrial units have come up after the said judgment was delivered by this Court. Pursuant to the recommendations of EAC, the clearance is granted to the SEZ in terms of EIA Notification, 2006 as per clause S(iii) read with clause 8(i) and (ii) with effect from 20.07.2012.

All the units which are operating, have been granted their respective requisite clearances as required by the MoEF/State Environment Impact Assessment Authority ('SEIAA')/GPCB. These authorities, being aware that the SEZ has not yet been granted environmental clearance, granted clearances to the units.

No condition was imposed, while granting environmental clearance, on the units that the said clearance is subject to the clearance being granted to the SEZ.

The Development Commissioner under the Special Economic Zones Act, 2005 granted approval for the units to be established in the SEZ without any condition qua the environmental clearance to the SEZ and in fact imposed a condition that the unit should be established within a stipulated period.

When the public hearing under the EIA Notification, 2006 was conducted, the villagers were very much aware that units were being established and had even sought information in respect of the same under the RTI Act, and one Dharmendrasinh K.Jadeja in his letter dated 05.10.2010 addressed to the Public Hearing Committee, had specifically mentioned about the existence of 20 units. These proceedings were with the EAC when it recommended environmental clearance in respect of SEZ.

At the EAC meeting held on 16/17.04.2012, presentation was made by APSEZ in which it was highlighted that certain units have been commissioned and the position of the units was also clearly demarcated in the map tendered before the EAC.

The advocate for the petitioners had addressed two letters to the MoEF dated 27.08.2011 and 13.09.2011, specifically alleging that the unit of petitioners of Special Civil Application No.2621 of 2013 are being established in SEZ in absence of environmental clearance to the SEZ. In spite of such letter, when the petitioners of Special Civil Application No.2621 of 2013 inquired from the MoEF *vide* letter dated 12.10.2011 whether they need any environmental clearance or

not, the MoEF responded *vide* letter dated 25.10.2011 that no environmental clearance is required for establishing their units in the SEZ under EIA Notification, 2006.

As is evident from the observations made by this Hon'ble Court in Part-IV of its judgment in Writ Petition (PIL) No. 194 of 2011 dated 09.05.2012, the Union of India was supporting its letter dated 25.10.2011 addressed to the petitioners of Special Civil Application No.2621 of 2013 that no environmental clearance was required for their unit to be established in the SEZ and that the Union had nothing more to say in the matter.

MoEF has itself granted environmental clearance to units in Andhra Pradesh Special Economic Zone on 08.06.2009 and 05.08.2011 before environmental clearance was granted to the said SEZ on 13.02.2012 and the said units were even established before environmental clearance to the SEZ. Similarly, MoEF granted environmental clearance to a unit in Dahej SEZ on 19.08.2008 before the environmental clearance was granted to the said SEZ on 17.03.2010. Even projects within this SEZ were granted clearance by MoEF prior to environmental clearance to the SEZ itself.

In view of Clause 8(iii) of EIA Notification, 2006, the final recommendation of the EAC shall be considered as grant or denial of clearance by the Regulatory Authority in terms of such recommendation, if the Regulatory Authority fails to communicate its decision pursuant to the final recommendations within the time stipulated in Clauses 8(i).

(1) The entire premise of the petitioners' contention is based on an assumption that an application would get "deemed clearance" under Clause S(iii) of the EIA Notification, 2006 if the regulatory authority (MoEF) does not decide within the stipulated period. This is incorrect. The fiction created under Clause 8(iii) is not that the application as made by a project proponent is deemed to be granted, but that the recommendations of the EAC, after scoping and due appraisal, whether approving or rejecting the proposal, are to be treated as the decision of the regulatory authority, which is a different matter altogether.

(2) There is no provision/condition in the EIA Notification, 2006 to the effect that the deeming provision would be inapplicable on account of the commencement of construction prior to grant of environmental clearance. Reading such a condition into the EIA Notification, 2006 would amount to legislating which is impermissible.

(3) Such a condition cannot be read in by an analogy with case law relating to deemed permission, but has to be supported by a provision in the notification, since the fiction is not that the application as made is deemed to be granted without scrutiny, but that the recommendations of the expert body - EAC, made after due appraisal, are treated as if the same is the decision of the regulatory authority.

(4) The principle of "reading down" a provision would not apply in the present case since the same would be applicable only for the purpose of saving the provision from being declared *ultra vires* the Constitution or the parent statute or for the purpose of bringing it in conformity with the parent statute, which is not the case here. In any case, in the absence of a challenge to the provision, there cannot be any question of reading it down.

(5) Similar provisions exist in environmental legislations, including Section 25(7) of the Water (Prevention and Control of Pollution) Act, 1974, proviso to Section 21(2) of the Air (Prevention and Control of Pollution) Act, 1981 as well as Clause 2(V) of the Environment Impact Assessment Notification, 1994. Therefore, a deeming provision is not unknown to environmental legislation.

(6) The scheme of the EIA Notification, 2006 indicates a very comprehensive procedure entailing application of mind at every stage by persons equipped with the necessary expertise for deciding whether an SEZ project deserves environmental clearance, as also the importance of time bound decision making in this regard at every stage. The scheme therefore indicates the rationale and reasonableness of the provisions. Therefore, there is no justification for reading something into the notification by holding that the deeming clause is not applicable to certain cases.

(7) The very authority which has issued the EIA Notification, 2006 has itself not interpreted it to mean that a breach thereof would warrant automatic shelving of the application or would render the deeming provision inapplicable. Such an interpretation by the very authority issuing the notification is entitled to be given weight particularly since the Hon'ble Court is considering interpretation of a subordinate legislation of that authority itself and not the interpretation of a parent statute on the basis of an interpretation of an administering authority.

(8) The judgments on deemed permission cited by the petitioners are clearly distinguishable. In all those cases, the deemed permission itself ran contrary to the statute, in other words the subject matter of such permission (SEZ in this case) was not permitted by law.

(9) Reliance placed by the petitioners and the Union on the letters of MoEF to Gujarat State Coastal Zone Management Authority ("GCZMA") dated 26.10.2012 and the replies thereto by APSEZ and GCZMA do not in any manner militate against the clearance already granted under EIA Notification, 2006 on the basis of the recommendations of the EAC. Even the appointment of Sunita Narain Committee does not militate against the clearance. Such subsequent inquiry cannot in any manner

affect the clearance granted, unless some action in respect of SEZ is taken.

IV. Coastal Regulatory Zone ("CRZ") clearance also stands granted in light of CRZ Notification dated 06.01.2011.

Since project has been granted clearance under the EIA Notification and since Gujarat State Coastal Zone Management Authority has recommended the project, the contention that CRZ clearance is not granted is ex-facie untenable.

V. Sunita Narain Committee was constituted after the clearance is granted to APSEZ in terms of Clause 8(iii) and the same was constituted in respect of earlier environment clearance granted in respect of the port activities of the project proponent and not in respect of the SEZ, which is an independent project of the project proponent.

VI. A company such as APSEZ has various projects such as port and port backup related activities, social infrastructure, SEZ. For each such project, APSEZ as a project proponent is required to obtain environmental clearance. As and when it obtains environmental clearance in respect of such project, the project proponent can carry out the activities of such project. There is absolutely no requirement that all environmental clearances are required to be obtained before any activity is carried out.

SEZ is one of the projects of the project proponent APSEZ. While it is true that it can carry out activities and create infrastructure for the SEZ after obtaining environmental clearance under EIA Notification, 2006, there is nothing under the Special Economic Zones Act, 2005 or the EIA Notification, 2006 prohibiting it from leasing the land to different parties for establishing their projects in the SEZ and that both the SEZ and the units can establish themselves after obtaining necessary consents/environmental clearance respectively.

While the judgment delivered by this Hon'ble Court in Writ Petition (PIL) No.194 of 2011 dated 09.05.2012 is a binding precedent, the respondent no.8 submits that the factual premises on the basis of which the said judgment has proceeded is incorrect in so far as it proceeds on the basis of the answer given on behalf of this respondent to a specific query raised by the Hon'ble Court. It clearly appears from the judgment that the Counsel for the Respondent did not appreciate the purport of the question and consequently answered it on the basis of what he understood was the question.

Section 3 of the Special Economic Zones Act, 2005 (hereinafter referred to as the 'Act') provides for the procedure for seeking approval of a Special Economic Zone ('SEZ') and its grant by the Central Government. Once an area is notified under Section 4(1) of the Act as a SEZ exemption is available both under Section 7 and Section 26 of the Act to the SEZ or a unit situated therein. The areas in the SEZ have to be

demarcated into processing and non-processing areas by the Development Commissioner under Rule 11 of the Special Economic Zones Rules, 2006 (hereinafter referred to as the 'Rules') read with Section 6 of the Act.

For establishing a unit in a SEZ the person so interested may submit a proposal to the Development Commissioner which shall forward it to the Approval Committee and once approval is granted by the Approval Committee, the Development Commissioner may grant Letter of Approval to the person concerned. The relevant provisions are Section 15 of the Act read with Rule 17 and 18 of the Rules. The Developer can enter into a lease agreement and give possession to such entrepreneur only after the Development Commissioner grants Letter of Approval, and such entrepreneur individually will have to undertake to fulfill environmental and pollution control norms as may be applicable to the industry/unit which he proposes to establish [*see Rule 18(2)(ii) and (iii)*]. Thus, the Act itself contemplates individual environment and pollution clearances to be obtained by the units which are being set up in the SEZ.

In the event, SEZ is refused environmental clearance the units may lose the benefit of exemptions granted under the Act, but the land leased to them would continue to be with them and if they want to run the industry they can do so long as they fulfill the requirements of environmental laws.

In view of the above, it is not essential for leasing of land or for establishment of units in the SEZ that SEZ should have environment clearance. The individual units must obtain such environmental clearance, as may be necessary.

SEZ of the respondent no.8 is presently extending over 8000 ha and to develop the complete SEZ would take considerable time. The property of the SEZ belongs to APSEZ. There is absolutely no bar in giving lands in the processing zones on lease for units to come up after the Development Commissioner grants approval to such units to be established in the SEZ. There is absolutely no bar in the units being established either under the SEZ Act or under the Environment (Protection) Act, 1986 for units to obtain their environmental clearance and establish themselves as and where environmental clearance has been granted (See above). Development activities have been carried out either by the developer or co-developer (such as CETP and social infrastructure). In fact the CETP has been established for the benefit of the units which have been approved by the Development Commissioner. It would be well neigh impossible for the developer to completely develop the SEZ and then grant lease for the units to come up. That is not the intendment or purport of the provision of the Act or the rules framed thereunder.

Once the Development Commissioner grants the approval to the unit, such approval is only for the period of one year and the unit has to commence production/service within

one year, which can be extended for further period not exceeding two years and for a further period of one year provided two-third of the activities relating to the setting up of the unit is complete. [*see Rule 19(4)*]

The respondent no.8 charges lease rentals for the land given on lease and such charges have nothing to do with the infrastructure to be provided by the respondent no.8. It is a pure and simple lease between the owner of the property and the lessee. Separate maintenance charges are leviable by the respondent no.8 for the infrastructure which it provides/may provide in future. If the SEZ fails to provide, for any reason whatsoever, it can still charge lease rentals, while it may not be in a position to claim any maintenance charges.

Even otherwise, the judgment dated 09.05.2012 passed in Writ Petition (PIL) No. 194 of 2011 also does not lay down that the Developer cannot sub-lease the land, since the observation that the Developer was not entitled to sub-lease the land is found only in the supporting view taken by the Hon'ble Chief Justice. In fact, the finding in the judgment rendered by one of us (Pardiwala, J.) is to the effect that the Developer could have allotted plots to the companies desirous of putting up their Units. Therefore, the said judgment dated 09.05.2012 contains two different views on this issue and hence it may not be considered to be an authority for the proposition that the allotment or lease of the plot is impermissible in law.

The contention that the approval granted to the SEZ under SEZ Act has expired is *ex-facie* untenable in view of Rule 6(2)(a) and (aa) of the Rules, which provide that the Letter of Approval of a Developer shall be valid for three years, within which time atleast one unit has commenced production, in which case the approval shall continue. In the instant case as this has happened, the validity of the Letter of Approval continues.

VI. Submissions on behalf of the Respondent Nos.10,14,15,17 and 19 :

Mr.Mihir Joshi, the learned senior advocate assisted by Mr.Shamik Bhatt, made the following submissions :

The recommendations made by the EAC are not the subject matter of challenge in Writ Petition (PIL) No.21 of 2013 filed by the villagers. In such circumstances, the petition itself would not survive and if the petitioners are inclined to challenge the legality and validity of grant of deemed environmental clearance on the basis of the recommendations of the EAC, then the petitioners should file a fresh petition and no relief could be granted in the present petition.

Mr.Joshi submitted that assuming for the moment that his clients took possession of the plots allotted to them by the MPSEZ and pursuant to such allotment they put up construction and started operating their individual units, by itself would not be a bar in grant of environmental clearance.

Mr.Joshi submitted that this petition deserves to be

rejected on the ground of delay itself as his clients have already started operating their units since 2008 onwards and by now a huge investment has been made in the individual projects.

Apropos the aforenoted submissions, according to Mr.Joshi, the learned senior advocate appearing for the individual unit holders, the following issues may be considered by this Court in deciding whether the petitioners are entitled to any of the reliefs claimed in the petition :

1. Whether the commencement of construction in the SEZ prior to grant of environmental clearance can render the provision for deemed clearance inapplicable and ineffective in the facts of the case.

2. Whether the commencement of construction in the SEZ prior to grant of environmental clearance can render the decision of the EAC void and non-est under law.

3. Whether the decision of the EAC deserves to be quashed and set aside on the limited parameters of judicial review available in cases of decisions of Expert bodies.

4. Whether legality and validity of the deemed clearance of the SEZ and that of the decision of the EAC dated 4/5.6.2012 recommending grant of environment clearance can at all be questioned in the absence of any challenge thereto or relief being sought for in that behalf in the petition.

5. Whether the default of the Developer in obtaining environmental clearance for the SEZ at the relevant time or the inaction of the authorities in processing the application for environmental clearance, is of a nature as would render the setting up of Units illegal, particularly in the context of existence of valid permissions granted to the Units under the

SEZ Act and environment laws and in the context of the absence of any default, mala fides or bad faith on the part of the Units.

6. In the facts of the case, where the EAC has recommended environmental clearance, where the Units have duly complied with their obligations under law and there is no fault or bad faith that can be attributed to the Units, whether the petitioner is entitled to the relief of closure/demolition of the Units as prayed for, particularly in the absence of any adverse environment impact being 'averred or established.

7. Whether a direction for demolition on the ground that the deemed clearance in any case would not validate the prior illegality, is not harsh, inequitable, disproportionate and would amount to issuing a futile writ, since the same construction could be put up immediately upon demolition.

8. Whether the subsequent actions of the MoEF militate against the contention regarding deemed clearance.

9. Whether the respondents are in contempt of earlier directions of this Hon'ble Court.

10. Whether the petition is barred by delay and laches.

11. Whether the petition is maintainable.

VII. Submissions on behalf of the Respondent Nos.11,16,18 and 21 :

Mr.Mihir Thakor, the learned senior advocate appearing with Ms.Amrita Thakor, has raised the following submissions :

The entire premise of the petitioners' contention is based on an assumption that an application would get "deemed

clearance" under Clause 8(iii) of the EIA Notification, 2006 if the regulatory authority (MoEF) does not decide within the stipulated period. This is incorrect. The fiction created under Clause 8(iii) is not that the application as made by a project proponent is deemed to be granted, but that the recommendations of the EAC, after scoping and due appraisal, whether approving or rejecting the proposal, are to be treated as the decision of the regulatory authority which is a different matter altogether.

There is no provision/condition in the EIA Notification, 2006 to the effect that the deeming provision would be inapplicable on account of the commencement of construction prior to grant of environmental clearance. Reading such a condition into the EIA Notification, 2006 would amount to legislating which is impermissible.

Such a condition cannot be read in by an analogy with case law relating to deemed permission, but has to be supported by a provision in the notification, since the fiction is not that the application as made is deemed to be granted without scrutiny, but that the recommendations of the expert body - EAC, made after due appraisal, are treated as if the same is the decision of the regulatory authority.

The principle of "reading down" a provision would not apply to the present case since the same would be applicable only for the purpose of saving the provision from being declared *ultra vires* the Constitution or the parent statute or for the purpose of bring it in conformity with the parent statute, which is not the case here. In any case, in the absence of a

challenge to the provision, there cannot be any question of reading it down.

Similar provisions exist in environmental legislations, including Section 25(7) of the Water (Prevention and Control of Pollution) Act, 1974, proviso to Section 21(2) of the Air (Prevention and Control of Pollution) Act, 1981 as well as Clause 2(V) of the Environment Impact Assessment Notification, 1994. Therefore, a deeming provision is not unknown to environmental legislation.

The scheme of the EIA Notification, 2006 indicates a very comprehensive procedure entailing application of mind at every stage by persons equipped with the necessary expertise for deciding whether an SEZ project deserves environmental clearance, as also the importance of time bound decision making in this regard at every stage. The scheme therefore indicates the rationale and reasonableness of the provisions. Therefore, there is no justification for reading something into the notification by holding that the deeming clause is not applicable to certain cases.

The very authority which has issued the EIA Notification, 2006 has treated the project/activities inside the SEZ distinctly from the SEZ itself. In the case of the Dahej SEZ, the MoEF granted environmental clearance to one Indofil Organic Industries Ltd. situated in the Dahej SEZ on 19.8.2008, much prior to the grant of environmental clearance to the Dahej SEZ itself on 17.3.2010. Even in the present case, the Thermal Power Plant, the CETP and Township and Area Development Project, which are all situated inside the SEZ, have been

granted environmental clearance and are carrying on activities.

The very authority which has issued the EIA Notification, 2006 has itself not interpreted it to mean that a breach thereof would warrant automatic shelving of the application or would render the deeming provision inapplicable. Such an interpretation by the very authority issuing the notification is entitled to be given weight particularly since the Court is considering the interpretation of a subordinate legislation of that authority itself and not the interpretation of a parent statute on the basis of an interpretation of an administering authority.

The nature of the alleged illegality is not such as would warrant non-consideration of the application for all time to come, for the following reasons :

i. The clearance is sought for an SEZ which is essentially an industrial estate, with little pollution potential of its own and grant thereof does not give an unbridled licence for units to be set up in the area since they also have to comply with the requirements of the environment laws individually.

ii. The construction of the Thermal Power Plant (TPP), CETP and social infrastructure in the SEZ has been undertaken with appropriate environment clearances which have not been challenged.

iii. The Units were not made aware at any stage that SEZ did not have the required clearance and the representation was to the contrary as evidenced by the lease deeds. The authorities have at no point of time ever conveyed any objection to the activities undertaken by the units for setting up their industry. The Units have applied for and obtained permission for setting up Unit in SEZ from the Development Commissioner and No Objection Certificate and Consolidated Consent from GPCB as applicable.

iv. The illegality as held by this Court is in the Units commencing construction prior to the clearance being granted to the SEZ. The Units have otherwise been set up in accordance with the necessary permissions and in accordance with law. A distinction must be drawn between commencement of construction without the SEZ having permission at that stage and a Unit set up without requisite approvals at all, and the consequences of both cannot be the same.

v. The nature of the illegality is such that public purpose will not be sacrificed if it is impliedly regularised by granting the clearance.

vi. In any case, the requirement of prior clearance is by subordinate legislation and the interpretation and understanding of the authorities is also not that post facto grant is impermissible.

In the present case, there is no allegation of any illegality attached to the decision making process and hence there cannot be any question of judicial review in the present case.

The EIA Notification, 2006 provides for a comprehensive procedure leading upto the recommendation by the EAC. Clause 7(11) provides that the EAC is required to determine comprehensive Terms of Reference (TOR) addressing all relevant environmental concerns for preparation of an EIA Report. Thereafter, as per Clause 7(111), a public consultation has to take place during which the concerns of the local affected persons and others having a plausible stake in the environmental impact of the project are to be ascertained. The final EIA Report is to be prepared pursuant to the completion of public consultation and this is to be submitted to the EAC by the applicant. Thereafter, the EAC is required to carry out appraisal of the project in terms of Clause 7(IV), which means a detailed scrutiny of the application, final EIA Report, outcome of public consultations, etc. After detailed scrutiny, the EAC has to make its recommendation to the regulatory authority either or grant or for rejection of environmental clearance.

In the present case, the aforesaid process has been followed over a period of 3 ½ years starting from January 2009 when the TOR was determined, public consultations during October 2010 record of which was sent to MoEF, submission of Rapid Environment Impact Assessment Report and presentation by the respondent no.8 before the EAC in April 2012, submission by the respondent no.8 of the

details/information sought by EAC in May 2012 and thereafter, the recommendation of the EAC on 4/5.6.2012.

At no stage the entire proceeding culminating in the EAC's recommendation has been challenged on any ground. Nor has the same been challenged or questioned in the present petition. There is no fault found in regard to the decision making process. Therefore, the EAC's decision is not open to challenge in the present petition.

Assuming that the EAC's decision is open to challenge on merits, the EAC is constituted by the Central Government under Clause 4(h) of the EIA Notification, 2006 and comprises of professionals and experts with requisite expertise and experience in certain fields/disciplines as more particularly provided in Appendix VI of the EIA Notification, 2006. Therefore, the decision of the EAC is a decision of a expert body. The Courts are not equipped with necessary expertise to look into the issue of whether the decision of the EAC is incorrect on merits, that is, whether the SEZ project deserves, on merits, an environmental clearance or not.

The petitioners have sought to contend that the EAC was not cognizant of the fact that the respondent Units were already constructed and were operational inside the SEZ and certain other infrastructure facilities were also established and hence its decision is based on incorrect and incomplete facts, which therefore vitiates its decision. In this regard, the respondents submit as under:

i. This argument of the petitioners confuses the SEZ project with the individual projects of the Units situated inside the SEZ. The bar against construction is qua the SEZ project/activity and not the independent projects/activities coming up inside the SEZ like those of the respondent Units. This is also the understanding of the very authority which has issued the EIA Notification, 2006. [see the case of the Dahej SEZ and Indofil Organic Industries Ltd. Here also, environment clearance was granted to the Thermal Power Plant, the CETP and Township and Area Development Project, which are all situated inside the SEZ]

ii. There is no provision in the EIA Notification, 2006 to the effect that construction carried out prior to grant of environmental clearance would result in rejection of the proposal of the project proponent. Therefore, the decision of the EAC cannot be vitiated on such a ground which is not available as per the provisions of the EIA Notification, 2006.

This petitioners' argument proceeds on a presumption that the EAC was not aware of the construction inside the SEZ. Such a presumption is not warranted in the absence of the records and proceedings of the EAC and is not warranted even in view of the following documents/facts on the record of the present petition: (1) Development Commissioner's letter dated 30.7.2010, (2) representation dated 5.10.2010, (3) GPCB's letter dated 11/18.10.2010, (4) judgment dated 9.5.2012, (5) minutes of EAC meeting dated 4/5.6.2012 indicating that EAC

was aware of court cases, (6) the fact that respondent no.8 had made a presentation and submitted a map with the location of the Units to EAC during its meeting dated 16/17.4.2012, (7) MoEF's site visit on 6/7.12.2010, (8) the activities of some of the Units (for example the respondent no.16 manufactures very huge boilers weighing hundreds of tons, and the respondent no.18 has a warehouse and open yard for storage of machinery and equipment) are such that it is not possible to suggest that such activities can be carried out otherwise than in an open manner, (9) the Units are operating under their own independent permissions granted by concerned authorities, (10) the other projects inside the SEZ like TPP, CETP, township have received environmental clearance.

The petition primarily seeks an order restraining the respondents' activities till environmental clearance is granted to the SEZ. It does not question the legality and validity of the decision of the EAC dated 4/5.6.2012 recommending grant of environment clearance, or that of Clause 8(iii) of the EIA Notification, 2006, or that of the deemed clearance to the SEZ by virtue of the said Clause 8(iii).

Going into the question of the correctness or otherwise of the EAC's decision or the validity of the deemed clearance would amount to changing/enlarging the scope of the petition and travelling far beyond the pleadings.

A challenge to the EAC's recommendation would necessarily entail comprehensive pleadings on fact and law as

also grounds on which the same is challenged, and would involve going into the records of the proceedings prior to the recommendation made by the EAC and also EAC's own records. Without this, the issue of validity of the EAC's recommendation cannot be gone into.

As per Clause 8(iii) of the EIA Notification, 2006, if the decision of the MoEF (which is the regulatory authority) is not communicated within the period specified, the recommendation of the EAC is deemed to be the decision of the MoEF. In the present case, the MoEF has not communicated any decision in regard to grant/rejection of environmental clearance to the SEZ pursuant to the recommendation of the EAC as contained in the minutes of the EAC's meeting held on 4/5.6.2012 and 9/10.7.2012. Therefore, Clause 8(iii) of the EIA Notification, 2006 comes into play and hence the recommendation of the EAC to grant environmental clearance to the SEZ is deemed to be the decision of the MoEF.

In the absence of any pleading or relief sought, it would not be permissible to go into the legality or otherwise of the deemed clearance of the SEZ, not only since it would amount to travelling far beyond the scope of the petition but also because it would amount to questioning the provisions of the EIA Notification, 2006 without any foundation whatsoever for doing so in the petition itself.

Going into the validity of the deemed clearance would also amount to changing the nature of the petition which is

limited to seeking a restraint order against the respondent units till the SEZ has environmental clearance.

The Developer of an SEZ is either the owner or the lessee of the land on which the SEZ is established. Such ownership/leasehold rights are independent property rights of the Developer which have no connection with environmental laws and therefore, lease/sublease by the Developer of such land or portions thereof in favour of other entities is not subject to environmental laws. The Units are therefore legal and validly in possession of their respective parcels of land and have rights over the same.

The EIA Notification, 2006 does not bar establishment and operation of Units in their respective plots even if the SEZ itself has not received environmental clearance. If the individual Units operating inside an SEZ (which does not have environmental clearance) have obtained all necessary permissions/consents, they would be in the same position as similar non-SEZ units operating outside an SEZ.

The provisions of the SEZ Act provide that a person intending to set up a Unit in an SEZ has to submit a proposal to the Development Commissioner concerned. Such proposal is thereafter forwarded to the Approval Committee for its approval. If approval is granted, the Development Commissioner issues a Letter of Approval to the person concerned to set up a Unit in the SEZ and undertake such operations which the Development Commissioner may authorise. The SEZ Rules prescribe that a Letter of Approval would be valid for a period of one year within which period the

Unit shall commence its activity, subject to an extension being granted by the Development Commissioner on a request of the entrepreneur. It is also provided that the Letter of Approval would be valid for 5 years, subject to further extensions, from the date of commencement of production or service activity and it shall be construed as a licence for all purposes related to authorized operations. Thus, the said provisions demand timely action on the part of the Units in regard to starting their commercial actitivities.

The present respondents (which are entities having no connection with the respondent no.8) are Units situated within the multi-product SEZ of the respondent no.8 situated at Mundra, Kutch. The said respondents have been issued their respective Letters of Approval by the respondent no.5 - Development Commissioner for setting up their units and carrying on their operations in the SEZ. The said respondents have executed their respective agreements with the respondent no.8 in respect of the revenue survey numbers or part thereof on which their units are situated. They have received necessary permissions, as applicable to each of them, under applicable environmental laws.

Thus, the existence and activities of the units are carried out pursuant to necessary approvals and permissions having been granted by various authorities including the Central Government through the Development Commissioner. The activities of the respondent units can, by no stretch of imagination, be termed as "surreptitious" and are in fact very much within the knowledge of all concerned authorities, including the Central Government.

The respondents are independent entrepreneurs unconnected with the respondent no.8, who, being the "Developer" of the SEZ, has to provide only the infrastructure facilities in the SEZ. They have themselves constructed their industrial sheds/units on their respective parcels of land inside the SEZ. The respondent no.8 has nothing to do with the ownership, construction and operation of the units.

The units were not made aware at any stage that the SEZ did not have the required clearance and the representation was to the contrary as evidenced by the lease deeds.

The authorities have at no point of time ever conveyed any objection to the activities undertaken by the units for setting up their industry.

The units have been established based on the understanding and interpretation placed by the very authority (MoEF) which has issued the EIA Notification, 2006 to the effect that the units in an SEZ are to be treated distinctly from the SEZ itself.

The units have no say in and cannot take any steps in regard to getting environmental clearance in respect of the SEZ.

Had the respondents been aware that the SEZ did not have all necessary clearances and that they could not have constructed and operated inside the SEZ, there was no logical reason or advantage to them to invest huge sums of money in

establishing their units in this SEZ, given the likelihood of closure/demolition of the said units.

The case is required to be viewed in the context of the fact that, if the units are closed/demolished, it would result in a serious travesty of justice. This is because the consequence of the inability or default of the Developer in obtaining environmental clearance or the inaction of the authorities in processing the Developer's application for environmental clearance would solely fall on the units, which have started after complying with all their requirements and which have absolutely no say in the matter of environmental clearance of the SEZ. Such a direction would therefore be extremely harsh and inequitable.

The units have established on the basis of their respective Letters of Approval, agreements and permissions/consents. They were not made aware at any stage that the SEZ did not have the required clearance and the representation was to the contrary as evidenced by the lease deeds. The authorities have at no point of time ever conveyed any objection to the units' activities.

The EIA Notification, 2006 does not contain any provision to the effect that the units would be prohibited from carrying on construction and industrial activity. Nor does it contain any provision for closure/demolition of the units on such a ground. Thus, such a prayer is not supported by law.

The understanding and interpretation of the authorities as regard the provisions of the EIA Notification, 2006 was also

to the effect that the activities of the units could go ahead if they had their own permissions as applicable.

There is no allegation of any environmental damage on account of the activities of the units.

The entire procedure as prescribed in the EIA Notification, 2006 has been followed pursuant to which the EAC has recommended that the SEZ be granted environmental clearance. The MoEF having not taken a contrary decision within the stipulated time, the said recommendation has become the decision of the MoEF as per law. Even if it is held that the deeming provision as per Clause 8(iii) of the EIA Notification, 2006 would not apply in the present case, the fact remains that the EAC has recommended grant of environmental clearance to the SEZ and hence demolition of the units pending the decision of the MoEF would be unjust and inequitable, especially when the EIA Notification, 2006 itself provides that the recommendation of the EAC should normally be accepted.

If demolition is directed and thereafter the MoEF accepts the recommendation of the EAC, it would imply issuance of a futile writ and would also entail huge losses to all concerned.

The consequences of issuance of a writ as prayed for would fall on the units who have not indulged in any illegality at all, without subserving any public interest since the breach complained of is not having environmental clearance for

commencing activity in the SEZ, and not that of any adverse environment impact.

Even otherwise, such a direction cannot be passed in the present proceedings without the petitioners having approached the appropriate authorities having the powers to direct demolition.

In the aforesaid circumstances, it would be extremely unjust and unreasonable to direct closure/demolition of the units.

The EIA Notification, 2006 does not contain any provision for suspending the time period prescribed in Clause 8 thereof. Such a provision cannot be read into the notification.

The time period prescribed in Clause 8 of the EIA Notification, 2006 for the regulatory authority (MoEF) to take a decision and the effect of not taking a decision within such period cannot be suspended on account of mere inaction/failure on the part of the MoEF to take a decision. Such an interpretation would be dehors the language of the provision and would defeat the purpose thereof.

The period of 45 days from the date of the recommendation of the EAC got over on 21.7.2012 or 25.8.2012. The only subsequent action of the MoEF was that of addressing the letter dated 26.10.2012 to the GCZMA and that of appointing the Sunita Narain Committee, which was done on 14.9.2012. Both the said actions were subsequent to the

expiry of the period of 45 days and therefore had no bearing on the deemed clearance.

Even otherwise, many months have passed since the Department of Forests and Environment, State of Gujarat addressed a letter dated 9.1.2013 to MoEF giving details as sought by the MoEF and the Sunita Narain Committee gave its report dated 18.4.2013. Despite this, nothing is heard from the regulatory authority. Hence, there is no justification for contending that the deeming provision as contained in Clause 8(iii) of the EIA Notification, 2006 remains in abeyance even as on date.

The earlier directions were given in Writ Petition (PIL) No. 194 of 2011 in which the respondents were not made parties. Therefore the respondent cannot be said to be in contempt thereof.

The directions in that petition were specifically to the units which were made parties therein and hence do not apply to the present respondents.

The units have been constructed and are functioning in the SEZ since about 2 years or more. The nature of the construction and activities are such that there could be no question of doing the same "surreptitiously". The units have obtained all approvals/permissions as applicable to them and such approvals/permissions are public records. The record of the present petition indicates that the petitioners were aware of the existence of the units.

The records pertaining to the construction and activities of the Thermal Power Plant, the CETP and the township were also publicly available since these projects were granted environmental clearance and these facts were also in the knowledge of the petitioners since the petitioners have themselves produced the EIA Report**.**

The present petition was filed on or about 12.2.2013, that is, many years after the construction of the units and the aforesaid projects started and much after the said units and projects commenced their commercial activities.

The Writ Petition (PIL) No.194 of 2011 seeking almost identical reliefs was filed on or about 28.12.2011 and it is clear from the judgment rendered therein that the existence of the units was within the knowledge of the public much prior to the filing of the same.

The petitioners, by their own inaction, have allowed the units to be set up by incurring huge expense and have placed the respondents in a situation in which it would be unreasonable, inequitable and unjust to put them back in their original position prior to the construction of their respective units. In such circumstances, the respondents submit that the present petition suffers from gross delay and laches and the reliefs sought by the petitioners, if granted at this stage, would result in grave injustice and inequity.

There is no allegation of any environmental impact of damage or imminent danger to the environment or any injury

and hence there is no violation of any constitutional or legal right.

The petitioners have not approached the appropriate authorities under the environmental laws in regard to the prayers made by them in the present petition. The petitioners are asking this Court to act as a substitute to the authorities established under the environmental laws.

The petition is barred in view of the National Green Tribunal Act, 2010 and the judgment of the Hon'ble Supreme Court reported in 2010 (8) SCC 326**.**

VIII. Submissions on behalf of the Respondent No.12 – Empezar Logistics Private Limited :

Mr.P.C.Kavina, the learned senior advocate appearing on behalf of the respondent no.12, submitted that so far as his client is concerned, there is no question of any environmental impact or damage or imminent danger to the environment as his client is engaged in the business of providing its service in relation to warehousing, storage of goods, container freight stations and allied services, logistics support and other such activities. Mr.Kavina submitted that according to the provisions of the EIA Notification, 2006, the environmental clearance is required to be taken by only those projects which are listed in the Schedule thereto and not any others. In such circumstances, according to Mr.Kavina, the case of his client is altogether different from the other respondents.

IX. Submissions on behalf of the Petitioners of

Special Civil Application No.2621 of 2013 :

Mr.Gopal Subramaniam, the learned senior advocate appearing for the petitioner, made the following submissions :

In the case of the Mundra SEZ, the EAC recommended approval of the proposal of APSEZ for EC as recorded in the minutes of its meeting held on June 4-5, 2012 read with the minutes of its meeting held on July 9-10, 2012. More than a year has passed since then but the MoEF has not conveyed its decision. The time frame stipulated in Clause 8 of the EIA Notification has elapsed long ago and it is submitted that by virtue of the provisions of Clause 8 of the EIA Notification, the EC is deemed to have been granted by MoEF to the Mundra SEZ in terms of the final recommendations of the EAC. Hence, it is submitted that the Petitioners can carry on construction and proceed ahead with the implementation of their respective Projects in the Mundra SEZ.

It is submitted that in the present case it is the EAC which is the expert body for making the recommendation as to whether EC should be granted or not. The panel of EAC is constituted by experts that are appointed by the Government itself and paramount importance has to be given to the recommendations of the EAC as is also evident from the fact that Clause 8(ii) itself mandates that 'the Regulatory Authority shall normally accept the recommendations of the Expert Appraisal Committee...'. Further, the EIA notification 2006 issued by the Government is a complete code that is not dependent on anything.

It is submitted that the role of the regulatory authority MoEF whilst considering the EAC recommendations is very limited inasmuch as MoEF is not an expert body but a Ministry having no expertise in the matter. MoEF has very limited discretion in the matter and must normally accept the recommendations of the Expert Appraisal Committee.

Clause 8(iii) is not a deeming fiction whereby upon expiry of a particular period, the mere application for EC stands automatically granted without any application of mind. Clause 8(iii) creates a deeming fiction only to give finality to the recommendations of the expert body i.e. the Expert Appraisal Committee which has considered the application for EC in detail and has made the recommendation after following the detailed stage wise procedure prescribed in Clause 7 and after a thorough and detailed application of mind by the experts comprising the EAC. Clause 8 (iii), therefore, only gives finality to the recommendation of the expert body which has made its recommendation on the basis of a detailed inquiry into the same. Clause 8(iii) gives finality to the recommendations of the expert body whose recommendations are even otherwise mandated to be normally accepted by the Regulatory Authority under Clause 8(ii).

It is submitted that this Court and the MoEF both cannot substitute their opinion for an expert opinion. The Central Government being the regulatory authority has no expertise of its own and must normally act on the report submitted by the EAC. The Central Government does not possess unfettered discretion but only guided discretion which discretion is based upon the recommendations of EAC.

It is submitted that if the Central Government would have had any objection to the EAC recommendations it would have pointed out the same in the first instance. In the present case without prejudice to the contention that EC has already been granted to Mundra SEZ as per Clause 8 of the Notification, it can also be logically and reasonably be inferred that EAC's recommendation for grant of EC has been accepted by the Central Government.

It is submitted that the obligation of the Central Government under the notification is timely and the sole intention of putting the time constraint is to ensure that a timely decision is taken by the Central Government which in the present case it has failed to take. It is submitted that an applicant who is entitled and recommended by the experts for an EC should timely know the stand of MoEF, otherwise it may have to face a situation of cost overrun causing massive financial injury to such an applicant.

This Court in its judgment dated 9.05.2012 in Writ Petition (PIL) No.194/2012 had held the Petitioners i.e. ABFPL does not require any EC as the Projects proposed to be set up by the Petitioners do not fall under the category of projects requiring EC under the EIA Notification, 2006. However, the Petitioners were prohibited from proceeding ahead with the implementation of their Projects and to undertake any further construction work due to the finding that the Mundra SEZ had not yet been granted an EC for the Multi Product SEZ as a whole. The Petitioner in compliance with the said order immediately stopped further construction of their Projects.

It is submitted that after the judgment dated 9.05.2012, various developments have taken place and EAC being the expert body, after detailed and careful analysis of all relevant facts and circumstances, has recognized that EC has to be given to APSEZ. APSEZ has informed the Petitioner that it has fulfilled all necessary requirements for grant of EC. However, the Central Government has neither rejected nor accepted the recommendation of the EAC. It has not asked the EAC to reconsider its recommendation. It is submitted that there has been absolutely no communication from MoEF with regard to the EAC recommendations. The Central Government has to act reasonably and has to keep in mind the cannons of discipline while accepting or rejecting the recommendations of EAC, however, it can surely not be allowed to merely sit silent for over a year.

Further, this is not even a case where the Central Government has put APSEZ to certain terms and conditions before it could act upon the EAC recommendations. Instead, MoEF has formed a new third party committee namely the Sunita Narain Committee that has no role whatsoever and any view taken by this new committee whether positive or negative will be of no help. It is submitted that the Committee is an extra-judicial body which has no power or authority whatsoever insofar as analyzing the EAC recommendations is concerned.

It is submitted that it can surely not be allowed by this Court that the Petitioner herein suffers for absolutely no fault of its own and only due to MoEF's unjustified delay in considering the EAC recommendations. It is submitted that this

Court, in the backdrop of such facts, has the authority to put certain terms and conditions to APSEZ whilst acting upon its EC as recommended by the EAC and may also take a guarantee from APSEZ that it will fulfill all its obligations.

It is submitted that the sole intention of the judgment dated 9.05.2012 was to prevent an irregularity which could be rectified even now. The intention was never to dislocate the units but to compensate the ones who have been dislocated.

It is submitted that it is for this Court to decide the future coarse of action and no purpose will be served by sending the matter back to the Government or to the EAC. Even the Sunita Narain Committee Report recognized the same and suggested the following -

> "*7.2. Recommendation for effective deterrence for non-compliance and remedial measures - In the Committee's assessment there is incontrovertible evidence of violation of EC condition and non-compliance. It must also be recognized that the Company has bypassed environmental procedures in certain cases. The question before the Committee is to determine the future course of action. One option would be to recommend the cancellation of clearances, where procedures have been bypassed. In addition, legal proceeding could be initiated against non-compliance and violations of EC conditions. But it is also clear that these steps, however, harsh they may sound, are in the nature of being procedural and would only lead to delay without any gains to the environment and the people. The Committee is cognizant of the fact that large scale development has already been undertaken and it is not possible or prudent at this stage to halt or cease its operations. Therefore, the Committee has decided to recommend a different course of action, which is both intended to be an effective deterrent and also suggests the way for future remedial action to improve the environment.*"

It is submitted that it is a well-known fact that there were no indigenous turbine manufacturing facilities in India and therefore turbines had to be imported in to India which had been a very expensive process. Alstom being one of the leading manufacturers would be manufacturing these turbines in India through the petitioners which would be cost effective and environment friendly. It is submitted that the petitioners being a responsible company, has acted with great caution as it has not performed any activity whatsoever after the judgment dated 9.05.2012 unlike the other 12 units and moreover has acknowledged its duty to secure the environment and protect the same.

The petitioners submit that upon learning that the EAC in its 113 meeting held on 4/5th June, 2012 and the 114th meeting held on 9/10th July, 2012 had duly recommended the proposal of the Mundhra SEZ favourably for grant of EC and CRZ Clearance, the petitioners first addressed a letter dated 28th September 2012 seeking clarifications from APSEZ whether it had complied with all the conditions mentioned by the EAC in its minutes while recommending their case for grant of EC by the competent authority and whether after the recommendations by EAC on 9th July 2012, APSEZ had heard anything from the Government on the issue. By its letter dated 29th September, 2012, APSEZ informed the petitioners that it had complied with all the conditions mentioned in the Minutes of the 113th meeting of the EAC and also that APSEZ had not received any communication from the MoEF after the 114th Meeting of the EAC was held on 9th July 2012. The time frame

stipulated in Clause 8 of the EIA Notification having elapsed and therefore, by virtue of Clause 8 (iii) of EIA Notification, the recommendation by the EAC having been deemed to have been accepted by MoEF, the petitioners *bona fide* believed and continue to believe that the EC sought for Mundra SEZ is deemed to have been granted by MoEF in terms of the EAC recommendation. However, before acting further on the basis that the EC had been granted, the petitioners thought it fit and proper to first seek a clarification from the MoEF in this respect. In view of the same, the petitioners sent a letter dated 11th October, 2012 to the MoEF *inter alia* drawing its attention to the provisions of Clause 8(iii) of the EIA Notification and requesting MoEF to advise the petitioners as to whether their understanding of the said clause is correct and they can accordingly proceed with the implementation of their Projects and resume their construction activities. MoEF did not reply to the letter and did not give any clarification as to whether EC is deemed to have been granted to APSE2.

It is the MoEF's responsibility to put APSEZ to terms and ensure that APSEZ complies with them. However, the MoEF has maintained an inexplicable silence. It has neither asked the EAC to reconsider its recommendation nor has it granted the EC. It is APSEZ's responsibility to ensure that EC is granted at the earliest. It is on APSEZ's representations that the petitioners leased the plots in the SEZ and invest money on it. Therefore, APSEZ was bound to take all steps to get the EC including seeking appropriate remedy before this Court, however, it has not taken any such step. In this tussle between the MoEF, who has to give the EC, and APSEZ, whose obligation it is to get the EC, it is the petitioners who are stuck.

While the petitioners have complied with the order of this Court and stopped construction, APSEZ and the other units have continued to operate. Therefore, the petitioners had no other remedy except to file the present petition.

It is submitted that since the MoEF has abandoned its duty regarding grant of EC, this Court should hold the APSEZ has EC in view of the the EAC recommendation. Without prejudice to the petitioners' submission that the APSEZ has deemed EC, it is submitted that even if this Court were to hold that the APSEZ does not have deemed EC, it is prayed that this Court should not send the matter to MoEF and instead itself consider the EAC recommendation and grant EC subject to any terms that this Court may deem fit.

The petitioners, under the *bona fide* belief that EC is deemed to have been granted, have before taking any further steps have thought it fit and proper to approach this Court and have acted in a very *bona fide* manner.

The petitioners have neither committed any illegality nor it has acted against the Judgment dated 9.05.2012. It is evident from the judgment dated 9.05.2012 coupled with MoEF's letter dated 25.10.2011 to the petitioners, ABFPL per se does not require an Environment Clearance. It is submitted that the petitioner has never taken the law in its hand and have always wanted to approach this Court to adopt the right path which clearly works out balance of convenience in favour of the petitioners.

It was submitted that an order be passed by this Court declaring that the APSEZ has a deemed clearance under Clause 8 (Hi)

of EIA Notification, 2006 and thus, there is no impediment against the petitioners in continuing to establish their respective Projects in land situated in Mundra SEZ, being part of Revenue Survey No. 295/1 and part of Revenue Survey No. 225 of Mouje Village Siracha and Navinal, Tal, Mundra, District Kutch, Gujarat in view of the fact that the petitioners have already obtained statutory clearances inter alia from Gujarat Pollution Control Board.

Submissions of the Petitioners in rejoinder :

Mr.Anand Yagnik, the learned advocate appearing for the petitioners in Writ Petition (PIL) No.21 of 2013 in rejoinder, made the following submissions :

(i) Deeming provision in Clause 8 (iii) can be invoked by the private respondents only when, as a pre-condition, the proposed SEZ and the units within the same have complied with the clause 2 of the EIA Notification, 2006.

Indisputably, the Developer of the proposed SEZ has carried out substantial development of providing infrastructure as stated in final EIA Report of April 2012 and otherwise.

Moreover, all the respondent units have stated on oath in their reply that they have developed their respective units by putting up construction and carrying out manufacturing activity for last more than two to four years. In other words, the private respondents have flagrantly violated Clause 2 of EIA Notification and the development within the proposed SEZ and within the respective units is absolutely illegal and therefore, deeming provision cannot come to the rescue of the respondents and either give an environmental clearance or legitimize illegal development and construction.

In other words, one who violates the basic purpose and object of EIA Notification, 2006 and instead of carrying out no development till the environmental clearance is granted, has carried out substantial development and construction cannot be permitted to resort to deeming fiction.

Deeming fiction is based on presupposition that the proposed project is in conformity with the law, which provides deeming fiction. If the case is otherwise, then deeming fiction cannot be permitted to be invoked by one who has consistently violated the very notification providing for such deeming fiction.

Section 3(3) of the Environment (Protection) Act, 1986 and
Rule 5(iii) of the Environment (Protection) Rules, 1986 vests absolute power in the Central Government to decide and take a final decision. It does not provide for any delegation and hence, by a delegated legislation or subordinate legislation such power cannot be directly or indirectly be vested with Expert Appraisal Committee through deeming fiction. Clause 8(iii) is beyond the scope and ambit of Section 3(3) and Rule 5(iii). The same is therefore on the fact of it, illegal and unconstitutional and therefore is to be ignored or read down.

Clause 8(3) by creating a deeming fiction violates fundamental right under Article 21 of the Constitution of India merely on executive inaction. Fundamental right cannot be permitted to be frustrated or taken away by subordinate or delegated legislation, where frustration is based on inaction of the executive creating right by default in favour a project

proponent at the cost of the people of the affected area. On the face of it, Clause 8(3) is *ultra vires* and therefore, cannot be enforced or permitted to be resorted to.

It has to be interpreted in conformity with the law and the constitution.

Recommendations of the Expert Appraisal Committee are devoid of ground reality as reflected from the minutes.

In a petition under Article 226 in the nature of a public interest litigation, the Court can certainly look into the subsequent events and thereby look into the report of Sunita Narain Committee. The Report of the Committee has completely eroded the credibility of Expert Appraisal Committee and therefore, deemed environmental clearance cannot be permitted to be invoked.

Sunita Narain Committee's report has not been challenged by the private respondents.

The recommendations of the Expert Appraisal Committee are not binding as per Section 3 and Rule 5.

ANALYSIS :

Having heard the learned counsel appearing for the parties and having gone through the materials on record, in our opinion, the following questions fall for our consideration in both the petitions :

(1) Whether the Writ Petition (PIL) No.21 of 2013 filed by the residents of the village deserves to be rejected on the

ground of delay and laches;

(2) Whether the Writ Petition (PIL) No.21 of 2013 deserves to be rejected applying the doctrine of *res judicata* or constructive *res judicata*;

(3) Whether the Writ Petition (PIL) No.21 of 2013 should be rejected on the ground that the legality and validity of the deemed clearance of the SEZ and that of the decision of the EAC dated 4th-5th June 2012 recommending grant of environmental clearance has not been questioned and in the absence of such challenge thereto no relief could be granted in favour of the petitioners as prayed for in the Writ Petition (PIL) No.21 of 2013;

(4) Whether the Writ Petition (PIL) No.21 of 2013 should be rejected on the ground that there is an alternative remedy available to the petitioners before the National Green Tribunal constituted under the National Green Tribunal Act, 2010;

(5) Whether the decision rendered by this Court in the case of Ranubha Rajmalji Jadeja and others v. Union of India and others, Writ Petition (PIL) No.194 of 2011 decided on 9th May 2012, has any bearing on the issues involved in both the petitions herein;

(6) Whether the commencement of construction by the respondent nos.10 to 21 in the SEZ prior to the grant of environmental clearance in favour of the respondent no.8 MPSEZ could be termed as *per se* illegal, and if that be

so, then whether such an illegality could be said to have been cured on the strength of the grant of deemed environmental clearance in favour of the respondent no.8 MPSEZ by a fiction of law;

(7) Whether the respondent nos.10 to 21 as on today could be said to be lawfully operating their units within the SEZ;

(8) Whether the petitioners of Writ Petition (PIL) No.21 of 2013 are entitled to the reliefs prayed for in the petitions;

(9) Whether Alstom Bharat Forge Power Limited, the petitioner of Special Civil Application No.2621 of 2013, is entitled to a declaration that since APSEZ has obtained a deemed clearance under Clause 8(iii) of the EIA Notification, 2006, there is no impediment against it in continuing to establish their respective projects in the land situated in Mundra SEZ.

Before adverting to the rival submissions canvassed on either side, we deem it necessary to consider the issue which was raised in the Writ Petition (PIL) No.194 of 2011, and decided by this very Bench *vide* judgment and order dated 9th May 2012.

The Writ Petition (PIL) No.194 of 2011 was filed by the residents of village Navinal other than the one who have filed the Writ Petition (PIL) No.21 of 2013, substantially raising the grievance that without grant of prior environmental clearance in favour of the MPSEZ under the EIA Notification, 2006 issued

under Rule 5 of the Environment (Protection) Rules, 1986 read with Section 3 of the Environment (Protection) Act, 1986, the Alstom Bharat Forge Power Limited had started construction of its factory for the manufacturing of power plant equipments within the SEZ. Manifold issues were raised in the said petition but in substance the main issue was with regard to the environmental clearance as required mandatorily under the EIA Notification, 2006.

After taking into consideration all the relevant aspects of the matter, the question which was posed by us for our consideration in the said petition was as under :

> "*Having heard the learned counsel for the respective parties and having perused the materials on record, the short question for our consideration in this petition is as to whether in the absence of any environmental clearance certificate granted in favour of the MPSEZ in terms of the Notification dated 14th September 2006 issued by the Ministry of Environment and Forests, Government of India, whether the unit proposed to be setup by respondent no.10 within the MPSEZ can proceed with the construction work or not irrespective of the fact as to whether respondent no.10 is obliged to obtain any independent environmental clearance for the project or not.*"

We answered the aforesaid question by observing as under :

> "*Having regard to the mandatory nature of the environmental clearance and the object behind the Notification dated 14th September 2006, we have no doubt in our mind that respondent nos.10 and 11 could not have proceeded ahead with their projects. At the best, respondent no.8 – MPSEZ could have allotted the plots to the companies desirous of putting up their own units. In any case, the allottee of a plot (i.e. the*

lessee) cannot proceed ahead with the construction of the unit without the MPSEZ obtaining environmental clearance from the Ministry of Environment and Forests.

We are unable to fathom the idea that all the infrastructural facilities which the MPSEZ is obliged to provide will have to be taken care of by the individual allottees in the event if for any reason the authority concerned refuses to grant environmental clearance in favour of the MPSEZ. The MPSEZ has acquired approximately 18000 hectares of land from the Government for the purpose of developing a port, which is going to be one of the Asia's biggest port. The Government has allotted approximately 18000 hectares of land for the purpose of developing a port. If the MPSEZ itself is not accorded environmental clearance, then the question will be as to who will develop the port and whether the port can be developed by the allottees who have been allotted land by the MPSEZ. This area of 18000 hectares includes 14 villages of Mundra Taluka and the MPSEZ has to provide for infrastructural facilities on a large scale, which include gardens, playgrounds, dwelling units, hospitals, clinics, dispensaries, schools, colleges, market places, hostels, hotels, restaurants, cafeterias, theaters, auditoriums, libraries, public entertainments, clubs, public utilities, service building and such other facilities, conveyances and amenities as the MPSEZ may deem it necessary or expedient for carrying out the objects of the MPSEZ and/or Mundra SEZ. For any reason, if the environmental clearance is not granted in favour of the MPSEZ, then how will the allottees be able to provide for such infrastructural facilities or infrastructure on their own, which the MPSEZ has agreed to provide as per the terms of the agreement. One cannot forget or overlook the fact that environmental clearance is required to be obtained by the MPSEZ because it has the obligation of providing the infrastructural facilities as referred to above and while providing such infrastructure, it will definitely have some impact on the environment and that is the reason why, after extensive study of the entire project, the authority has to decide as to whether environmental clearance must be granted or not. Under such circumstances, it is very difficult for us to accept the submission of Mr.Thakore that the individual allottees will take care of the infrastructural facilities. However, taking into consideration the infrastructural facilities which are required on a port, it is humanly impossible for an individual allottee or a unit holder to provide all such facilities on its own.

Over and above this, we are also of the view that if the MPSEZ has already allotted plots to different companies for setting up of the industrial plants and if such allottees have proceeded ahead with construction of their individual plants in the

absence of any infrastructural facilities available at the port, then that by itself will lead to a very disastrous situation.

When law requires a thing to be done in a particular manner, the same must be done in the same manner or not done at all. The law envisages that no construction, preliminary or otherwise, can be undertaken without environmental clearance and the judgment of the Supreme Court in the case of T.N.Govindavarman Thirumulkpad v/s. Union of India, reported in (2002) 10 SCC 606, also holds that it is impermissible to undertake construction of project before such a clearance, therefore, there is no reason why we should permit respondent nos.10 and 11 to go ahead with their project.

It appears to us that respondent nos.10 and 11 have taken this issue very lightly. No doubt, being allottees they would be more interested in going ahead with their venture. But, the question is, at what cost. We cannot overlook the fact that public hearing precedes environmental clearance. Law envisages that before the environmental clearance is granted, the objections in this regard must be considered by giving public hearing. One cannot lose the sight of the fact that the persons who lodge their objections or make suggestions before the committee are not only entitled to get copies of the minutes of the meeting at the public hearing, but ultimately if the Central Government grants the environmental clearance, under S.11 of the National Environmental Appellate Authority Act, 1997, they also have a right to prefer an appeal to the Appellate Authority against the order granting environmental clearance. Section 11(2) of the said Act also defines "person" as any person who is likely to be affected by the grant of environmental clearance or any association of persons (whether incorporated or not) likely to be affected by such order and functioning in the field of environment. Therefore, grant of environmental clearance is not just an empty formality but the authority has to threadbare consider each and every aspect relating to the environment. We have noticed that in the present case also, public hearing had taken place and series of objections have been raised by various people. We have also noticed that the objections are of a very serious nature and cannot be brushed aside lightly.

Our attention has been drawn to the objections placed in writing in this regard, which we would like to incorporate thus :

> *1. The project for which the public hearing is going on has already completed 75% of the construction activities. The venue for the public hearing has been selected away from the project location such that the public hearing committee does not see the construction that has taken*

place. I am ready to show you the location where the construction activities are taking place without permission. The videography of the construction must be taken before the end of the public hearing and only then the public hearing must be concluded.

2. *The company has constructed parts of West port and laid a railway line on forest land without getting the necessary permissions. If the clearance has been obtained, then the company may produce the documents by the end of the public hearing.*

3. *If the SEZ is given clearance, then the company will construct a boundary wall thereby blocking the fishermens' access to their traditional settlements. Also, there are several creeks which are important for fishermen, these will be rendered unusable. Nearly 10,000 fishermen depend on traditional fishing and if their occupation is affected, then it will have a direct impact on their families. Why should the company be allowed to establish at the cost of the fishing community.*

4. *The company is in possession of Government land meant for rehabilitation of displaced persons. The company has also taken possession of Gauchar lands. In Luni village there is no Gauchar land left at all. Nearly 5000 cattle depend on the Gauchar land and if the project is allowed then the animal husbandry in the area will be severely affected. What steps will the company take in this regard ?*

5. *The company has taken possession of nearly 18,000 Ha. of land in the Mundra area. However, as per the central government notification, only 6472.8684 Ha. of land has been notified as SEZ. All the excess land in the possession of the company has to be given back to the Government and the lease must be cancelled. Why has the company acquired excess land ? Is the company ready to give the land back to the Government ?*
6. *There are several temples and mosques within the SEZ area. If the SEZ is allowed then these monuments will be destroyed and also the access road to these areas of religious importance will be blocked. What steps will the company take in this regard ?*

7. *The company has defrauded the public as well as the Government authorities. The company acquired forest land for the purpose of the Mundra Port and Special*

Economic Zone and destroyed mangroves in the area. As per rules, the company is supposed to do compensatory afforestation in another area. But the company has given land near Kori Creek, which is under the control of the BSF and also it is an area which already has dense mangroves. No new mangroves are grown. What is the company's response to this ?

8. *The company says that it is being established so that industrial development can take place. For this, the annual tax subsidy given by the government to the Mundra SEZ amounts to nearly 1765.65 Cr. However, consider the fact that the Central and State Government announced a package of Rs.8,500 Cr. After Kutch earthquake. In just five years, so much development has taken place in Kutch. When the company is getting so many subsidies from the Government and there is no benefit for the public, how can this be called as development ?*

9. *The Mundra coast has a vast intertidal zone. This area falls under CRZ I as per Government records. The company is filling such area with soil and using it for port backup/SEZ area and establishing industries over it. The hydrology of the area will be affected and the water that is blocked in this area will enter into other areas. What steps are being taken by the company to mitigate this ?*

10. *Nearly 20 companies have already been established in the Mundra SEZ. Because of this, already the marine pollution is increasing. If the SEZ is permitted then more industries will be allowed and there will be significant impact on agriculture and animal husbandry. What is the response of the company to this issue ?*

11. *The company has acquired land at a price of Rs.2 to Rs.10 from the state government and then sold it back to Government companies like IOC, IPCL at exorbitant rates of around Rs.600/-. This is misuse of taxpayers' money and only the company is making profits. The Mundra SEZ should not be allowed.*

12. *The Waterfront development project of the company was given environment clearance inspite of people's opposition and it is causing great damage to the environment. The workers employed by the company are cutting mangroves and using it as fuel wood. The mangrove cover is reducing day by day. This will affect*

marine life in a significant way. What does the company say in this regard ?

13.The forest department has done afforestation and mangrove plantation at a cost of nearly 50 lakhs and now this area has been given to the Mundra SEZ. This is not acceptable. The Mundra SEZ must not be given clearance.

14.There is significant horticulture in the area, which will be affected if the Mundra SEZ is allowed, therefore the Mundra SEZ should not be given Environmental Clearance.

15.The company has not enclosed any ToR given by the MoEF for the EIA of the Mundra SEZ. No ToR compliance report has been submitted. It is not clear whether the EIA is complete or not.

16.The EIA is based on data collected between 2006 and 2008. However, several changes have taken place in the meantime. Why has the EIA report containing latest data not been submitted for the public hearing ?

17.Eight CFS terminals are under operation without permission in the Mundra SEZ. The Kandla SEZ has also raised this issue. This is a violation of environmental laws. Now the public hearing is being held so that the violations can be regularized. Will the company clarify in this matter ?

In view of the above objections, I demand that :

1. *The Adani Mundra SEZ must not be given Environment Clearance.*

2. *Construction has already taken place in the area notified for the SEZ. The environment public hearing committee may visit these areas and take videography of the construction that has taken place and submit it to the authorities.*

3. *The construction that is going in the SEZ area must be stopped immediately and heavy fine imposed on the Adani group for the violations.*"

If respondent nos.10 and 11 are permitted to go ahead with the construction so far as their units are concerned on the assumption or hope that environmental clearance would be

granted to the MPSEZ in recent future, and in the same manner if other units also identically situated like respondent nos.10 and11 proceed ahead, then practically the right of appeal which has been provided under the Act against grant of environmental clearance to any aggrieved person would also stand frustrated.

In view of what has been discussed above holding that action of respondent nos.10 and 11 in implementation of the project without environmental clearance being accorded in favour of the MPSEZ under the provisions of the Environment (Protection) Act, 1986, the rules framed thereunder and the Notification, is illegal, it is not permissible for respondent nos.10 and 11 to proceed ahead with the implementation of their project till the MPSEZ obtains the environmental clearance.

We dispose of this writ-petition with a direction to respondent nos.10 and 11 not to proceed ahead in implementation of their project and not to undertake any further construction work, whether preliminary or otherwise, till the MPSEZ is granted environmental clearance. The writ-petition to that extent is allowed."

One of us, His Lordship Bhaskar Bhattacharya, CJ., in a separate but a concurring judgment, made the following observations :

"*The moot question that falls for determination in this Public Interest Litigation is, if the MPSEZ itself has not been granted environmental clearance under the Notification of 2006 by the Central Government, whether any unit setup within the MPSEZ, as a Lessee of the MPSEZ, can proceed with the construction work irrespective of the fact whether such individual unit is required to obtain separate environmental clearance or not.*

Mr Thakore and Mr Joshi, the learned Senior Counsel appearing on behalf of MPSEZ and respondent No.10 respectively, submitted that even if, ultimately, the environmental clearance is not given to the MPSEZ, the infrastructural facilities which the MPSEZ is required to provide to all the units within the same, will have to be arranged by the individual unit itself within the MPSEZ, after obtaining direct permission from the Central Government.

There is no dispute that although MPSEZ has applied for environmental clearance as required under the law, till date, the same has not been conferred and notwithstanding such fact, MPSEZ has already executed separate lease deeds in favour of different units like respondent No.10.

It appears from the Lease Deed executed between MPSEZ and respondent No.10 that there is clear mention of the fact that the Government of India has permitted MPSEZ, the Lessor, vide a Letter of Approval dated April 12, 2006 to establish a Multi-Product Special Economic Zone at Mundra and the Lessee, i.e., the respondent No.10, was desirous to take on lease a plot of land in the processing area of the MPSEZ for setting up a unit for manufacture of Turbine, Generator and other spares and auxiliaries related to those products and also for providing services of erection and commissioning of above mentioned products. According to the terms of the lease-deed, the Lessee is required to pay Annual Lease Rent at the rate of Rs.20 a square meter payable annually in advance and the same shall be escalated every five (5) years at the rate of twenty percent (20%) and the first escalation of Annual Lease Rent shall be made in the year 2015-16 with effect from 1st April 2015. According to the terms of the lease, in addition to the Annual Rent indicated above, the Lessee is also required to pay SEZ maintenance charges at the rate of Rs.18/- a square meter per annum for the maintenance and upkeep of all the infrastructural facilities provided to the Land and the determination of such amount of Maintenance charges shall be done in an open and transparent manner and would be reviewed by the Development Commissioner of Mundra SEZ. According to the said term, any upward revision of the Maintenance Charges with a maximum frequency of once a year can be made unless a requirement of refurbishment due to damages to infrastructure caused by natural or man made factor arises. The said deed further provides that the Lessor shall have right to charge fifteen percent (15%) towards management and coordination of Mundra SEZ maintenance and refurbishment as above. The deed further mentions that in case of failure of the Lessee to pay the above Annual Lease Rent or SEZ Maintenance Charge would make the Lessee a defaulter and will give right to the Lessor to terminate the Lease before expiry of the period mentioned therein.

In the Lease Deed, the Lessor covenants that it would comply with all the terms and conditions from time to time which have been mentioned in Letter of Approval under which it has been permitted by the Government to establish Mundra SEZ. In clause 3.4, it has been further asserted by the Lessor that it has obtained all the required permissions and the

Governmental Approvals as required in the name of Lessor for granting lease of the land to the Lessee and shall be responsible to comply with all the required terms and conditions and such permissions and approvals received from the Government and shall keep such approvals and permissions in force (to the extent necessary under applicable Laws) and shall make all its statutory compliances to keep the Lease in full force and effect during the entire term.

From the above clause of the Lease Deed, it is clear that the Lease has been executed not only for enjoyment of the land under the SEZ, but also for the purpose of giving infrastructural facilities provided to the land for which separate maintenance charge has been provided. It further appears that the Lessor was conscious that it was required to comply with all the terms and conditions from time to time which has been mentioned in the Letter of Approval and it further asserted that it has obtained all the required permissions and Governmental Approvals as required in the name of Lessor and is also responsible to comply with all the permissions and approvals received from the Government and shall keep such approvals and permissions in force to keep the lease in full force and effect during the entire term.

It is an admitted fact that environmental clearance required to be taken by the Lessor has been applied for but has not yet been granted. Nevertheless, the Lessor has asserted the above fact of getting permission and keeping such permission alive during the subsistence of lease in favour of the respondent no. 10. Over and above, it has also decided to accept not only rent for land but also the maintenance charges for giving infrastructural facilities in advance as mentioned in the Deed.

I, therefore, find no substance in the contention of Mr Thakore or Mr Joshi, the learned senior counsel appearing on behalf of the respondent nos. 8 and 10 respectively that if in the long run, no environmental clearance is given by the Central Government, the separate unit holders would be to make independent arrangements for infrastructural facilities by taking separate permission of their own from the Central Government because such provision is not indicated in the lease deed. On the other hand, the Lease Deed casts a duty upon the Lessor to provide for such facilities in lieu of rent and maintenance charge.

I have already pointed out that the Lease is executed not only for the enjoyment of the possession in the land but also for enjoyment of infrastructural facilities to be arranged by the Lessor and if required permission for such infrastructural

facilities has not yet been given by the Central Government, the Lessor, in my opinion, was not even competent to create a Lease for the above purpose.

I, thus, find substance in the contention of the petitioner that so long the Lessor itself is not vested with the right to have establishment of various infrastructural facilities by taking environmental clearance, it cannot confer the right of enjoyment of such facilities to its Lessee.

It is now well known that Lease is a doctrine of separation of title from actual enjoyment of the subject matter. Before execution of a Lease in favour of a Lessee, the Lessor retains both the title and the right of enjoyment of the property. Once a Lease is executed, the Lessor retains only the title to the property but loses its right of enjoyment thereof by conferring the same in favour of its Lessee. According to the 2006 Notification, in order to have such right of creation of infrastructural facilities over the land allotted, prior approval of the Central Government is necessary before making any construction and thus, without having acquired such right, the MPSEZ, the allottee from the Government, could not convey such right to its Lessee. In other words, a Lessee cannot have better right than that of his Lessor in the property. Law is also well settled that there cannot any valid Lease for enjoyment of a property, which is not in existence and not capable of being put into possession of the Lessee at the time of execution of the Lease.

I, thus, find that so long the environmental clearance is not granted by the Central Government in favour of MPSEZ for creation of infrastructural facilities on the land so allotted and consequent to such permission, such facilities have been actually created by the allottee, the latter cannot lawfully lease out the right of enjoyment of the infrastructural facilities to its Lessee.

I, consequently, agree with my learned Brother as regards the relief granted to the petitioner in this application ordered by His Lordship."

Thus, from the above, it is evident that we took the view that so long as the environmental clearance is not granted by the Central Government in favour of the MPSEZ for creation of infrastructural facilities on the land so allotted and consequent to such permission such facilities have been actually created

by the allottee, the lessor cannot lawfully lease out the right of enjoyment of the infrastructural facilities to its lessee. Accordingly, we allowed the petition restraining the two unit holders against whom the petition was filed from proceeding ahead in the implementation of their projects with a direction that they shall not undertake any further construction work, whether preliminary or otherwise, till the MPSEZ was granted environmental clearance.

At this stage, it may not be out of place to state that the aforesaid judgment and order passed by us has attained finality. Till this date, it remains in operation and during the course of the hearing of the Special Civil Application No.2621 of 2013, Mr.Gopal Subramaniam, the learned senior advocate appearing for the petitioners who were the respondents in the Writ Petition (PIL) No.194 of 2011, made a statement at the bar that his clients have accepted the verdict of this Court and conceded to the proposition of law laid down by us.

However, Mr.Subramaniam submitted that his clients had to file a substantive petition only with a view to inform this Court that since the MPSEZ has now obtained a deemed environmental clearance, it would be open for his clients to proceed with the construction in light of such deemed environmental clearance, but still thought fit to first bring it to the notice of this Court about the so-called deemed environmental clearance before actually commencing with the construction work as in the earlier petitions they were restrained from putting up any construction.

Therefore, the picture that emerges as on today is that as

against the law laid down by us in the Writ Petition (PIL) No.194 of 2011 that if the MPSEZ itself has not been granted environmental clearance under the EIA Notification, 2006 by the Central Government, any unit setup within the MPSEZ as a lessee of the MPSEZ could not have proceeded with the construction work irrespective of the fact that such individual unit was required to obtain separate environmental clearance, the units i.e. the respondent nos.10 to 21 are now taking the shelter of the deemed environmental clearance granted in favour of the MPSEZ by a fiction of law.

Whether such a deemed environmental clearance would save the situation or not, is the moot question which we propose to consider, but before we answer this question, we deem it necessary to deal with the preliminary contentions raised by the respondents as regards the maintainability of the Writ Petition (PIL) No.21 of 2013.

Delay and Laches :

We first propose to take up the contention of delay and laches.

According to the learned counsel appearing for the respondents, the Writ Petition (PIL) No.21 of 2013 should not be entertained on the ground of delay and laches. The units are in operation since 2008 and by now each of the units have invested a huge amount running in crores of rupees. Besides the huge investment, hundreds of local have been employed in the respective units and if the units are asked to stop their operations, then even the locals would be without

employment.

It was also sought to be contended that the petitioners being the residents of the same village where the units have been setup, would have been aware of the fact that the units are being setup in the MPSEZ. The units have been setup since 2010 and thereafter been commissioned. It was also submitted before us that in the earlier round of litigation being Writ Petition (PIL) No.194 of 2011, the villagers had thought fit to implead only two unit holders, more particularly when they were aware that there are many units in operation within the SEZ. Even the present petitioners were aware about the various units in operation within the SEZ and such fact is evident considering that a public hearing for environmental clearance had taken place on 5th October 2010 and during the public hearing, the villagers were aware of the fact that 20 units have been setup.

As against the above, Mr.Yagnik submitted that the SEZ is spread over in 18000 hectares of land covering more than 14 villages. It is more than 35 kms. in length in terms of the available road. According to Mr.Yagnik, it was not possible for the petitioners to know in which part of the entire SEZ the activities were going on. Mr.Yagnik submitted that after the pronouncement of the judgment in the Writ Petition (PIL) No.194 of 2011, efforts were made to find out about the other units in operation, and after a thorough inquiry, the villagers have brought to the notice of this Court that there are other units also operating within the SEZ without any environmental clearance granted in favour of the MPSEZ.

We are not impressed by the submission of delay and laches vociferously canvassed on behalf of the respondents because this is not a matter which deserves to be rejected on a technical plea of delay.

We are conscious of the fact that the principle of delay applies even in cases of public interest litigations, but the rule which says that the Court may not inquire into belated and stale claims is not a rule of law, but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is a delay, the court must necessarily refuse to entertain the petition. Each case must depend on its own facts. The question of delay is one of discretion of the court to follow from case to case. There is no lower limit and there is no upper limit. It will all depend on what the breach of the fundamental right and the remedy claimed are and how the delay arose. (see Ramchandra Shankar Deodhar and others v. The State of Maharashtra and others, reported in AIR 1974 SC 259)

We are dealing with a very important issue of environment and the rights of the people who are likely to be affected and, therefore, in such circumstances, we do not deem fit to reject the petition on a plea of delay and laches.

In the case before us, it is not in dispute that the respondent nos.10 to 21 started their industrial units after being put into possession by the lessor MPSEZ in the year 2008 knowing fully well that the lessor has not been granted the environmental clearance by the Central Government as required under the Notification, 2006. They continued with

their operations. In Writ Petition (PIL) No.194 of 2011, we held that the unit holders as lessees could not have proceeded with the construction of their plots in the absence of any valid environmental clearance granted in favour of the lessor MPSEZ. In such circumstances, the defence of delay do not hold good. When the law requires a thing to be done in a certain way, then it has to be done in that way and no other.

Even though, there may be some doubt as to whether delay and laches can deny the relief prayed for by the petitioners in this petition, we are of the opinion that the unit holders, if acted with the knowledge that they are violating the provisions of law, then in such circumstances, even if there is any inordinate delay in redressing the grievance, the relief to set right the illegality should not be denied. The defence of laches or inordinate delay is a defence in equity. In equity, both the parties must come to the court with clean hands. The equitable defence can be put up by a party who has acted fairly and honestly. A person who is guilty of violating the law or infringing or usurping somebody else's right cannot claim the continued exercise of the usurped right.

In the aforesaid context, we may refer to a recent pronouncement of the Supreme Court in the case of Tukaram Kana Joshi and others v. M.I.D.C. and others, reported in AIR 2013 SC 565. His Lordship Dr.B.S.Chauhan, J. reiterated the position of law on the issue of delay. What was assailed before the Supreme Court was the judgment and order passed by the High Court of Bombay by way of which the High Court had rejected the claim of the appellants for compensation due to them for the land taken by the respondent authorities, without

resorting to any procedure prescribed by law. It was contended before the Court that the delay and laches on the part of the appellants had extinguished the right to put forth a claim. In such circumstances, His Lordship made the following observations in paragraphs 10, 11 and 12, which, in our opinion, are very apt and helps the petitioners :

> "*10. The State, especially a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause of action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional imitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.*
>
> *11. The question of condonation of delay is one of the discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226, nor is it that there can never be a case where the Courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it.*

The validity of the party's defence must be tried upon principles substantially equitable. (Vide: P.S.Sadasivaswamy v. State of T.N. AIR 1974 SC 2271; State of M.P. and Ors. v. Nandlal Jaiswal and Ors., AIR 1987 SC 251; and Tridip Kumar Dingal and Ors. v. State of West Bengal and Ors., (2009) 1 SCC 768: (AIR 2008 SC (Suppl) 824);)

12.No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non-deliberate delay. The court should not harm innocent parties if their rights have infact emerged, by delay on the part of the petitioners. (Vide:Durga Prasad v. Chief Controller of Imports and Exports and Ors. AIR 1970 SC 769; Collector, Land Acquisition, Anantnag and Anr. V. Mst. Katiji and Ors., AIR 1987 SC 1353; Delhi Rohtas Light Railway Company Ltd. v. District Board, Bhojpur and Ors., AIR 1993 SC 802: (1992 AIR SCW 3181); Dayal Singh and Ors. v. Union of India and Ors. AIR 2003 SC 1140: (2003 AIR SCW 685); and Shankara Co-op. Housing Society Ltd. v. M.Prabhakar and Ors. AIR 2011 SC 2161 : (2011 AIR SCW 3033))"

Applying the aforesaid proposition of law laid down by the Supreme Court, we hold that there is no substance in the preliminary objection raised on behalf of the respondents as regards the delay and laches.

There is one more reason why we are not inclined to accept the plea of delay and laches. The EIA Notification, 2006

dated 14th September 2006 makes it very clear that no construction of the new projects or activities or the expansion or modernization of the existing projects on the date of the Notification or activities listed in the Schedule to the Notification entailing capacity addition with change in process and/or technology is permissible in the absence of a prior environmental clearance to be granted by the Central Government. In the year 2008, when the respondent nos.10 to 21 setup their individual units by making construction, they were aware of the fact that the lessor who has put them in possession of the land forming a part of the SEZ himself was not possessing a valid environmental clearance in terms of the EIA Notification, 2006, then in such circumstances, they could not have proceeded ahead with the construction of their individual units. Whatever may be their understanding of the position of law at the relevant point of time, but the fact is that the respondent nos.10 to 21 cannot plead ignorance of the mandate laid in the Notification, 2006. This is exactly what we have held in our judgment and order dated 9th May 2012 in Writ Petition (PIL) No.194 of 2011.

Such being the position, the respondent nos.10 to 21 cannot take advantage of their own wrong by pleading delay and laches to meet with the petition filed against them.

The maxim: 'Nullus commandum capere potest de injuria sua propria' (No man can take advantage of his own wrong) applies directly to the facts of the present case. The maxim: 'Nullus commandum capere potest de injuria sua propria' (No man can take advantage of his own wrong) is one of the salient tenets of equity. The respondents cannot secure the assistance

of a Court of law for enjoying the fruit of their own wrong.

In this connection, we may quote with profit a decision of the Supreme Court explaining this principle of law, in the matter of Union of India and others v. Major General Madan Lal Yadav [Retd.], reported in (1996)4 SCC 127. In paragraph 28, the Supreme Court observed as under :-

> "*In this behalf, the maxim 'nullus commandum capere potest de injuria sua propria' - meaning no man can take advantage of his own wrong - squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123(2). In Broom's Legal Maximum [10th Edn.] at page 191 it is stated :-*
>
> > "*...it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.”*
>
> "*The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted therein that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof, the author has placed reliance on another maxim 'frustra legis auxilium invocat quaerit qui in legem committit'. He relies on Perry v. Fitzhowe [(1846)8 Q.B. 757]. At page 192, it is stated that if a man be bound to appear on a certain day, and before that day the obligee puts him in prison, the bond is void. At page 193, it is stated that "it is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned". At page 195, it is further stated that "a wrong doer ought not to be permitted to make a profit out of his own wrong". At page 199 it is observed that "the rule applies to the extent of undoing the advantage gained where that can be done and not to the extent of taking away a right*

previously possessed."

In view of the above, we reject the first preliminary objection of delay and laches canvassed on behalf of the respondents.

***Res Judicata* and Constructive *Res Judicata* :**

We shall now deal with the second preliminary objection raised by the respondents as regards the doctrine of *res judicata* and constructive *res judicata*.

Mr.Dave, the learned senior advocate appearing on behalf of the respondent no.8 MPSEZ vehemently submitted that the Writ Petition (PIL) No.21 of 2013 is hit by the doctrine of *res judicata* inasmuch as it could have been argued in the earlier round of litigation before this Court that even if the environmental clearance is granted it would not save the situation for the unit holders because they had completed the construction way back in the year 2008. In short, according to Mr.Dave, in the judgment and order rendered by this very Bench in Writ Petition (PIL) No.194 of 2011, it has been very clearly observed that the two unit holders who were made respondents shall not proceed further with any type of construction till the environmental clearance is obtained by the lessor i.e. the MPSEZ. According to Mr.Dave, at that very stage it should have been argued and it could have been argued by the petitioners of Writ Petition (PIL) No.194 of 2011 that it would not make any difference whether environmental clearance is now granted or not.

Thus, according to Mr.Dave, the doctrine of constructive *res judicata* would apply in the present petition despite the fact that the petitioners are different, but the question of law remains the same which could have been raised but was not raised in the earlier round of litigation.

In this connection, we may refer to a decision of the Supreme Court in the case of Forward Construction Co. v. Prabhat Mandal, (1986)1 SCC 100, wherein the Supreme Court held that the principles of constructive *res judicata* are applicable to public interest litigation, particularly in view of the Explanation VI to Section 11 of the Code of Civil Procedure, 1908: The Court observed thus :

> "*But it is only when the conditions of Explanation VI are satisfied that a decision in the litigation will bind all persons interested in the right litigated and the onus of providing the want of bona fides in respect of the previous litigation is on the party seeking to avoid the decision. The words "public right" have been added in Explanation VI in view of the new S.91 CPC and to prevent multiplicity of litigation in respect of public right. In view of Expln. VI it cannot be disputed that Section 11 applies to public interest litigation not by way of a private grievance. It has to be a bona fide litigation in respect of a right which is common and is agitated in common with others.*"

The aforenoted decision has been considered in a subsequent judgment of a Bench of two Judges of the Supreme Court in the case of V.Purushotham Rao v. Union of India, (2001)10 SCC 305, wherein the Supreme Court held thus :

> "*In our considered opinion, therefore, the principle of constructive res judicata cannot be made applicable in*

each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and the larger public interest which is being served. There cannot be any dispute that in competing rights between the public interest and individual interest, the public interest would override."

Thus, from the above, it is evident that the question as to whether the principles of constructive *res judicata* will apply in the facts of a particular litigation instituted in public interest will depend, *inter alia*, on the nature of the litigation, its impact on the society and the public interest involved.

In Sheodan Singh v. Daryao Kunwar, (1966)4 SCR 300, the Supreme Court laid down the ingredients of Section 11 of the Code of Civil Procedure, the principles of which could be extended even to the writ proceedings, stating as under :

"*9. A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely -*

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

(iii) The parties must have litigated under the same title in the former suit;

(iv) The Court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

> *(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. Further Explanation 1 shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied.*"

In this regard, we may also quote with profit the decision of the Supreme Court in the case of Bhama Kumar Jain (*supra*), wherein the Supreme Court has explained the distinction between the principle of estoppel and constructive *res judicata*. The Court observed thus :

> *"Res judicata debars a Court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.*"

Thus, the question which is required to be posed is what was in issue in the Writ Petition (PIL) No.194 of 2011 filed by the residents of village Navinal. The issue was, whether the lessor MPSEZ could have allotted the plots in favour of the lesses within the SEZ, and whether the lesses, in turn, could have developed their plots and put up construction on their units in the absence of grant of environmental clearance in terms of the EIA Notification, 2006 issued by the Ministry of

Environment and Forests, Government of India, in favour of the lessor MPSEZ.

We held that in the absence of the grant of environmental clearance in favour of the lessor MPSEZ, the unit holders had no right to put up any construction or undertake any activity on their individual plots and, accordingly, we restrained the two respondents who were before us.

In the present petition, the villagers other than the one who had filed the earlier petition have come with a case that the dictum of law laid down by this Court in Writ Petition (PIL) No.194 of 2011 should equally apply to all other units which are in operation as on today within the SEZ. In defence, the lessor MPSEZ and the individual unit holders, namely, the respondent nos.10 to 21 have come out with a case that there is a deemed environmental clearance as on today and, therefore, there is no question of now restraining the unit holders from operating their individual units.

In this petition, we are considering the question, whether there is a deemed environmental clearance and what would be the effect of such a deemed environmental clearance, as pleaded by the respondents in their defence. Thus, it could not be said by any stretch of imagination that such issue was directly and substantially involved in the earlier round of litigation and has been finally decided by this Court.

As a matter of fact, the petitioners herein had no idea or knowledge of any deemed environmental clearance obtained

by the lessor MPSEZ and it is only when a reply was filed taking up this contention that they realized that pursuant to the recommendations made by the EAC, there is a deemed environmental clearance as the Central Government failed to pass any orders within a period of 45 days as stipulated in the EIA Notification, 2006.

Thus, we are not impressed by the submissions of Mr.Dave that the petition is hit by the doctrine of *res judicata* or constructive *res judicata* and we, accordingly, reject the second preliminary objection as regards the maintainability of this petition. On the other hand, the MPSEZ and the petitioner of Special Civil Application No.2621 of 2013 who were parties to the earlier proceedings are bound by our observations made in Writ Petition (PIL) No.194 of 2011 decided on 9th May 2012 and which has attained finality that so long the environmental clearance is not granted by the Central Government in favour of the MPSEZ for creation of infrastructural facilities on the land so allotted and consequent to such permission, such facilities have been actually created by the allottee, the latter could not have lawfully leased out the right of enjoyment of the infrastructural facilities to its lessee.

Lack of Pleadings and Relief :

The above takes us to deal with the third preliminary objection raised on behalf of the respondents as regards the lack of pleadings and relief prayed for in the Writ Petition (PIL) No.21 of 2013. It has been stated that in the Writ Petition (PIL) No.21 of 2013 there is no prayer to set aside the recommendations made by the EAC as regards the grant of

environmental clearance and also no prayer to declare that there is no deemed environmental clearance in favour of the lessor MPSEZ.

In short, the objection is to the effect that the petition has become infructuous and should be rejected because the petitioners are unaware of the fact that a deemed environmental clearance could be said to have been granted in favour of the lessor MPSEZ.

It is now well-settled that strict rules of pleading may not apply to a public interest litigation if there is sufficient material on record on the basis of which the Court may proceed. The technicalities of the rules of pleadings cannot be made applicable vigorously. Pleadings prepared sometimes on the basis of incomplete information in a public interest litigation should be considered having regard to the issue which is being brought before the Court. It is now well-settled that even a simple letter addressed by a citizen could be treated as a public interest litigation and the Court may look into the same by calling upon the respondents to explain.

In the present case, there is no doubt that the petition proceeds only on the footing that there are many units operating within the SEZ as on today in the absence of any environmental clearance granted in favour of the lessor MPSEZ and, therefore, they should be restrained from operating their units.

It is only when the respondents appeared and filed their counter that the petitioners realized that the EAC, in its

meetings conducted some time in the months of April, June and July 2012 respectively, had discussed the issue of grant of environmental clearance in favour of the MPSEZ and, accordingly, recommended to the Central Government to grant such environmental clearance. The Central Government, having not acted on such recommendations within a period of 45 days as prescribed in the Notification, a deemed environmental clearance is said to have been granted in favour of the MPSEZ by a deeming fiction.

Ordinarily, a writ court should not grant relief to the petitioner on a case for which there is no foundation in the pleadings and which the other side is not called upon or had an opportunity to meet. But, when the alternative case, which the petitioner is able to make is not only admitted by the respondents in their reply but is expressly put forward as an answer to the complaint which the petitioner makes in the petition, there would be nothing improper or illegal now giving the petitioner the relief as prayed for in the petition. In the present case, to meet with the petition of the petitioners, the respondents have pleaded and put forward in defence the deemed environmental clearance with necessary materials on record.

We are considering the issue of the deemed environmental clearance based on the materials which have been produced by the respondents themselves, and after considering such materials if we reach to the conclusion that there is merit in what the petitioners have to say as regards the deemed environmental clearance, then it could not be said that the respondents have been taken by surprise.

In this connection, we may quote with profit a decision of the Supreme Court in the case of Firm Sriniwas Ram Kumar v. Mahabir Prasad and others, reported in AIR 1951 SC 177.

In the said case, the appeal before the Supreme Court was on behalf of the original plaintiff and it arose out of a suit for specific performance of a contract to sell a house belonging to the defendants (second party) who had agreed to sell the house to the plaintiff, but subsequently, resiled from the agreement and sold the same to the defendants (first party) who purchased it with notice of the contract.

The suit was contested by both sets of defendants. The second party defendants contended, *inter alia*, that they had never agreed to sell their house to the plaintiff and the story of a contract of sale as setup by the plaintiff was entirely false. They admitted that they were in need of money and had approached the plaintiff for a loan and the plaintiff had advanced to them a sum of Rs.30,000=00 at the rate of 6% interest per annum. According to the second party defendants, it was entirely for facilitating the payment of interest due on the loan and not in part performance of the contract of sale that the plaintiff was put in possession of the same.

The trial Judge dismissed the plaintiff's claim for specific performance, but as the second party defendants admitted that they had taken an advance of Rs.30,000=00 from the plaintiff, a money decree was given to the plaintiff for such sum against the defendants with interest at the rate of 6% per annum from the date of the suit till realization.

Against such a decision, the plaintiff filed an appeal in the High Court at Patna and the second party defendants also filed cross-objections challenging the propriety of the money decree that was passed against them.

The High Court, *vide* its judgment, dismissed the appeal of the plaintiff and allowed the cross-objections preferred by the second party defendants. The High Court agreed with the trial Judge in holding that the sum of Rs.30,000=00 was advanced as a loan by the plaintiff to the second party defendants. However, on the basis of the evidence on record, the High Court reached to the conclusion that the money decree granted against the second party defendants was not warranted in law as no case of a loan was made out by the plaintiff in the plaint and no relief was claimed on that basis. The result was that the suit was dismissed in its entirety and a decree for recovery of money that was made in favour of the plaintiff by the trial Court was set aside. Against the judgment passed by the High Court, the plaintiff came up in appeal before the Supreme Court. In the aforesaid background, the Supreme Court held as under :

> *"As regards the other point, however, we are of the opinion that the decision of the trial Ct. was right and that the H.C. took an undoubtedly rigid and technical view in reversing this part of the decree at the Subordinate Judge. It is true that it was no part of the pltf's case as made in the plaint that the sum of Rs. 30,000 was advanced by way of loan to the defts. second party. But it was certainly open to the pltf. to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of*

sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A pltf. may rely upon different rights alternatively and there is nothing in the Civil P.C. to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Ct. to give him relief on that basis. The rule undoubtedly is that the Ct. cannot grant relief to the pltf. on a case for which there was no foundation in the pleading and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the pltf. could have made, was not only admitted by the deft. in his written statement but was expressly put forward as an answer to the claim which the pltf. made in the suit, there would be nothing improper in giving the pltf. a decree upon the case which the deft. himself makes. A demand of the pltf. based on the deft's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the deft. in his pleadings. In such circumstances when no injustice can possibly result to the deft., it may not be proper to drive the pltf, to file a separate suit. As an illustration of this principle, reference may be made to the pronouncement of the Judicial Committee in Mohan Manucha v. Manzoor Ahmad,70 I.A. 1 : (A.I.R. (30) 1943 P.C. 29). This appeal arose out of a suit commenced by the pltf applt. to enforce a mtge. security. The plea of the deft. was that the mtge. was void. This plea was given effect to by both the lower Ct. as well as by the P.C. But the P.C. held that it was open in such circumstances to the pltf to repudiate the transaction altogether and claim a relief outside it in the form of restitution under S. 65, Contract Art. Although no such alternative claim was made in the plaint, the P.C. allowed it to be advanced and gave a decree on the ground that the resp. could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the applt. even though the appeal was heard ex parte in the absence of the resp."

Following the aforesaid principles as laid down by the

Supreme Court, we reject the submission canvassed on behalf of the respondents that the petition deserves to be rejected on the ground of lack of proper pleadings and relief.

Plea of Alternative Remedy :

It was also sought to be contended that the petition should not be entertained as there is an alternative remedy available to the petitioners by approaching the National Green Tribunal constituted under the National Green Tribunal Act. We are not impressed by such submission canvassed on behalf of the respondents. It is true that the power of the High Court to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature and cannot be curtailed by other provisions of the Constitution of India or a statute, but the High Courts have imposed upon themselves certain restrictions on the exercise of such powers. One of such restriction that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction under Article 226 of the Constitution of India. But again this rule of exclusion of writ jurisdiction on account of availability of an alternative remedy does not operate as an absolute bar to entertain a writ petition but is a discretion to be exercised depending upon the facts of each case.

In an appropriate case, inspite of availability of alternative remedy, the High Court may still exercise its jurisdiction in atleast three contingencies : (1) where the writ petition seek enforcement of any of the fundamental rights; (2) where there is a failure of principles of natural justice; or (3) where the orders or proceedings are wholly without jurisdiction

or *vires* of an Act is challenged.

In the present case, the petitioners are seeking implementation of the judgment rendered by this Court in Writ Petition (PIL) No.194 of 2011 decided on 9th May 2012 so far as the other units are concerned, namely, the respondent nos.10 to 21 who have continued their manufacturing activities in the absence of any environmental clearance. Whether there is a deemed environmental clearance and what would be the effect of the same, is the issue which we are considering in this petition.

However, the fact is that the petitioner are seeking enforcement of fundamental rights under Article 21 of the Constitution of India by seeking implementation of Environmental Laws on the allegations that there is gross violations of the regulations of the Notification, 2006 at the end of the respondents.

In such circumstances, we reject the submissions canvassed on behalf of the respondents as regards the alternative remedy.

Deemed Environmental Clearance :

The above takes us to the main and the core issue of deemed environmental clearance. Before we proceed to answer the issue of deemed environmental clearance, it is necessary for us to consider the Environment Impact Assessment Notification, 2006 dated 14th September 2006.

We quote the relevant part of the Notification as under :

"Whereas, a draft notification ***under sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986 for imposing*** *certain restrictions and prohibitions on new projects or activities, or on the expansion or modernization of existing projects or activities based on their potential environmental impacts as indicated in the Schedule to the notification, being undertaken in any part of India[1], unless prior environmental clearance has been accorded in accordance with the objectives of National Environment Policy* ***as approved by the Union Cabinet on 18th May, 2006*** *and the procedure specified in the notification, by the Central Government or the State or Union territory Level Environment Impact Assessment Authority (SEIAA), to be constituted by the Central Government in consultation with the State Government or the Union territory Administration concerned under sub-section (3) of section 3 of the Environment (Protection) Act, 1986 for the purpose of this notification, was published in the Gazette of India, Extraordinary, Part II, section 3, sub-section (ii) vide number S.O. 1324 (E) dated the 15th September ,2005 inviting objections and suggestions from all persons likely to be affected thereby within a period of sixty days from the date on which copies of Gazette containing the said notification were made available to the public;*

And whereas, copies of the said notification were made available to the public on 15th September, 2005;

And whereas, all objections and suggestions received in response to the above mentioned draft notification have been duly considered by the Central Government;

Now, therefore, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of section 3 of the Environment (Protection) Act, 1986, read with clause (d) of sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986 and in supersession of the notification number S.O. 60 (E) dated the 27th January, 1994, except in respect of things done or omitted to be done before such supersession, the Central Government hereby directs that on and from the date of its publication the required construction of new

projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to this notification entailing capacity addition with change in process and or technology shall be undertaken in any part of India only after the prior environmental clearance from the Central Government or as the case may be, by the State Level Environment Impact Assessment Authority, duly constituted by the Central Government under sub-section (3) of section 3 of the said Act, in accordance with the procedure specified hereinafter in this notification."

*"**4. Categorization of projects and activities:-***

(i) All projects and activities are broadly categorized in to two categories - Category A and Category B, based on the spatial extent of potential impacts and potential impacts on human health and natural and man made resources.

(ii) All projects or activities included as Category 'A' in the Schedule, including expansion and modernization of existing projects or activities and change in product mix, shall require prior environmental clearance from the Central Government in the Ministry of Environment and Forests (MoEF) on the recommendations of an Expert Appraisal Committee (EAC) to be constituted by the Central Government for the purposes of this notification;

(iii) All projects or activities included as Category 'B' in the Schedule, including expansion and modernization of existing projects or activities as specified in sub paragraph (ii) of paragraph 2, or change in product mix as specified in sub paragraph (iii) of paragraph 2, but excluding those which fulfill the General Conditions (GC) stipulated in the Schedule, will require prior environmental clearance from the State/Union territory Environment Impact Assessment Authority (SEIAA). The SEIAA shall base its decision on the recommendations of a State or Union territory level Expert Appraisal Committee (SEAC) as to be constituted for in this notification. In the absence of a duly constituted SEIAA or SEAC, a Category 'B' project shall be treated as a Category 'A' project;"

*"**6. Application for Prior Environmental Clearance (EC):-***

An application seeking prior environmental clearance in all cases shall be made in the prescribed Form 1 annexed herewith and Supplementary Form 1A, if applicable, as given in Appendix II, after the identification of prospective site(s) for the project and/or activities to which the application relates, before commencing any construction activity, or preparation of land, at the site by the applicant. The applicant shall furnish, along with the application, a copy of the pre-feasibility project report except that, in case of construction projects or activities (item 8 of the Schedule) in addition to Form 1 and the Supplementary Form 1A, a copy of the conceptual plan shall be provided, instead of the pre-feasibility report."

*"**8. Grant or Rejection of Prior Environmental Clearance (EC):***

(i) The regulatory authority shall consider the recommendations of the EAC or SEAC concerned and convey its decision to the applicant within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned or in other words within one hundred and five days of the receipt of the final Environment Impact Assessment Report, and where Environment Impact Assessment is not required, within one hundred and five days of the receipt of the complete application with requisite documents, except as provided below.

(ii) The regulatory authority shall normally accept the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned. In cases where it disagrees with the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, the regulatory authority shall request reconsideration by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned while

stating the reasons for the disagreement. An intimation of this decision shall be simultaneously conveyed to the applicant. The Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, in turn, shall consider the observations of the regulatory authority and furnish its views on the same within a further period of sixty days. The decision of the regulatory authority after considering the views of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall be final and conveyed to the applicant by the regulatory authority concerned within the next thirty days.

(iii) In the event that the decision of the regulatory authority is not communicated to the applicant within the period specified in sub-paragraphs (i) or (ii) above, as applicable, the applicant may proceed as if the environment clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned.

(iv) On expiry of the period specified for decision by the regulatory authority under paragraph (i) and (ii) above, as applicable, the decision of the regulatory authority, and the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall be public documents.

(v) Clearances from other regulatory bodies or authorities shall not be required prior to receipt of applications for prior environmental clearance of projects or activities, or screening, or scoping, or appraisal, or decision by the regulatory authority concerned, unless any of these is sequentially dependent on such clearance either due to a requirement of law, or for necessary technical reasons.

(vi) Deliberate concealment and/or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection, and cancellation of prior environmental clearance granted

on that basis. Rejection of an application or cancellation of a prior environmental clearance already granted, on such ground, shall be decided by the regulatory authority, after giving a personal hearing to the applicant, and following the principles of natural justice."

"9. Validity of Environmental Clearance (EC):

The "Validity of Environmental Clearance" is meant the period from which a prior environmental clearance is granted by the regulatory authority, or may be presumed by the applicant to have been granted under sub paragraph (iv) of paragraph 7 above, to the start of production operations by the project or activity, or completion of all construction operations in case of construction projects (item 8 of the Schedule), to which the application for prior environmental clearance refers. The prior environmental clearance granted for a project or activity shall be valid for a period of ten years in the case of River Valley projects (item 1(c) of the Schedule), project life as estimated by Expert Appraisal Committee or State Level Expert Appraisal Committee subject to a maximum of thirty years for mining projects and five years in the case of all other projects and activities. However, in the case of Area Development projects and Townships [item 8(b)], the validity period shall be limited only to such activities as may be the responsibility of the applicant as a developer. This period of validity may be extended by the regulatory authority concerned by a maximum period of five years provided an application is made to the regulatory authority by the applicant within the validity period, together with an updated Form 1, and Supplementary Form 1A, for Construction projects or activities (item 8 of the Schedule). In this regard the regulatory authority may also consult the Expert Appraisal Committee or State Level Expert Appraisal Committee as the case may be."

"10. Post Environmental Clearance Monitoring:

(i) It shall be mandatory for the project management to submit half-yearly compliance reports in respect of the stipulated prior environmental clearance terms and

conditions in hard and soft copies to the regulatory authority concerned, on 1st June and 1st December of each calendar year.–

(ii) All such compliance reports submitted by the project management shall be public documents. Copies of the same shall be given to any person on application to the concerned regulatory authority. The latest such compliance report shall also be displayed on the web site of the concerned regulatory authority."

What is discernible from the aforenoted Notification, 2006 is as under :

(1) From the date of its publication there shall not be any construction of new projects or activities or the expansion or modernization of the existing projects or activities listed in the Schedule to the Notification entailing capacity addition with change in process and/or technology without a prior environmental clearance from the Central Government;

(2) The language used in the Notification is plain and clear. It reads : "only after the prior environmental clearance from the Central Government".

(3) The regulatory authority shall consider the recommendations of the EAC within 45 days of the receipt of the recommendations of the EAC;

(4) The regulatory authority shall normally accept the recommendations of the EAC, and in case of disagreement, shall request the EAC to reconsider within 45 days of the receipt of the recommendations of the

EAC while stating the reasons for the disagreement;

(5) If the regulatory authority fails to communicate its decision to the applicant within a period of 45 days as specified in Clause (1), the applicant may proceed as if the environmental clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the EAC.

The emphasis is on the use of the words "the applicant may proceed as if the environmental clearance sought for has been granted or denied". It is evident that it is only on the expiry of 45 days from the date of the recommendations of the EAC that a deeming fiction comes into play due to failure on the part of the regulatory authority to take appropriate decision on such recommendations. On expiry of 45 days, it would be permissible for the applicant to proceed as if the environmental clearance sought for has been granted.

Something else, that is of utmost importance is to understand that the deeming fiction as provided in Clause 8 of the EIA Notification, 2006 can only operate prospectively and not retrospectively. That is to say, the deeming provision would give rise to presumption that the clearance is granted on the expiry of 45 days' period from the date of the recommendations of the EAC in the absence of any order passed by the Central Government.

It is to be noted that what is to be deemed is a matter of fact; there is a 'deeming fiction'. It is also to be noted that when a fact is to be deemed, its consequences and incidents

are also to be deemed; that is to say, what follows from the deemed fact is also to be deemed.

Object of obtaining prior environmental clearance from the Central Government :

The Supreme Court, in N.D.Jayal and another v. Union of India and others, reported in (2004)9 SCC 362, has explained the aspects related to conditional clearance. We may quote with profit the observations made by the Supreme Court in paras 22 to 26, which read as under :

> *"22. Before adverting to other issues, certain aspects pertaining to the preservation of ecology and development have to be noticed. In Vellore Citizens Welfare Forum v. Union of India, (1996)5 SCC 647, and in M.C.Mehta v. Union of India, (2002)4 SCC 356, it was observed that the balance between environmental protection and developmental activities could only be maintained by strictly following the principle of 'sustainable development.' This is a development strategy that caters the needs of the present without negotiating the ability of upcoming generations to satisfy their needs. The strict observance of sustainable development will put us on a path that ensures development while protecting the environment, a path that works for all peoples and for all generations. It is a guarantee to the present and a bequeath to the future. All environmental related developmental activities should benefit more people while maintaining the environmental balance. This could be ensured only by the strict adherence of sustainable development without which life of coming generations will be in jeopardy.*
>
> *23. In a catena of cases we have reiterated that right to clean environment is a guaranteed fundamental right, May be in different context, the right to development is also declared as a component of Article 21 in cases like Samata v. State of Andhra Pradesh, (1997)8 SCC 191,*

and in Madhu Kishore v. State of Bihar, (1996)5 SCC 125.

24. The right to development cannot be treated as a mere right to economic betterment or cannot be limited to as a misnomer to simple construction activities. The right to development encompasses much more than economic well being, and includes within its definition the guarantee of fundamental human rights. The 'development' is not related only to the growth of GNP, in the classic work - 'Development As Freedom' the Nobel prize winner Amartya Sen pointed out that 'the issue of development cannot be separated from the conceptual framework of human right'. This idea is also part of the UN Declaration on the Right to Development. The right to development includes the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples' well being and realization of their full potential. It is an integral part of human right. Of course, construction of a dam or a mega project is definitely an attempt to achieve the goal of wholesome development. Such works could very well be treated as integral component for development.

25. Therefore, the adherence of sustainable development principle is a sine qua non for the maintenance of the symbiotic balance between the rights to environment and development. Right to environment is a fundamental right. On the other hand right to development is also one. Here the right to 'sustainable development' cannot be singled out. Therefore, the concept of 'sustainable development' is to be treated an integral part of 'life' under Article 21. The weighty concepts like inter-generational equity (State of Himachal Pradesh v. Ganesh Wood Products, (1995)6 SCC 363, public trust doctrine (M.C.Mehta v. Kamal Nath, (1997)1 SCC 388) and precautionary principle (Vellore Citizens, (1996)5 SCC 647), which we declared as inseparable ingredients of our environmental jurisprudence, could only be nurtured by ensuring sustainable development.

26. To ensure sustainable development is one of the goals of Environmental Protection Act, 1986 (for short 'the Act') and this is quiet necessary to guarantee 'right

to life' under Article 21. If the Act is not armed with the powers to ensure sustainable development, it will become a barren shell. In other words, sustainable development is one of the means to achieve the object and purpose of the Act as well as the protection of 'life' under Article 21. Acknowledgment of this principle will breath new life into our environmental jurisprudence and constitutional resolve. Sustainable development could be achieved only by strict compliance of the directions under the Act. The object and purpose of the Act - "to provide for the protection and improvement of environment" could only be achieved by ensuring the strict compliance of its directions. The concerned authorities by exercising its powers under the Act will have to ensure the acquiescence of sustainable development. Therefore, the directions or conditions put forward by the Act need to be strictly complied with. Thus the power under the Act cannot be treated as a power simpliciter, but it is a power coupled with duty. It is the duty of the State to make sure the fulfillment of conditions or direction under the Act, Without strict compliance, right to environment under Article 21 could not be guaranteed and the purpose of the Act will also be defeated. The commitment to the conditions thereof is an obligation both under Article 21 and under the Act. The conditions glued to the environmental clearance for the Tehri Dam Project given by the Ministry of Environment vide its Order dated July 19, 1990 has to be viewed from this perspective."

A lot has been argued on the deeming fiction provided in Clause 8 of the EIA Notification, 2006 and the deemed environmental clearance said to have been granted in favour of the MPSEZ. What is the effect of such a deeming provision and what could be the legislative intent behind providing such a deeming provision.

The word "deemed" is used in various senses. Sometimes, it means "generally regarded". At other time, it signifies 'taken prima facie to be', while in other case, it

means, 'taken conclusively'. Its various meanings are, - 'to deem' is 'to hold in belief, estimation or opinion'; to judge; adjudge; decide; considered to be; to have or to be of an opinion; to esteem; to suppose, to think, decide or believe on considerations; to account, to regard; to adjudge or decide; to conclude upon consideration. (see Major Law Lexicon by P.Ramanatha Aiyar, 4th Edition 2010 Vol.2)

A deeming fiction is a supposition of law that the thing is true without inquiring whether it be so or not, that it may have the effect of truth so far as it is consistent with justice. A deeming provision is made to include what is obvious or what is uncertain or to impose, for the purpose of statute, an ordinary construction of a word or phrase that would not otherwise prevail but, in each case, it would be a separate question as to that what object the Legislature has made on such a deeming fiction.

In this connection, we deem it necessary to consider few precedents on the true meaning of the word 'deem' and 'deeming fiction'.

In ***Consolidated Coffee Ltd. v/s. Coffee Board, Bangalore***, reported in AIR 1980 SC 1468, the purpose of the word 'deemed' occurring in Section 5(3) of the Central Sales Tax Act, 1956 came for consideration. The issue that emanated was whether a legal fiction had been created by use of the word 'deemed'. It is fruitful to reproduce what has been exposited by Their Lordships:

"*A deeming provision might be made to include what is*

obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case it would be a question as to with what object the legislature has made such a deeming provision. In St. Aubyn and Ors. v/s. Attorney General, 1952 A.C. 15 at p.53 Lord Radcliffe observed thus:

> "*The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.*"

In ***State of Tamil Nadu v/s. M/s. Arooran Sugars Ltd.***, reported in AIR 1997 SC 1815, a Constitution Bench, while dealing with the deeming provision in a statute, opined that the role of a provision in a statute creating legal fiction is well settled. Their Lordships referred to the decisions in ***East End Dwellings Co. Ltd. v/s. Finsbury Borough Council***, 1952 AC 109, ***Chief Inspector of Mines v/s. Karam Chand Thapar***, AIR 1961 SC 838, ***J.K. Cotton Spinning and Weaving Mills Ltd. v/s. Union of India***, AIR 1988 SC 191, ***M.Venugopal v/s. Divisional Manager, Life Insurance Corporation of India***, AIR 1994 SC 1343 and ***Harish Tandon v/s. Addl. District Magistrate, Allahabad***, AIR 1995 SC 676, and came to hold that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between which persons such a statutory fiction is to be resorted to and

thereafter the courts have to give full effect

> "*6. ... It is a well known principle of construction that in interpreting a provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the Section by which it is created...*"

From the aforesaid pronouncements, the principle discernible is that, it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the Court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term deemed has to be read in its context and further the fullest logical purpose and import are to be understood. It is because in modern legislation, the term deemed has been used for manifold purposes. The object of the Legislature has to be kept in mind. (See ***Andaleeb Sehgal v/s. Union of India and another***, AIR 2011 Delhi 29 (FB))

In the aforesaid context, we may also profitably state that the language employed in Clause 8 of the EIA Notification, 2006 must be read in a holistic and purposeful manner. The Court has a sacrosanct duty to understand the intention of the Legislature while interpreting a provision.

In ***Lt. Col. Prithi Pal Singh Bedi v/s. Union of India and Ors.***, reported in AIR 1982 SC 1413, the Apex Court has

expressed the view as follows:

> "*The dominant purpose in construing a statute is to ascertain the intention of the Parliament. One of the well recognised canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision the Court should adopt literal construction if it does not lead to an absurdity. The first question to be posed is whether there is any ambiguity in the language used in Rule 40. If there is none, it would mean the language used speaks the mind of Parliament and there is no need to look somewhere else to discover the intention or meaning. If the literal construction leads to an absurdity, external aids to construction can be resorted to. To ascertain the literal meaning it is equally necessary first to ascertain the juxtaposition in which the rule is placed, the purpose for which it is enacted and the object which it is required to subserve and the authority by which the rule is framed. This necessitates examination of the broad features of the Act.*"

In ***Reserve Bank of India v/s. Peerless General Finance and Investment Co. Ltd. and others***, reported in AIR 1987 SC 1023, Their Lordships have ruled thus:

> "*Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover*

what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place..."

Bearing the aforesaid principles in mind, it is necessary for us now to consider the object of such deeming provisions provided by the Legislature in the EIA Notification, 2006.

The environmental clearance process is required for 39 types of projects and covers aspects like screening, scoping and evaluation of the upcoming projects. The main purpose is to assess impact of the project on the environment and the people and to try to minimize the same.

The environmental clearance process has been a subject of significant debate, particularly on how uncertainty in the granting process affects the implementation period and costs of the projects.

Every provision of a statute is brought into by the Legislature with a particular object in mind, and when a provision requires a thing to be done in a particular manner and charged the executive with the task of getting it done in that fashion alone, the power under the provision has to be exercised responsibly to ensure proper governance of matters which have a direct bearing on the welfare of each and every citizen individually and the society as a whole.

It is also a settled law that whenever there are two

possible interpretations, the one which subserves to the intent of the Legislature is to be accepted. The object of the Notification, 2006 is to assess impact of the plant project on the environment and the people and to try to minimise the same, and thus, the interpretation which upholds any such scheme should be followed. Heydon's principle is now well-recognized in interpreting any enactment. It lays down : the courts must see (a) what was the law before making of the Act; (b) what was the mischief or defect for which the law did not provide; (c) what is the remedy that the Act has provided; and (d) what is the reason of the remedy. It states that courts must adopt that construction which suppresses the mischief and advances remedy. (see Raipur Development Authority v. Anupam Sahakari Gruh Nirman Samiti, (2000)4 SCC 357)

It appears to us that the object behind providing for such a deeming fiction is to see that the project does not get delayed, as a result of which, the project proponent may not have to suffer hardship. This is precisely the reason why Clause 8 of the EIA Notification, 2006 provides that the Central Government should act on the recommendations of the EAC within a period of 45 days; failing which, the applicant may proceed as if the environmental clearance sought for has been granted in terms of the final recommendations of the Expert Appraisal Committee.

Clause 8(3) of the EIA Notification, 2006 states that the applicant may proceed as if the environmental clearance sought for has been granted. Thus, it is very evident that it is only after the deeming fiction comes into play on the expiry of the period specified in sub-para (1) of Clause 8 that the

applicant gets a right to proceed ahead with the project and in any case not before the grant of the same.

It was sought to be contended very vociferously that the term 'deemed clearance' in the facts of the case is a misnomer. The fiction created is not that the application as made by the project proponent is deemed to be granted, but that the recommendations of the EAC after scoping and due appraisal, whether approving or rejecting the proposal, are to be treated as the decision of the regulatory authority, which is a different matter altogether.

It was also sought to be contended on behalf of the respondents that the construction having been undertaken prior to the grant/deemed grant of the clearance, could not be termed as invalid because there is no provision in the Notification, 2006 laying down that any breach by commencing construction prior to clearance would invalidate the deemed clearance. According to the respondents, reading in such a condition would amount to legislating, which is impermissible.

We are not impressed by such submission canvassed on behalf of the respondents because if such submissions are accepted, we will be doing violence with the terms of the Notification and the very object with which such Notification has been issued would stand frustrated. When the Notification makes it very clear that it is only after the expiry of 45 days' period it would be permissible for the applicant to proceed with the project, then it necessarily implies that the applicant cannot proceed with the project before the deeming fiction comes into play. In taking such a view, it could not be said that

we are reading something in the Notification which would amount to legislating. We have merely construed the plain meaning and object of the Notification which makes it abundantly clear that prior to the grant of environmental clearance, be it actual grant by the Central Government or by a deeming fiction, no construction or any other activity could be undertaken. Once the first part of the Notification makes this very clear, then by any stretch of imagination, it cannot be said that any construction or activity undertaken prior to the grant of deemed clearance would stand automatically validated.

It was also sought to be vociferously contended on behalf of the unit holders that the individual unit holders have obtained clearance from the concerned authorities so far as their part of the obligation is concerned before they started operating the units. In view of such clearance and permission being granted by the authorities, they proceeded ahead with the construction on the premise that it was permissible for them to put up the construction. It was also sought to be argued that the units were not made aware at any stage that the SEZ had not obtained the required clearance.

We are not impressed even by such submission because this issue has been set at rest by us while deciding the Writ Petition (PIL) No.194 of 2011. In so many words we have held that so long the environmental clearance is not granted by the Central Government in favour of the MPSEZ for creation of infrastructural facilities on the land so allotted and consequent to such permission, such facilities have been actually created by the allottee, the latter cannot lawfully lease out the right of

enjoyment of the infrastructural facilities to its lessees. We have held in so many words that a lessee cannot have a better right than that of the lessor in the property. Law is also well-settled that there cannot be any valid lease for enjoyment of the property, which is not in existence and not capable of being put into possession to the lessee at the time of execution of the lease.

Therefore, the submissions that the unit holders have been granted permission by the Development Commissioner of the SEZ and GPCB is of no avail to the unit holders. Even if they had obtained the permission from the other authorities, then only after the grant of the environmental clearance to the lessee i.e. the MPSEZ, they could have setup their units on the strength of the individual permission which has been granted in their favour.

It was also sought to be argued on behalf of the respondents that no useful purpose is going to be served by asking the unit holders to stop operating their units and remove the construction, more particularly, when the environmental clearance is deemed to have been granted and there is no serious impact so far as the issue of pollution is concerned.

The learned counsel appearing for the respondents tried to convince us that when the EAC made the recommendations, they were conscious of the fact that the unit holders have already started operating their respective industrial units and despite the same, thought fit to recommend to the Central Government granting of the environmental clearance.

The question is not whether the units who have already started their operations since 2008 have created problems of pollution and environment, but it is a matter of complying with the provisions of law laid down by the Legislature.

Unfortunately, in the present case, the respondent no.1 Union of India, in its Ministry of Environment and Forests, has taken this issue very lightly. We are at pains to state that in such an important matter relating to environment and gross violations of the EIA Notification, 2006, it has not thought fit even to file a formal reply and clarify the matter. Time and again we kept on inquiring during the course of the hearing of the petition with the learned Assistant Solicitor General of India as to what was the material considered by the EAC while recommending the environmental clearance to the Central Government. We also kept on inquiring why the Central Government kept quiet upon the recommendations of the EAC and allowed the time period to expire so as to give effect to the deeming provision under Clause 8 of the Notification. Till the conclusion of the hearing of this petition, there was no answer at the end of the Union of India. We were completely bereft of the materials which the EAC must have taken into consideration while making the recommendations for grant of environmental clearance.

We understand the anxiety of the Central Government in speedy implementation of the project for which the project proponent might be committed. But the question before us is that can the project proponent as a lessor and the unit holders within the SEZ as lessees be permitted to flout the provisions

of the Notification, 2006 or the laws made by the Parliament. The answer has to be in the negative. Considering the mandatory nature of the environmental clearance, procedure has to be meticulously followed. Only on grant of environmental clearance any construction, preliminary or otherwise, relating to setting up of the project can be undertaken. There is an express prohibition that 'no construction work, preliminary or otherwise, relating to setting up of the project may be undertaken till the environment and/or site clearance is obtained'.

It is preposterous to suggest that such prohibition would apply to the respondent no.8 MPSEZ as the developer of the SEZ, but the same would not apply to the unit holders who are put into possession by the lessor without any environmental clearance.

In this connection, we may quote with profit a decision of the Supreme Court in the case of Indian Council Enviro Legal Action v. Union of India, reported in AIR 1996 SC 1446.

In the said case, the Supreme Court noted that the Governmental authorities were showing scant respect in the matter of enforcement of the Acts and developments were taking place for personal gains at the expense of the environment and with disregard to the law. The Supreme Court expressed thanks to the public spirited persons initiating public interest which enables the Courts to examine the matters and issue appropriate directions. The Court observed as under :

"*With rapid industrialisation taking place, there is an*

increasing threat to the maintenance of the ecological balance. The general public is becoming aware of the need to protect environment. Even though, laws have been passed for the protection of environment, the enforcement of the same has been tardy, to say the least. with the governmental authorities not showing any concern with the enforcement of the said Acts, and with the development taking place for personal gains at the expense of environment and with disregard to the mandatory provisions of law, some public spirited persons have been initiating public interest litigations. The legal position relating to the exercise of jurisdiction by the Courts for preventing environmental degradation and thereby, seeking to protect the fundamental right of the citizens, is now well settled by various decisions of this Court. The primary effect of the Court, while dealing with the environmental related issues, is to see that the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws. The Courts, in a way act as the guardian of the people's fundamental rights but in regard to many technical matters, the Courts may not be fully equipped. Perforce it has to rely on outside agencies for reports and recommendations whereupon orders have been passed from time to time. Even though it is not the function of the Court to see the day to day enforcement of the law, that being the function of the Executive but because of the non-functioning of the enforcement agencies, the Courts as of necessity have had to pass orders directing the enforcement agencies to implement the law."

We may also quote with profit a decision of the Supreme Court in the case of Sterlite Industries (India) Limited and others v. Union of India and others, reported in (2013)4 SCC 575.

In the said decision, the Supreme Court considered the scope of the Court to take environmental clearance in judicial review and the power to quash the same. The Supreme Court also considered the power of the High Court to quash the

environmental clearance on the complaint of breach of a mandatory requirement in the procedure. We may quote with profit the observations made by the Supreme Court in paras 32, 34 and 40 :

> *"32. Where, however, the challenge to the environmental clearance is on the ground of procedural impropriety, the High Court could quash the environmental clearance only if it is satisfied that the breach was of a mandatory requirement in the procedure. As stated in Environmental Law edited by David Woolley QC, John Pugh-Smith, Richard Langham and William Upton, Oxford University Press:*
>
> > *"It will often not be enough to show that there has been a procedural breach. Most of the procedural requirements are found in the regulations made under primary legislation. There has been much debate in the courts about whether a breach of regulations is mandatory or directory, but in the end the crucial point which has to be considered in any given case is what the particular provision was designed to achieve."*
>
> *As we have noticed, when the plant of the appellant-company was granted environmental clearance, the notification dated 27.01.1994 did not provide for mandatory public hearing. The Explanatory Note issued by the Central Government on the notification dated 27.01.1994 also made it clear that the project proponents may furnish rapid EIA report to the IAA based on one season data (other than monsoon), for examination of the project Comprehensive EIA report was not a must. In the absence of a mandatory requirement in the procedure laid down under the scheme under the Environment (Protection) Act, 1986 at the relevant time requiring a mandatory public hearing and a mandatory comprehensive EIA report, the High Court could not have interfered with the decision of the Central Government granting environmental clearance on the ground of procedural impropriety.*

34. In Belize Alliance of Conservation Non-governmental Organizations v. The Department of the Environment and Belize Electric Company Limited (supra) cited by Mr. Prakash, the Lords of the Judicial Committee of the Privy Council have quoted with approval the following words of Linden JA with reference to the Canadian legislation in Bow Valley Naturalists Society v. Minister of Canadian Heritage [2001] 2 FC 461 at 494:

> *"The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized but, as long as they follow the statutory process, it is for the responsible authorities."*

The aforesaid passage will make it clear that it is for the authorities under the Environment (Protection) Act, 1986, the Environment (Protection) Rules, 1986 and the notifications issued thereunder to determine the scope of the project, the extent of the screening and the assessment of the cumulative effects and so long as the statutory process is followed and the EIA made by the authorities is not found to be irrational so as to frustrate the very purpose of EIA, the Court will not interfere with the decision of the authorities in exercise of its powers of judicial review.

40. This takes us to the argument of Mr. Prakash that had the Ministry of Environment and Forests, Government of India, applied its mind fully before granting the environment clearance and had the TNPCB applied its mind fully to the consents under the Air Act and the Water Act and considered all possible environmental repercussions that the plant proposed to be set up by the appellants would have, the environmental problems now created by the plant of the appellants would have been prevented. As we have already held, it is for the administrative and statutory

authorities empowered under the law to consider and grant environmental clearance and the consents to the appellants for setting up the plant and where no ground for interference with the decisions of the authorities on well recognized principles of judicial review is made out, the High Court could not interfere with the decisions of the authorities to grant the environmental clearance or the consents on the ground that had the authorities made a proper environmental assessment of the plant, the adverse environmental effects of the industry could have been prevented. If, however, after the environmental clearance under the Environment (Protection) Act, 1986, and the Rules and the notifications issued thereunder and after the consents granted under the Air Act and the Water Act, the industry continues to pollute the environment so as to effect the fundamental right to life under Article 21 of the Constitution, the High Court could still direct the closure of the industry by virtue of its powers under Article 21 of the Constitution if it came to the conclusion that there were no other remedial measures to ensure that the industry maintains the standards of emission and effluent as laid down by law for safe environment (see M.C.Mehta v. Union of India and others, [(1987) 4 SCC 463] in which this Court directed closure of tanneries polluting the waters of River Ganga).”

It may not be out of place at this stage to consider the recommendations of the EAC with respect to grant of environmental clearance and CRZ clearance for the proposed multi-product SEZ at Mundra. The minutes of the 113th Meeting of the Expert Appraisal Committee held on 4th-5th June 2012 are placed on record and Item No.5.5 deals with the clearance with which we are concerned. It reads as under :

“5.5 EC and CRZ clearance for proposed Multi-Product SEZ at Mundra by M/s.Mundra Port and SEZ Ltd. (F.No.10-138/2008-IA.III)

The project involves development of multi-product

SEZ on a plot area of 18,000 ha. of which 5,920.7762 ha. is presently notified under Special Economic Zone (SEZ). The multi-product SEZ will provide plots to various industries and also develop dwelling units, hotels, shopping malls and other related amenities and utilities. The total water requirement is 11 MLD (source-River Narmada). It is also proposed to have a desalination plant of 150 MLD capacity and 2 Central Effluent Treatment Plants (CETPs) of 50 MLD capacity and 17 MLD each capacity. It is also proposed to have a STP of 62 MLD capacity.

The project was appraised by the EAC in its meeting held on 30th and 31st January 2009 and finalized the TOR including conduct of Public Hearing. Public Hearing was conducted on 05.10.2010.

It is informed by the proponent that the ongoing court cases do not have any stay in the present project. Only laying of pipeline are proposed within CRZ areas. The SCZMA has recommended the project vide letter dated 27.03.2012.

The proposal was examined by the EAC in its meeting held on 16th-17th April 2012 and Committee sought additional information. The response submitted by the proponent were examined by the Committee.

During the discussion, the following points emerged :

(i) There shall be no allotment of plot in CRZ area to industries except the port and harbor & the activities require foreshore facilities. Proponent shall submit undertaking.

(ii) Monitoring on marine disposal shall be carried out and the quality of marine parameters at the outfall shall be monitored and report submitted to RO, MoEF along with half yearly compliance report.

(iii) There shall be no development activities in CRZ area other than those permissible under the Coastal Regulation Zone Notification, 2011.

(iv) Proponent shall identify 200 ha. of land for

mangrove plantation as per the condition laid by SEAC.

(v) 50 meter buffer from the existing mangrove area should be provided for any developmental activity.

(vi) Proponent shell develop the green belt of 3 layers of canopy all along the periphery, except water front.

(vii) All the recommendation of the EMP shall be complied with letter and spirit. All the mitigation measures submitted in the EIA report shall be prepared in a matrix format and the compliance for each mitigation plan shall be submitted to MoEF along with half yearly compliance report to MoEF-RO.

(viii) The outfall structure is very close to the turning circle at very shallow depth. This may be extended to water depth of about 6 – 8 m. near the shipping channel.

(ix) Under water pipelines (intake and outfall) shall be laid underground at least 2.0 m. below its crown from the sea bed.

The Committee recommends the proposal for Environmental and CRZ Clearance with the above conditions in the Clearance letter for strict compliance by the project proponent."

It appears on plain reading of the very first paragraph wherein it has been stated that the multi-product SEZ will provide plots to various industries and also develop dwelling units, hotels, shopping malls and other related amenities and utilities.

Whether the EAC had any idea on 4th-5th June 2012 that the SEZ has already provided the plots to various industries and such industries have already started operating their units. We do not find any material except the emphasis placed by the respondents on the observations made in the second

paragraph that the project was appraised by the EAC in its meeting held on 30th-31st January 2009 and finalized the terms of reference including the conduct of public hearing which was undertaken on 5th October 2010. Based on such observations, it was submitted that the minutes of public hearing and the objections must have been taken into consideration by the EAC and, therefore, the EAC could be said to be within the knowledge that the MPSEZ has already allotted the plots to various industries and such industries have already started operating.

We deem it necessary to refer to a very recent judgment of the Supreme Court in the case of T.N.Godavarman Thirumulpad v. Union of India and others, Appeal No.202 of 1995 decided on 6th January 2014, wherein the Supreme Court took serious note of the various deficiencies with regard to processing, appraisal and approval of the projects for environmental clearance under the EIA Notification dated 14th September 2006.

Having taken cognizance of such deficiencies, the Supreme Court directed the Central Government to constitute a Regulator at the national level having its offices in all the States which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearances and which can also monitor the implementation of the conditions laid down in the environmental clearances.

The issue before the Supreme Court was, whether the order of the Supreme Court in Lafarge Umiam Mining Private

Limited v. Union of India and others, (2011)7 SCC 338, for appointing a National Regulator under Section 3(3) of the Environment (Protection) Act, 1986, was merely a suggestion or a mandamus to the Central Government. The Supreme Court considered sub-paras (i.1), (i.2), (i.3), (i.4) and (i.5) of para 122 of the Lafarge Umiam Mining Private Limited (*supra*), which are extracted herein below :

> *"(i.1.) The time has come for this Court to declare and we hereby declare that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the grant of permissions under Section 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and improvement under the Environment (Protection) Act, 1986. The principles/ guidelines mentioned in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation) Act, 1980. This direction is required to be given because there is no machinery even today established for implementation of the said National Forest Policy, 1988 read with the Forest (Conservation) Act, 1980. Section 3 of the Environment (Protection) Act, 1986 confers a power coupled with duty and, thus, it is incumbent on the Central Government, as hereinafter indicated, to appoint an appropriate authority, preferably in the form of regulator, at the State and at the Central level for ensuring implementation of the National Forest Policy, 1988.*
>
> *(i.2.) The difference between a regulator and a court must be kept in mind. The court/tribunal is basically an authority which reacts to a given situation brought to its notice whereas a regulator is a proactive body with the power conferred upon it to frame statutory rules and regulations. The regulatory mechanism warrants open discussion, public participation and circulation of the draft paper inviting suggestions.*
>
> *(i.3.) The basic objectives of the National Forest Policy, 1988 include positive and proactive steps to be taken. These include maintenance of environmental stability*

through preservation, restoration of ecological balance that has been adversely disturbed by serious depletion of forests, conservation of natural heritage of the country by preserving the remaining natural forests with the vast variety of flora and fauna, checking soil erosion and denudation in the catchment areas, checking the extension of sand dunes, increasing the forest/tree cover in the country and encouraging efficient utilisation of forest produce and maximising substitution of wood.

(i.4.) Thus, we are of the view that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.

(i.5.) There is one more reason for having a regulatory mechanism in place. Identification of an area as forest area is solely based on the declaration to be filed by the user agency (project proponent). The project proponent under the existing dispensation is required to undertake EIA by an expert body/institution. In many cases, the court is not made aware of the terms of reference. In several cases, the court is not made aware of the study area undertaken by the expert body. Consequently, MoEF/State Government acts on the report (Rapid EIA) undertaken by the institutions who though accredited submit answers according to the terms of reference propounded by the project proponent. We do not wish to cast any doubt on the credibility of these institutions.

However, at times the court is faced with conflicting reports. Similarly, the Government is also faced with a fait accompli kind of situation which in the ultimate analysis leads to grant of ex post facto clearance. To obviate these difficulties, we are of the view that a regulatory mechanism should be put in place and till the time such mechanism is put in place, MoEF should prepare a panel of accredited institutions from which alone the project proponent should obtain the Rapid EIA and that too on the terms of reference to be formulated by MoEF."

After taking note of the observations made by the

Supreme Court referred to above, the Supreme Court proceeded to observe as under :

> *"It will be clear from the underlined portions of the order of this Court in Lafarge Umiam Mining Private Limited extracted above that this Court on an interpretation of Section 3 (3) of the Environment (Protection) Act, 1986 has taken a view that it confers a power coupled with duty to appoint an appropriate authority in the form of a Regulator at the State and at the Central level for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters and has accordingly directed the Central Government to appoint a National Regulator under the said provision of the Act. Mr. Parasaran is, therefore, not right in arguing that in the case of Lafarge Umiam Mining Private Limited, this Court has merely suggested that a National Regulator should be appointed and has not issued any mandamus to appoint a National Regulator.*
>
> *We further find on reading of sub-paragraphs (i.2), (i.3) and (i.5) of Paragraph 122 of the order in the case of Lafarge Umiam Mining Private Limited extracted above that this Court has not found the mechanism of making the EIA appraisals of projects by the MoEF to be satisfactory. As a matter of fact, we also find that the Department of Management Studies, Indian Institute of Technology, Delhi, has prepared report on 'Scope, Structure and Processes of National Environment Assessment and Monitoring Authority (NEAMA)' for the Ministry of Environment and Forest, Government of India, and the Executive Summary of the Report points out the problems with regard to the implementation of EIA 2006 Notification. Paragraph 4 from Section I of the Executive Summary under the heading 'Major Findings & Recommendations', is extracted hereinbelow:*
>
> > *"4. We analysed the implementation of EIA 2006 notification and the proposed CZM notification 2010 in terms of policy, structure and process level issues. Almost all the problems in implementing these notifications relate to structure and processes. Key issues are mentioned below*
> >
> > *a. The presence of MoEF in both the appraisal and*

approval processes leads to a perception of conflict of interest. The Member Secretary (who, according to the 2006 notification, was supposed to be the Secretary) is involved in the processing, appraisal and approval of the EIA applications.

b. Lack of permanence in the Expert Appraisal Committees leads to lack of continuity and institutional memory leading to poor knowledge management.

c. Current EIA and CRZ clearances rely predominantly on the data provided by the project proponent and the absence of authenticated and reliable data and lack of mechanisms to validate the data provided by the project proponent might lead to
subjectivity, inconsistency and inferior quality of EIA reports.

d. Though the EIA notification requires several documents like ToRs (for every project), minutes of public hearing meetings (for each project), EIA report (with clearance conditions) and self-monitoring reports to be put in public domain (predominantly on the website), this has not been done for lack of institutional mechanisms. This leads to a perception of lack of transparency in the processes.

e. Several studies have pointed toward the poor monitoring of the clearance conditions. Huge gaps in monitoring and enforcement of clearance conditions actually defeats the very purpose of grant of conditional environmental clearance."

Hence, the present mechanism under the EIA Notification dated 14.09.2006, issued by the Government with regard to processing, appraisals and approval of the projects for environmental clearance is deficient in many respects and what is required is a Regulator at the national level having its offices in all the States which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearances and which can also monitor the implementation of the conditions laid down in the Environmental Clearances.

The Regulator so appointed under Section 3(3) of the Environment (Protection) Act, 1986 can exercise only such powers and functions of the Central Government under the Environment (Protection) Act as are entrusted to it and obviously cannot exercise the powers of the Central Government under Section 2 of the Forest (Conservation) Act, 1980, but while exercising such powers under the Environment Protection Act will ensure that the National Forest Policy, 1988 is duly implemented as held in the order dated 06.07.2011 of this Court in the case of Lafarge Umiam Mining Private Limited. Hence, we also do not find any force in the submission of Mr.Parasaran that as under Section 2 of the Forest (Conservation) Act, 1980 the Central Government alone is the Regulator, no one else can be appointed as a Regulator as directed in the case of Lafarge Umiam Mining Private Limited.

We, therefore, direct the Union of India to appoint a Regulator with offices in as many States as possible under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986 as directed in the order in the case of Lafarge Umiam Mining Private Limited and file an affidavit along with the notification appointing the Regulator in compliance of this direction by 31st March, 2014.

The I.As. will stand disposed of accordingly."

However, what next followed is very important. Although the Central Government did not deem fit for any reason to consider the recommendations made by the EAC for grant of environmental clearance within the period of 45 days, which has led the respondents to plead deemed environmental clearance, but the Central Government was forced to issue an Office Memorandum dated 14th September 2012 in the wake of the complaints being received from the Kheti Vikas Sewa Trust regarding severe impact upon the environment safety and integrity in Mundra Port and SEZ Limited in Mundra-Kutch, committed by the Adani Port and SEZ Limited, and considering

the severity of the issues involved in the matter, it was decided to constitute a committee known as Sunita Narain Committee.

The broad terms of the reference of the Committee for inspection of M/s.Adani Port and SEZ Limited were to examine the following :

(i) the allegations regarding bunding/diversion/blocking of creeks and reclamation etc. and thereby distortion of original HTL.

(ii) The HTL submitted by the proponent and HTL of approved Coastal Zone Management Plan.

(iii) Whether construction of Mundra Port, roads, railway was taken up prior to grant of Forest/Environmental Clearance.

(iv) The development of port with respect to the approved components.

(v) Compliance to the conditions of the Environmental and CRZ clearance granted for the port development.

(vi) The destruction of mangroves and levelling of sand dunes.

(vii) The development of Power Plant with respect to the approved components.

(viii) Compliance to the conditions of the Environmental clearance granted for the Power plant.

(ix) The likely impacts on agriculture due to ingress of salinity due to creation of huge water body of sea water for Adani Power Plant at Mundra Taluka.

(x) The issues related to handling of fly ash by Adani Power Limited and particularly with reference to the Notification on utilisation of fly ash.

(xi) The issues related to earthquake/Tsunami/other natural calamities and soil liquefaction which may be

impacted adversely by the project."

The Sunita Narain Committee took note of the recommendations of the EAC made in its 113th Meeting for the proposed multi-product SEZ by the MPSEZ and recommended in its report to the Central Government that it should commission a comprehensive study on the cumulative impacts of the projects, which have already been granted clearance. Such study, according to the Committee, should be used to assess and mitigate the impacts in the region. The Committee noted various irregularities like cases of procedural lapses, blocking of creeks, destruction of mangroves, flyash utilization and disposal. The Committee recommended for effective deterrence for non-compliance and remedial measures.

It was argued that the Sunita Narain Committee report is with respect to other clearance.

We may quote the following observations made by the Committee in its report :

*"**7.2. Recommendation for effective deterrence for non-compliance and remedial measures**.*

In the Committee's assessment there is incontrovertible evidence of violation of EC condition and non-compliance. It must also be recognized that the Company has bypassed environmental procedures in certain cases.

The question before the Committee is to determine the future course of action. One option would be to recommend the cancellation of clearances, where procedures have been bypassed. In addition, legal proceeding could be initiated against non-compliance and violations of EC conditions. But it is also clear that these steps, however, harsh they may sound, are in the nature of being procedural and would only lead to

delay without any gains to the environment and the people. The Committee is cognizant of the fact that large scale development has already been undertaken and it is not possible or prudent at this stage to halt or cease its operations.

Therefore, the Committee has decided to recommend a different course of action, which is both intended to be an effective deterrent and also suggests the way for future remedial action to improve the environment.

Given this the Committee recommends the following:

7.2.1 MoEF should impose a substantial deterrent for noncompliance and violations through the creation of an Environment Restoration Fund.

The Committee is aware that it is practically difficult to assign tangible and intangible costs to non-compliance and violations. However, the inability to quantify these costs should not deter us from setting precedence for the future. This will only result in the issue remaining unresolved and conflicted and will delay action to improve the environment and the livelihoods of people.

Considering the scale of the project, the Committee would recommend that the Environment Restoration Fund should be 1 per cent of the project cost (including the cost of the thermal power plant) or Rs 200 crore, whichever is higher.

The Environment Restoration Fund should operate under the chairmanship of the Secretary, MoEF and be used specifically for remediation of environmental damage in Mundra and also for strengthening the regulatory and monitoring systems.

The purpose of the Fund should be the following:

a. Protection of marine ecology;

b. Protection and conservation of mangroves, including development of new mangrove conservation areas;

c. Restoration and conservation of creeks;

d. Independent studies and monitoring of the entire

project areas, including cumulative impacts and public data disclosure systems.

e. Social infrastructure and livelihood support for fishers community, including development of access of fishers from their temporary settlements to villages."

It appears that the Sunita Narain Committee was also cognizant of the fact that large scale development has already been undertaken and, therefore, it was not possible or prudent at that stage to halt or cease its operation. This is suggestive of the fact that such developments have taken place in the absence of any prior environmental clearance.

Thus, in our view, although by a deeming fiction the environmental clearance could be said to have been granted in favour of the respondent no.8 MPSEZ, yet it is too late in the day to contend that whatever illegality has been committed stands cured or rectified by such grant of deemed environmental clearance.

Very curiously we may take note of the submission canvassed on behalf of the respondents that the judgment rendered by us in Writ Petition (PIL) No.194 of 2011 dated 19th May 2012 does not lay down that the developer cannot sublease the land as the observations that the developer was not entitled to sublease the land is found only in the supporting view taken by one of us (His Lordship Bhaskar Bhattacharya, CJ.). It was submitted that the finding in the judgment rendered by J.B.Pardiwala, J. is to the effect that the developer could have allotted the plots to the companies desirous of putting up their units. In such circumstances, it was submitted

that the said judgment dated 9th May 2012 contains two contrary views on this issue and, therefore, it may not be considered to be an authority for the proposition that the allotment or lease of the plot is impermissible in law.

We are afraid, we are not impressed by such submissions as it appears that the same has been canvassed as a last effort to salvage the situation. The observations made by one of us J.B.Pardiwala, J. that at the most the developer could have allotted the plots would not mean and could not have been construed by the respondents to convey that the allottees could develop the plots and put up construction on the same. That is not the substance of the judgment. What was sought to be conveyed was that at the most there could be allotment to a particular person interested to setup an industry in the SEZ. His Lordship Bhaskar Bhattacharya, CJ. clarified in no uncertain terms that so long the environmental clearance is not granted by the Central Government in favour of the MPSEZ for creation of infrastructural facilities on the land so allotted and consequent to such permission, such facilities have been actually created by the allottee, the later cannot lawfully lease out the right of enjoyment of the infrastructural facilities to its lessees.

It could not be said that there is any conflict of opinion in this regard.

It is settled principle of law that when the other Judges of the Bench do not express any contrary view or dissenting view than the view expressed by other Judge of the Bench, it is presumed that the Judges who have not expressed contrary to

the dissenting view have agreed with the view expressed by the other Judge.

In this connection, we may quote with profit a decision of the Queen's Bench in Guardians of the Poor of the West Derby Union v. The Guardians of the Poor of the Atcham Union, reported in XXIV Queen's Bench Division, 117. In the said case, His Lordship Esher, M.R. observed as under :

> *"The question is, what is the true construction of the 35th section of the Act of Parliament which is before us, and, when we have got at the true construction, what is the application of it to this case? With regard to the construction of this section, a great many Courts have considered it, and a great many judges have had different opinions about it. That being so, this Court expressed a hope, as we were told that several cases were going to the House of Lords, that the House of Lords would construe the whole section, so that we might know what their view of the true construction was. The House of Lords heard the cases, and did not give judgment at once, but considered the matter carefully, and four of the learned judges in the House of Lords gave judgment. Now we know that each of them considers the matter separately, and they then consider the matter jointly, interchanging their judgments, so that every one of them has seen the judgments of the others. If they mean to differ in their view, they say so openly when they come to deliver their judgments, and if they do not do this, it must be taken that each of them agrees with the judgments of the others."*

It was also sought to be vociferously canvassed before us that the Ministry of Environment and Forests as it has granted environmental clearance to the unit in Andhra Pradesh Special Economic Zone on 8th June 2009 and 5th August 2011 before the environmental clearance was granted to the said SEZ on 13th February 2012 and on the strength of such environmental

clearance the units were even established before the environmental clearance was granted in favour of the SEZ. It was also brought to our notice that the Ministry of Environment and Forests granted environmental clearance to a unit in Dahej SEZ on 19th August 2008 before the environmental clearance was granted to the said SEZ on 17th March 2010. According to Mr.Thakore, the learned counsel appearing for the respondent no.8 – MPSEZ, even the projects within this SEZ were granted clearance by the Ministry of Environment and Forests prior to the environmental clearance to the SEZ itself. We are of the opinion that this by itself would not help the respondents because there is nothing on record to indicate as to how and in what circumstances such environmental clearance was granted. This by itself is not sufficient to justify the commencement of the construction and the project even before EAC made its recommendations for grant of environmental clearance to the Ministry. At least one thing is clear from the examples relied upon by Mr.Thakore in both the cases, i.e. in Andhra Pradesh SEZ as well as in Dahej SEZ, there was environmental clearance by the Ministry itself to the units. Here, in the present case, all that has been obtained by the individual unit holders is the permission or consent from the GPCB and other authorities. Beside this, the Union would have been the right respondent to explain about the Andhra Pradesh SEZ and the Dahej SEZ, but it has chosen to remain quiet and failed to assist the court in this regard in any manner.

Case Law relied upon by the Petitioners :

We shall now look into few decisions relied upon by

Mr.Yagnik, the learned counsel appearing for the petitioners of Writ Petition (PIL) 21 of 2013, in support of his submissions :

In Gram Panchayat Navlakh Umbre (*supra*) which was a Public Interest Litigation, the challenge was to the environmental clearance granted to the respondent for setting up a 355 MWs combined cycle power project. The Court took note of the fact that on 14th September 2006 the Ministry of Environment and Forests, Union of India, issued a Notification in exercise of powers, *inter alia*, conferred by Section 3 of the Environment (Protection) Act, 1986 stipulating a requirement of a prior environmental clearance for setting up new projects or activities and for the expansion or modernization of existing projects or activities falling within the purview of the notification. The power project in that case was falling in category B-1 of the Schedule of the Notification.

The Court also took note of the deeming provision, stating that its concept was an integral part of the Notification dated 14th September 2006. The Court, thereafter, exhaustively considered various stages which an environmental clearance has to undergo. The principal argument before the Bench on the part of the respondent was that it had received deemed permission for project on the basis of the recommendations that were issued by the SEAC. The Court took the view that since it held the recommendations of the SEAC to be invalid and contrary to law, the basis on which the submissions of deemed permission had been urged would have no foundation whatsoever. The Court criticized and expressed its concern about the manner in which both the SEAC and SEIAA had proceeded to grant

clearances without application of mind in breach of the specific conditions of the Notification dated 14th September 2006. The respondent had carried out development work at the site without prior environmental clearance. The Court also took notice of the fact that its attention was drawn repeatedly by the petitioner to their grievance that even without an environmental clearance, the respondent had proceeded with the work at the site in breach of the Notification dated 14th September 2006.

In the aforenoted factual background, the Court made the following observations which, in our opinion, fortifies the submissions of Mr.Yagnik that the respondent nos.10 to 21 cannot take shelter of the deemed environmental clearance.

> *"The issue as to whether an applicant for environmental clearance has acted in breach of the condition which prohibits work prior to the receipt of environmental clearance is a material consideration in determining whether environmental clearance should be granted. A project proponent who seeks an environmental clearance under the law must demonstrably act in accordance with law. There is a serious allegation of a breach by the sixth respondent which resulted in the issuance of a notice to show cause by MPCB. That issue cannot be disassociated from the grant of an environmental clearance and a clearance could not have been granted without a definitive conclusion, arrived at in accordance with the principles of natural justice, on the issue of breach."*
>
> *"In Commissioner of Municipal Corporation, Shimla v. Prem Lata Sood and others, (2007)11 SCC 40, the question that fell for consideration before the Supreme Court was the interpretation of Section 247 of the Himachal Pradesh Town and Country Planning Act, 1977, which provides for a legal fiction specifying a period of 60 days within which the application for grant of sanction of a building plan should be granted, failing which,*

permission would be deemed to have been granted. The Supreme Court took the view that a legal fiction must be construed having regard to the purport and object of the Act for which the same was enacted."

The Court made the following observations in para 44 :

"There cannot be any doubt whatsoever that an owner of a property is entitled to enjoy his property and all the rights pertaining thereto. The provisions contained in a statute like the 1994 Act and the building bye-laws framed thereunder, however, provide for regulation in relation to the exercise and use of such right of an owner of a property. Such a regulatory statute must be held to be reasonable as the same is enacted in public interest. Although a deeming provision has been provided in sub-section (1) of Section 247 of the 1994 Act, the same will have restricted operation. In terms of the said provision, the period of sixty days cannot be counted from the date of the original application, when the building plans had been returned to the applicant necessary clarification and/or compliance of the objections raised therein. If no sanction can be granted, when the building plan is not in conformity with the building bye-laws or has been made in contravention of the provisions of the Act or the laws, in our opinion, the restriction would not apply despite the deeming provision."

"What is discernible from the observations made by the Supreme Court in para 44 is that although the law may have provided the deeming provision but if the building plan itself is not in conformity with the building bye-laws or in contravention of the provisions of the Act or laws, then in such circumstances, the deeming provision would not help the person placing reliance on the same. At this stage, it may not be out of place to state that the respondents have placed strong reliance on the decision of the Supreme Court in Live Oak Resort (P) Ltd. v. Panchgani Hill Station Municipal Council, (2001)8 SCC 329, but the said decision in Live Oak Resort (supra) was considered by the Bench in this case, observing as under :

> *"In that case a building plan had been granted;*

construction had been started in terms of the building plan as also the rules which were applicable at the relevant point of time. The question which arose for consideration therein was as to whether a subsequent amendment to the rules, in respect of additional FSI shall have any effect on the sanctioned building plan, it was contended that keeping in view the environmental question, the same will have not.

The said decision having been rendered in the fact situation obtaining therein, which has no similarity to the facts of the present case, which in our opinion, cannot be said to have any application whatsoever. The submission of Mr. Ganguli that despite expiry of the period of sanction of the development plan by the State under the 1977 Act, the same should be held to be extended, in our opinion, cannot be accepted."

From the above, it could be said that if the initial action is illegal, that is, if the foundation goes then the superstructure would fall. In the present case also, once we hold that the construction in the absence of environmental clearance is absolutely illegal, then the same by itself would not get regularized with the aid of the deeming provision.

Some what on the same line the Supreme Court in Kalidas Umedram and others v. State of Gujarat and another, (1996)7 SCC 635, took the view that a deemed provision would not be a free licence to make use of the same defeating the object with which such provision is made. The Supreme Court made the following observations as under :

"It is true that the proviso envisages deemed permission if the Collector does not grant permission within three

months from the date of the receipt of the application excluding the time as specified taken thereunder. But the condition is that land should be used for raising commercial crops but not for industrial purposes or for building purposes. Deemed permission would not be a free licence to use the land for any other purpose defeating the object of the grant. The public policy behind the grant is to augment agricultural production so as to enable the tiller of the soil economic empowerment and social and economic justice assured in the Preamble to the Constitution of India and Articles 38 and 46 to minimise inequalities in income and status. The State distributes under Article 39(b), its material resources to subserve the said purpose. Having obtained the grant or permission, the grantee-appellants cannot convert the land into non-agricultural use as well as for building houses. The sale of government land for nominal amount was for the avowed constitutional purposes. After the conversion, sale of the lands for building purposes would be a windfall. Obviously, the public purpose of the grant and the constitutional goals would be defeated by this method of circumvention. The Government, therefore, is justified in cancelling the grant. Under the above circumstances, the Government was entitled to revoke the grant in respect of the entire extent of land."

In Mansingbhai Kahalsingbhai v. Surat Municipal Corporation, AIR 2001 Guj. 44, the issue before the Division Bench of this Court was, whether the construction work carried out by the petitioners of that case was in accordance with the law or not. In the said case also, it was pleaded that the application for permission to construct was submitted on 7th August 1999 and since there was no communication in that regard within a period of one month, the application can be said to have been granted by a deeming fiction. In the said background, the Bench made the following observations :

"Thus even after a period of one month as stated by the

petitioner is over, it is necessary that unless and until notice is given to the City Engineer, the proposed date of commencement to erect a new building, the petitioners could not have commenced construction work. Section 263 and Rule 3 of Chapter XII refers to deeming provision. Reading the aforesaid provision assuming that the deeming provision is applicable for construction which is otherwise legal even then one has to give notice of commencement of work and only thereafter the work of erection of a building can be commenced. After completion of building within one month thereafter notice is required to be given in writing of completion accompanied by a certificate. Law also prohibits occupying the building in absence of any permit or occupation certificate issued to use the building. In the instant case, there is a flagrant violation of these provisions. No notice has been given and yet we find that persons have occupied the building. This speaks volume about the intention of the petitioners. The Court while exercising jurisdiction under Article 226 of the Constitution of India has to bear in mind that persons who are coming to the Court with clean hands and those who have acted in accordance with law are required to be assisted and not the persons who are committing breach of provisions of law."

"Thus, it goes without saying that deemed permission means that a person is erecting building after the expiry of the period mentioned in Rule 3 strictly in accordance with Rules, bye-laws etc. It is required to be emphasised here that when a person moves the Commissioner for permission of erection of a building, the person concerned knows the Rules and Regulations and Bye-laws with regard to Building Regulations. It is for him to carry out the construction as per the Building Regulations and Bye-laws and particularly keeping in mind the FSI. The person who constructs the building as per the Rules and Regulations can say that he has constructed the building as per the requirement of law but not otherwise. The deemed permission can be said to have been attracted in case where a person has carried out construction in accordance with the existing Rules, Bye-laws and Building Regulations and not otherwise. It is required to be noted that likewise the case of Calcutta Municipal Corporation before the Apex Court, Rule 3 of

Chapter XII of Appendix IV of the Act provides that if within 30 days there is no disapproval, subject to the Rules one may commence the work of erection of a building but not so as to contravene any provisions of the Act or any Rule or bye-laws. Under the Act before the commencement, notice is required to be given as contemplated in Chapter XII of Appendix IV. In our opinion, therefore, one has to submit a plan for erection of a building keeping in mind all the Building Regulations and if any one constructs contrary to that, the same being illegal must be demolished. The suggestion made by the petitioners that whatever type of the plan is submitted and for which no intimation is given within thirty days then the person is deemed to have been granted permission has no merit. If such a view is taken, it will be for the benefit of wrong doers only who will carry out the construction and will transfer the building/flats and innocent purchasers would be in difficulty. Under the circumstances, if one constructs building in contravention of the Rules and Regulations and Bye-Laws then he is a wrong doer and even if permission is not granted because of connivance or negligence of the Officer, shelter of deeming provision cannot be made available to him. Learned single Judge was justified in arriving at the conclusion that the deemed permission cannot be inconsistent with the Rules and Regulations and no deemed permission can be against the relevant Rules and Regulations."

Case Law relied upon by the Respondents :

We shall now proceed to deal with the various decisions on which strong reliance has been placed by the learned counsel appearing for the respondents.

On the point of suppression of material facts, strong reliance has been placed on the decision of the Supreme Court in Rajabhai Abdul Rehman Munshi v. Vasudev Dhanjibhai

Mody, AIR 1964 SC 345. In the said decision of the Supreme Court, it was observed that the Court is not bound to grant special leave on mere asking. A party who approaches a court knowing or having reasonable belief that if the true facts were brought to its notice, the court would not grant special leave, it is his duty to state facts which may reasonably having a bearing on the exercise of the discretionary powers of this court.

The Court observed that any attempt to withhold material information would result in revocation of the order obtained from the court.

There cannot be any debate with the proposition of law laid down by the Supreme Court in the facts of that case. This proposition in no manner is applicable in the present case because we have explained that there is no suppression of any material facts at the end of the petitioners. We have explained in the earlier part of our judgment that it is only when the counter was filed to the petition that it came to the notice of one and all that the respondents are relying on a deemed environmental clearance, which was not known to the petitioners. Thus, this decision of the Supreme Court is of no avail to the respondents.

A Division Bench decision of this High Court in the case of Satsangi Shishuvihar Kelavani Trust v. P.N.Patel, 1977 GLR 615, has been relied in support of the submissions with regard to the deeming fiction. In the said case, the Court considered

Sections 36(2) and 36(3) of the Gujarat Secondary Education Act, 1972. Section 36(2) provides for a deeming fiction that if the authorized officer fails to communicate its decision within the prescribed 45 days' period to the Manager, the action proposed shall be deemed to have been approved. Under Section 36(3) of the Act, in the context of suspension pending inquiry, the failure to communicate ratification of such suspension by the authorized officer within the period of 45 days would result into suspension ceasing to have any effect on the expiry of such period. In the facts of that case, the court observed that in case of action of termination of service of an employee by a school management previous permission was contemplated and subsequent ratification was also contemplated in suspension pending enquiry, but in both the cases deemed fiction would come into operation on the expiry of this 45 days' statutory period from the date of the receipt of the concerned proposal or action of suspension. The court observed that in case of suspension, such suspension would cease to have effect on the expiry of 45 days' period. The Court took the view that a fiction must have full statutory operation and there would not be any question of waiver or any extension or enlargement of a statutory period by unilateral action of the management or even by any waiver or consent.

This decision has been relied upon with a view to fortify the submission that the deeming fiction must be given its full meaning. As a proposition of law, we are in agreement with the same, but this decision is of no avail to the respondents because in the present case we have taken the view that prior

to the grant of any deemed environmental clearance, if there is a violation of the provisions of the Notification, 2006, then such breach or violation would not get cured or rectified by grant of deemed environmental clearance under a deeming provision.

In Municipal Committee, Hoshiarpur v. Darshan Lal, AIR 1946 Lahore 413, a learned Single Judge considered the provisions of the Punjab Municipal Act. In the said case, the Court considered Sections 195 and 195A of the Act, which provide that, where an application for sanction to continue the construction of a building which was stopped in pursuance of a notice under Section 195A was made to a Municipal Committee, but no order was passed thereon within a period of 60 days laid down by Section 193(4) of the Act, and the applicant completes the building after the statutory period, the sanction to build must be deemed to have been granted by the Municipal Committee. This judgment has been relied upon, more particularly, to lay emphasis on the observations made by the Court to the effect that there is no difference between an express sanction and a sanction which is in law deemed to have been granted.

This decision also is of no avail to the respondents because if the principle laid down in the said decision is considered closely, then in our opinion, it should help the petitioners. This decision is not helpful for two reasons: first, the court had no occasion to consider the issue as to what would be the position if the construction would have been completed prior to the expiry of 60 days as laid down by

Section 193(4) of the Act. Whether, in such circumstances, the person who wanted to put up the construction could have relied upon the deeming provision, and secondly, in the said case the construction was admittedly put up after the statutory period was over i.e. 60 days. If that be so, then with a view to give true meaning and effect to the deeming provision, the court was justified in holding that it would not make any difference between an express sanction and a sanction which is in law deemed to have been given. In short, what we want to convey is that an illegality already committed would not be saved by a grant of sanction, which is in law, deemed to be granted.

In Live Oak Resort (P) Ltd. and another v. Panchgani Hill Station Municipal Council and another, (2001)8 SCC 329, the Supreme Court considered the provisions of the Maharashtra Regional and Town Planning Act, 1966. In the said case, the Supreme Court considered the effect of the deemed sanction in the facts of that case. So far as this decision is concerned, we have taken note of the same in the earlier portion of our judgment and have observed that this judgment has been distinguished and explained in a subsequent judgment which we have quoted. However, in Live Oak Resort (*supra*), the Court took the view that where no orders are communicated within 60 days from the date of submission of the application either by way of a grant or refusal thereto, the authority shall be deemed to have permitted the proposed construction. In this case also, it was not the complaint that the appellants had completed the construction before the expiry of 60 days and thereafter took shelter of the deeming provision. In the facts

of that case, the Supreme Court came to the conclusion that the deeming provision saved the situation. This judgment also, in our opinion, is of no avail to the respondents.

Delhi Cloth and General Mills Co. Ltd. and another v. State of Rajasthan and others, (1996)2 SCC 449, has been relied upon to once again explain the deeming fiction provided by any provision of law. In the facts of that case, the Supreme Court observed that in view of the deeming provision under the Explanations, although the goods which were produced or manufactured at an intermediate stage and consumed or utilised for the manufacture of another commodity in a continuous process would be deemed to have been removed from such place or premises immediately before such consumption or utilisation. The Court said that it was well settled that a deeming provision was an admission of the non-existence of the fact deemed. Therefore, in view of the deeming provision under the Explanations, although the goods which were produced or manufactured at an intermediate stage and, thereafter, consumed or utilised in the integrated process for the manufacture of another commodity were not actually removed, they had to be regarded as having been removed. In the said case, the State of Rajasthan had issued a notification under Section 7(1) of the Rajasthan Town Municipalities Act, 1951, informing the public that, in exercise of powers under Section 5(1) of that Act, it proposed to extend the limits of the Kota Municipality so as to include therein the village of Raipura and it invited objections thereto. However, it was not followed by a final notification. In the case of the village of Ummedganj, there was a notification extending the

limits of the Kota municipality to include it, but it had also not been proceeded by a notification inviting objections of the public thereto. Later, another notification was published in 1960, whereby the village of Ummedganj was excluded from the limits of Kota Municipality. The provisions of the Rajasthan Municipalities Act, 1959 in regard to the delimitation of the municipalities and the procedure in that behalf were substantially similar to the one contained in the 1951 Act. The provisions of Sections 4 to 7 of the 1959 Act and the earlier provisions of the 1951 Act in the same behalf were, therefore, not met in the case of either the village of Raipura or the village of Ummedganj. Sections 4 to 7 of the Act remained on the statute book unamended when the Kota Municipal Limits (Continued Existence) Validating Act, 1975 was passed. Section 3 of the Validating Act provided that, notwithstanding anything contained in Sections 4 to 7 of the 1959 Act or in any judgment, decree, order or direction of any court, the villages of Raipura and Ummedganj should be deemed always to have continued to exist and they continue to exist within the limits of the Kota Municipality to all intents and fall all purposes. In the aforesaid facts of the case, the court took the view that the Validating Act required the deeming of the legal position that the villages of Raipura and Ummedganj fell within the limits of the Kota municipality and not the deeming of facts from which that legal consequence would flow. The court observed that when a fact is to be deemed, its consequences and incidents are also to be deemed, that is to say, what follows from the deemed facts is also to be deemed.

This decision, in our opinion, is of no avail to the

respondents as the principle of deeming provision was applied in the facts of that case.

In State of Bombay v. Pandurang Vinayak and others, AIR 1953 SC 244, the Supreme Court observed that, when a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. There cannot be any debate with the principle of law explained by the Supreme Court, and if this principle is applied in its full vigor, the same, in no manner, helps the respondents. What could be deemed in our case is the grant of environmental clearance with prospective effect and it would be open thereafter to go ahead with the developments in accordance with the Notification, 2006, but in any case, a deeming fiction cannot be applied retrospectively so as to submit that whatever illegality has been committed stands cured and rectified.

In State of Karnataka and another v. All India Manufacturers Organization and others, (2006)4 SCC 683, the Supreme Court explained the doctrine of *res judicata* in the facts of that case. In that case, the project in question was a mega project which was in the larger public interest of the State of Karnataka. A Public Interest Litigation was filed by an organization challenging the Framework Agreement (for short, 'FWA') on the ground that the land which was being acquired was in far excess than what was required for the project. It was

argued before the High Court of Karnataka that the land requirement in Schedule 1 of the FWA was highly exaggerated and would illegally create huge profits for Nandi Infrastructure Corridor Enterprises Ltd. (for short, 'Nandi'). The Supreme Court took notice of the fact that the project was earlier challenged by one H.T.Somashekar Reddy on the same grounds on which the subsequent public interest litigation was filed before the High Court. In the earlier round of litigation, the Karnataka High Court had held that the Government had not acted arbitrarily in entering into an agreement with the respondent no.2 and the agreement was not illegal as being opposed to public policy. The court had also held that the agreement in no manner contravened any constitutional provision or existing enactments. Accordingly, the petition was rejected by the High Court.

It appears that thereafter once again with respect to the same subject matter, a public interest litigation was filed raising two questions : (1) whether the FWA entered into between the Government of Karnataka and Nandi was a result of any fraud or misrepresentation; and (2) whether any excess land than what was required for the project had been acquired by the State Government, and whether it was open to it to raise such a plea.

The Division Bench of the High Court allowed the writ petitions directing the State of Karnataka and all its instrumentalities to execute the project as conceived originally and to implement the FWA in letter and spirit. The High Court also directed the prosecution of the Chief Secretary of the

Government of Karnataka, Under Secretary, Department of Industries and Commerce, as envisaged by Section 340 of the Code of Civil Procedure for certain offences which came to be notice of the Supreme Court as a result of the affidavits filed by them.

The State of Karnataka came up in appeal before the Supreme Court and mainly contended that the second petition filed before the High Court was hit by the principles of *res judicata* since the issue of excess land was 'directly and substantially in issue' in the first round of litigation. The Supreme Court, in order to appreciate such contentions, looked into the prayers made in the previous public interest litigation as compared to the prayers made in the subsequent petition. The Supreme Court noticed that the prayers in both the petitions were substantially the same. The Supreme Court, thereafter, considered, whether there was any fresh cause of action for filing a second petition, and on the basis of the materials on record, came to the conclusion that the very FWA that was uphold earlier was impugned for the second time. The Supreme Court, thereafter, considered that the issue of excess land was specifically raised in the first round of litigation which was decided by the High Court in favour of the State Government and, therefore, the same issue could not have been raised for the second time.

Thus, the Supreme Court, on the basis of the materials on record, came to the conclusion that the cause of action, the issues raised, the prayers made, the reliefs sought in first petition and the claims and arguments in the second petition

were substantially the same and, therefore, the plea of the appellant State Government that the judgment in the first round of litigation operated as a *res judicata* for the questions raised in the second petition.

In the aforesaid background, the Supreme Court observed that the High Court failed to consider the principle and philosophy behind Explanation IV to Section 11 of the Code of Civil Procedure which prevents the abuse of the process of the court.

During the course of hearing of this petition, a lot of emphasis was put on para 39 of this decision. In para 39, the Supreme Court has referred to a decision in the case of Greenhalgh v. Mallard, reported in (1947)2 All ER 255, wherein Somervell, L.J. observed thus :

> *"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them."*

In our opinion, this decision which has been relied upon to fortify the defence of *res judicata* is of no avail to the respondents because it could not be said that the issues raised in the present petition were directly and substantially in issue in Writ Petition (PIL) No.194 of 2011.

N.D.Jayal and another v. Union of India and others, (2004)9 SCC 362, has been relied upon in support of the submissions that once the EAC, after due consideration of the matter, recommended grant of environmental clearance to the State Government, then in such circumstances, this Court, in exercise of writ jurisdiction under Article 226 of the Constitution of India, should not sit in appeal over such recommendations. In the case before the Supreme Court, the issue was one relating to the Tehri Dam Project. In that context, the Supreme Court observed that the necessity or effectiveness of conducting 3D Non-Linear Test or Dam Break Analysis was taken into account by the Government and if the Government decided not to conduct such tests upon the opinion of the expert bodies concerned, then the Court should not advice the Government to go for such tests unless *mala fides*, arbitrariness or irrationality is attributed to such decision. The Court took the view that when the Government or the authority concerned, after due consideration of all the viewpoints and full application of mind, had taken a decision, then it was not appropriate for the Court to interfere. The Court observed that such matters must be left to the mature wisdom of the Government or the implementing agency. The Court also observed that if the situation demands, the Courts should take only a detached decision based on the pattern of the well-settled principles of administrative law. If any such decision was based on irrelevant consideration or non-consideration of material or was thoroughly arbitrary, then the Court will get in the way. The Supreme Court concluded by observing that the only point to consider was, whether the decision making agency took a well-informed decision or not. If the answer was 'yes', then there was no need to interfere.

In our opinion, this decision is of no avail to the respondents as there cannot be any debate on the proposition of law explained by the Supreme Court, but in the present case, the recommendations of the EAC are not much in debate. although we have explained that the Union of India has failed to place any materials on record to satisfy the Court as to how the decision was taken and on what materials. The issue in the present petition is one of the deeming provision and the effect of deemed environmental clearance.

Lafarge Umiam Mining Private Limited v. T.N.Godavarman and others, (2011)7 SCC 338, has been relied on in support of the submissions that it is within the power of the authorities to grant *ex post facto* forest and environmental clearances. In the said case, the issue before the Supreme Court was, whether the *ex post facto* forest and environmental clearances dated 19th April 2010 and 26th April 2010 respectively stood vitiated or not by the alleged suppression by Lafarge Umiam Mining Private Limited (*supra*). It was argued before the Supreme Court against the Lafarge that it had obtained such *ex post facto* clearances on the basis of 'absence of forest' with full knowledge that the project site was located on forest land. In the peculiar facts of the case, the Supreme Court took the view that the parameters of intergenerational equity were satisfied and no reasonable person could say that the impugned decision to grant Stage-I forest clearance and revised environmental clearance stood vitiated on account of non-application of mind by the Ministry of Environment and Forests. The Court, in para 112, observed that although the area could be treated as forest, still it was a

hilly uneven undulating area largely covered by 'Karstified' limestone. The Court further observed that the area could be reforested as a part of the reclamation plan. It further stated that the indigenous and native people were satisfied with the credentials of M/s.Lafarge as the company was providing health care facilities, drinking water facilities, employment for local youth, construction of village roads, employment for school teachers, scholarship programme for children, etc. The Court also took notice of the fact that the issue of mining was thoroughly discussed with the Village Durbar by the members of the HPC who visited the site and that the community was in agreement to allow M/s. Lafarge to continue mining.

Thus, in the facts of that case, the Supreme Court upheld the validity of the *ex post facto* forest and environmental clearances as it was satisfied with the materials on record that the appellant remained under a misconception that the area of mining was not forming a part of the forest area. We fail to appreciate how this decision would help the respondents because they are pleading deemed environmental clearance. In our view, a deemed environmental clearance cannot be equated with an *ex post facto* clearance.

Sterlite Industries (India) Limited and others v. Union of India and others, (2013)4 SCC 575, has been relied upon to fortify the submissions that it is for the administrative and statutory authorities empowered under the law to consider and grant environmental clearance and where no ground for interference with the decisions of the authorities on well recognized principles of judicial review is made out, the High Court should not interfere with the decisions of the authorities

to grant the environmental clearance or the consents on the ground that had the authorities made a proper environmental assessment of the plant, the adverse environmental effects of the industry could have been prevented.

In the said case, the environmental clearance for setting up the plant of the appellant Company was granted under Section 3(1) of the Environment (Protection) Act, 1986. The Environmental Impact Assessment Notification prevailing at the relevant point of time under Section 3(2)(v) of the Act, 1986 and Rule 5(3) of the Rules, 1986 was EIA Notification dated 27th January 1994. In the said Notification, it was not laid down that a public hearing was a must for grant of environmental clearance when the case of the appellant for grant of such environmental clearance was under consideration. Thus, the environmental clearance was granted by the Ministry of Environment and Forests on 16th January 1995 in accordance with the procedure laid down by the EIA Notification dated 27th January 1994 well before the issuance of the EIA Notification dated 10th April 1997 which provide for mandatory public hearing in accordance with the procedure laid down in Schedule IV.

In the aforesaid context, the Supreme Court took the view that the High Court could not have allowed the writ petitions challenging the environmental clearances on the ground that no public hearing was conducted before the grant of the environmental clearances.

This judgment is also of no avail to the respondents as the same was in the peculiar facts of that case. This judgment

does not deal, in any manner, with the issue of deemed environmental clearance or the effect of the deeming provision as laid down in Clause 8 of the EIA Notification, 2006.

Devilal Modi, Proprietor, M/s.Daluram Pannalal Modi v. Sales Tax Officer, Ratlam and others, AIR 1965 SC 1150, was relied on to fortify the submission as regards the petition being hit by the doctrine of *res judicata*.

In that case, the issue before the Supreme Court was, whether the principle of constructive *res judicata* could be invoked against a writ petition filed by the appellant who was the proprietor of a firm under Article 226 of the Constitution of India. The appellant had been assessed to sales-tax for the year 1957-58 under the Madhya Pradesh Sales Tax Act, 1950. The appellant had challenged the validity of the said order of assessment by a writ petition filed by him in the High Court of Madhya Pradesh. The High Court dismissed the writ petition, and by special leave, the appellant came before the Supreme Court. Before the Supreme Court, it was strenuously contended that where a citizen seeks for redress from the High Court by invoking its high prerogative writ jurisdiction under Article 226 of the Constitution of India, it would be inappropriate to invoke the principles of *res judicata* against him. It was argued that the appellant had been exposed to the risk of paying a large amount by way of sales-tax and penalty when the said liability had not been lawfully incurred by him and the impugned order was contrary to law. The Supreme Court held that there could be no doubt that the fundamental rights guaranteed to the citizens are a significant feature of our Constitution and the High Courts under Article 226 were bound to protect those

fundamental rights. The Court held that there could also be no doubt that if a case was made out for the exercise of its jurisdiction under Article 226 in support of the citizens' fundamental rights, the High Court would not hesitate to exercise that jurisdiction. But, at the same time, the Supreme Court observed that the question as to whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Article 226, cannot be answered merely in the light of the significance and importance of the citizens' fundamental rights. The Court observed that the general principle underlying the doctrine of *res judicata* was ultimately based on considerations of public policy. One important consideration of the public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by the appellate authorities.

On the facts of the case, the Court refused to interfere with the order passed by the High Court and dismissed the appeal, holding that the second writ petition filed by the appellant in the High Court was barred by constructive *res judicata*.

This decision of the Supreme Court explaining the principles of constructive *res judicata* is of no avail to the respondents because we have exhaustively dealt with this issue of *res judicata* taking the view that the petition is not hit by the doctrine in the facts and circumstances of the case.

Prestige Lights Limited v. State Bank of India, (2007)8 SCC 449, has been relied on to fortify the submissions that a

prerogative remedy is not available as a matter of course. In exercising extraordinary power, a writ court would bear in mind the conduct of the party invoking such jurisdiction. The Supreme Court in the facts of that case held that if the applicant fails to disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter.

This principle is a settled law and there cannot be any debate on this proposition of law. However, we have explained in detail that there has been no suppression of any material facts at the end of the petitioners and the petition does not deserve to be dismissed on such ground.

Chairman & MD, BPL Limited v. S.P.Gururaja and others, (2003)8 SCC 567, has been relied on to fortify the submissions that the petition deserves to be dismissed on the count of delay and laches. In the said case, the Karnataka Industrial Area Development Board, a statutory authority constituted under the Karnata Industrial Areas Development Act, 1966, acquired a vast tract of land in terms of the Notification issued under Section 28(1) of the Act for the purpose of allotment thereof to the entrepreneurs intending to setup industries in the State of Karnataka. The State Government, with a view to accelerate the economic development of the State, adopted a policy decision of dealing with the applications received from the entrepreneurs through one-window system. For achieving the said objective, a High-Level Committee was constituted under the State Government's orders and wherever an industrial project involved an investment beyond fifty crore, the decision to accord sanction/approval/clearance was to be

taken by it. The appellant of that case, with a view to set up industries, applied for allotment of 500 acres of land for its three projects. After considering the application, the Committee decided to allot 175 acres of land to the Company at Rs.92/- per sq.meter. The Karnataka Government, *vide* its order dated 16th May 1995, cleared three projects of the Company involving investment of Rs.663.56 crore. The respondents therein, describing themselves to be the social workers, filed a writ petition by way of a public interest litigation challenging the allotment of the said 175 acres of land to the Company, *inter alia*, on the grounds that : (a) the land to the other entrepreneurs was sold at the rate of Rs. 3,80,000=00 per acre whereas it was sold to the Company at the rate of Rs. 3,72,324=00 per acre; (b) the allotment was contrary to the regulations and, therefore, arbitrary and unreasonable; (c) the allotment was made without inviting applications and without notifying the availability of land to the general public; and (d) the exercise of power was *mala fide* and suffers from legal malice.

None of the contentions raised on behalf of the public interest litigants weighed with the High Court in the facts and circumstances of the case. But, on the materials on record, the Supreme Court was satisfied that the petition was not *bona fide* and, therefore, the Supreme Court came to the conclusion that the Board and the State had committed no illegality which could have been a subject matter of judicial review. It observed that the High Court had committed a manifest error in so far as it failed to take into consideration that the delay had defeated equity. The allotment was made in the year 1995, whereas the writ application was filed after one year.

According to the Supreme Court, delay of such a nature ought to have been considered by the High Court as of vital importance.

In our opinion, this decision is of no avail to the respondents as we have explained in details why the delay part should not come in the way of the petitioners, and most importantly, the Supreme Court was satisfied that there was no illegality committed in any manner by the appellant.

In the present case, we are of the firm view that the respondent nos.10 to 21 as lessees could not have put up any construction in the absence of environmental clearance, and the deemed environmental clearance would not absolve them from their obligation to adhere to the EIA Notification, 2006.

Netai Bag and others v. State of W.B. and others, (2000)8 SCC 262, has been relied on in support of the submissions with regard to delay and proper pleadings in the petition. In the said case, by notification dated 22nd August 1961 issued under the Land Acquisition Act, the Government of West Bengal acquired a piece of land for a certain project of the South-Eastern Railways. After completion of the project, the Railways surrendered the surplus land to the State Government. The West Bengal Livestock Processing Development Corporation was authorised to setup the Mourigram Abattoir Project on this land. However, despite their best efforts, the State Government could not be able to setup any project on the land which was a low-lying land situated in a semi-rural area. By that time, the State Government had established another abattoir project at Durgapur which, after commissioning, was

running into losses. No buyer could be available for Durgapur Project despite newspaper advertisements. On being invited by the State Government, a private party (Respondent No.5) therein agreed to take over the Durgapur Project and to setup an abattoir at Mourigram. The land at Durgapur and Mourigram was offered to respondent no.5 through long-term lease for 99 years on realisation of 100% market value as lease premium. Respondent no.5 made the payment accordingly. The transfer of the land at Mourigram to respondent no.5 was unsuccessfully challenged in a writ petition on several grounds by the appellants herein. Appellants 1 to 4 herein were the heirs of the erstwhile landowners while Appellants 5 and 6 claimed themselves to be promoters of the cause of vegetarianism. Before the Supreme Court, they challenged the action of the respondent solely on the ground of arbitrariness and violation of Article 14. They contended that the respondent State, without issuing any advertisement or resorting to the procedure of auction and tender, had secretly leased out the land at a throwaway price. Conceding that they had not made allegations of *mala fides* against any one of the respondents, the appellants contended that though not actual but legal *mala fides* were discernible from the pleadings of the parties and the record produced by them. On the other hand, the respondent State contended that the writ petition was not a *bona fide* action of the appellants, four of whom were the erstwhile owners interested only to get back the land legally acquired from them. That the petition suffered from unexplained delay and laches. That the lease was given to respondent no.5 upon consideration of all the facts and circumstances with the object of setting up an industry in the State of West Bengal which was likely to generate employment

to more than 300 persons and earn foreign exchange worth more than Rs.50 crore. That having failed in all its efforts for the purposes of transferring the Durgapur Project and establishment of Mourigram Project, the State Government wrote to some Bombay-based firms, reputed in the field, to salvage the two projects. Such positive response was received from some firms of which the respondent No.5 was found, on merits, to be preferable to others. The Supreme Court dismissed the appeal.

In the aforesaid background, the Supreme Court held that whether any advertisement was issued or not, or whether public auction or floating of tenders should have been dispensed or not, are the matters which require pleadings in order to enable the State Government to explain or justify their action in the circumstances of the case. The Court held that the appeal before the Division Bench of the High Court and in the Supreme Court being in continuance of the original proceedings in the form of a writ petition cannot enlarge the scope of the inquiry at a belated stage. The Court held that in the absence of any specific allegation of *mala fide* against any of the respondents, it could not be said that mere violation of such an alleged statutory provision which safeguards, as spelt out by the Supreme Court, would render the State action to be arbitrary in all cases. The Court further held that the writ petition was filed at the instance of the erstwhile owners of the land whose main object appear to get the land back by any means, as admittedly, with the passage of time and development of the area, the value of the land had appreciated manifold.

This decision, in our opinion, is in no manner helpful to the respondents because we have already explained why there is no delay and we have also dealt with the aspect of pleading exhaustively.

The decision of the Supreme Court in the case of State of Madhya Pradesh v. Narmada Bachao Andolan, (2011)7 SCC 639, has been relied upon to make good four submissions, (i) delay, (ii) PIL jurisdiction should be exercised cautiously (iii) whenever the Court comes to the conclusion that the process of the Court is being abused, the Court would be justified in refusing to proceed further with the matter and (iv) improper pleadings.

In the State of Madhya Pradesh (*supra*), the construction of the dam had started in October 2002 and was completed in October 2006. The Supreme Court observed that no objections had ever been raised by NBA at any stage. The Court also noted that the Narmada Development Authority *vide* order dated 28th March 2007 had issued the necessary permission in favour of the National Hydrolic Development Corporation to raise the water level of the dam to 189 m. upon showing that the rehabilitation of the oustees of five villages adversely affected at 189 m. had already been completed. The Court also noted that the writ petition was filed praying for restraining the government from closing the sluice gates of the dam contending that the re-settlement and rehabilitation was not complete. The Court also noted that there was no explanation as to under what circumstances the Court had been approached at such a belated stage.

On the aspect of pleadings, the Court took the view that there were no pleadings before the High Court on the basis of which the High Court could have entertained the petition. The Supreme Court held that in such circumstances it was liable to be rejected at the threshold for the reason that the writ petition suffered for want of proper pleadings and material to substantiate the averments/ allegations contained therein.

The Court also observed that the PIL jurisdiction should be exercised cautiously in matters that primarily require the application of the democratic process. The Court observed that whenever the Court comes to the conclusion that the process of the Court was being abused the Court would be justified in refusing to proceed further with the matter.

In our opinion, this decision is of no avail to the respondents because we have explained in details why there is no merit in the submission canvassed on behalf of the respondents as regards the delay and lack of pleadings. There cannot be any debate with the proposition of law explained by the Supreme Court that the Court should be *prima facie* satisfied regarding the correctness of the contents of the petition before entertaining a public interest litigation and the Court should also ensure that there is no oblique motive behind filing the public interest litigation. In our opinion, although a very heavy attack has been laid on the *bona fide* of the petition and the petitioners, yet this is not a petition which deserves to be thrown away by merely alleging *mala fides* or lack of *bona fides.*

We are of the opinion that in the matters of the present

nature which contains serious allegations touching the matters of great public importance relating to environment, for the purpose of *locus standi*, what is really relevant is the substance of the breaches of the Constitution complained of or any other law in force, and not the antecedents or the status of the person who conveys the information to the Court.

We are quite mindful that the Supreme Court in T.N.Godavarman (*supra*) has taken the view that however genuine a cause brought before the Court by a public interest litigant may be, the Court has to decline its examination at the behest of a person, who, in fact, is not a public interest litigant and whose *bona fides* and credentials are in doubt. At the same time, the Supreme Court also took the view that in a given exceptional case where *bona fides* of a public interest litigant are in doubt the Court may still examine the issue having regard to the serious nature of the public cause and likely public injury by appointing *amicus curiae* to assist the Court, but under no circumstances with the assistance of a doubtful public interest litigant.

In the present case, there is nothing on record to even remotely suggest that the *bona fides* and credentials of the petitioners are in doubt.

T.N.Godavarman Thirumalpad v. Union of India and others, (2006) 13 SCC 689, has been relied upon in support of the submission canvassed on behalf of the respondents that assuming for the moment that there is a breach or violation of the notification 2006, then in such circumstances, demolition of the units operating as on today is not the only option. In the

case of T.N.Godavarman (*supra*) the Delhi Development Authority (DDA) had proposed the development of international hotels complex on 315 hectares of land situated in the Vasant Kunj area after the said area was identified in the master plan for Delhi 2001 for urban use. The said area under the earlier master plan of 1962 was identified as a green area but later on there was a change of user to urban area under the master plan of 2001. The DDA planned to develop the said area for construction of hotels, convention centers etc. Before the Supreme Court IAs were filed relating to acceptability of the report given by the Expert Committee relating to the alleged violation of the environmental norms by the respondents. It was submitted before the Supreme Court that DDA had proceeded on a *bona fide* impression that all the requisite clearance had been obtained by it. It was also submitted that there was no question of it acting in a *mala fide* manner or irregular manner. The Court noted that the lands were allotted by DDA according to the notification dated 27th January 1994, wherein for the first time a provision for obtaining environmental clearance by the Central Government before undertaking any new project listed in Schedule 1 to the Notification was issued. The notification did not relate to the new construction projects and as such did not apply to them was the stance of the respondents which was accepted by the Supreme Court. The Supreme Court noted that the auction was conducted by the DDA, thereafter the project was undertaken and huge investments had been made with the sanction of the building plans they had applied for. The Court also noted that the Expert Committee after public hearing had made the recommendations with certain stipulation. It clearly stated that the project could be recommended for

environmental clearance. The Supreme Court observed that the confusion arose because the DDA all throughout had given an impression to the parties participating in auction that all the requisite clearances had been obtained. If such parties had the slightest of the idea that such clearances were not obtained by the DDA, they would not have invested such huge sums of money. The Court observed that the stand that wherever the constructions have been made unauthorizedly demolition is the only option would not apply in the case before it, more particularly, when the parties unlike, where some private individuals or private limited companies or firms being allotted to them made contraventions, are corporate bodies and institutions and, therefore the question of there having indulged in any malpractice in getting the approval or sanction did not arise.

In our opinion, this judgment is of no avail to the respondents, more particularly, the unit holders because by relying on this decision the unit holders have made an attempt to convince the Court that it is the respondent no.8 MPSEZ who is responsible for all the confusion and violation of the terms of notification dated 14th September 2006. By relying on this decision, it is also sought to be argued that if they would have known that unless and until the environmental clearance is granted in favour of lessor i.e. the developer of the SEZ the lessees would have no right to put up a brick of a construction. In our opinion, this is a last ditch effort on the part of the unit holders to salvage the situation. It may not be out of place to state at this stage that they themselves are not clear as regards their stance. In one breath they submit that they had a right to proceed with the construction on the strength of their

own independent clearances obtained on the other they submit that the MPSEZ ought to have brought it to their notice. In any view of the matter, the Supreme Court decided IAs in the facts of that case and it has no applicability in the present case.

The Corporation of Kolkata v. Mulchand Agrawal, AIR 1956 SC 110, has been relied upon in support of the submission that when the legislature entrusts to an authority the power to pass an order in its discretion and order passed by that authority in exercise of that discretion is, in general, not liable to be interfered with by an appellate authority unless it can be shown to have been based on some mistake of fact or misapprehension of the principles applicable thereto. In the said case, the Supreme Court was dealing with an appeal filed against the judgment of the High Court of Kolkata affirming the order of the Municipal Magistrate whereby he had dismissed an application filed by the appellant under Section 366 of the Kolkata Municipal Act, 1923 for demolition of certain constructions on the ground that they had been erected without previous permission of the authorities and in contravention of the prescriptions laid down in the building rules. In the said case, the Supreme Court took the view that the building rules are enacted generally for the benefit of the public and where such rules are violated and proceedings are taken for an order for demolition of the building under Section 363 of the Act, what is to be decided is whether the breaches are of formal or trivial character, in which case the imposition of fine might meet the requirement of the case, or whether they are serious or likely to affect adversely the interests of the public, in such case it would be proper to pass an order of

demolition. It appears that it was argued on behalf of the Corporation that they had received a complaint from the public and since the public complained about unlawful construction, it was decided to demolish the building. In such circumstances, the Supreme Court observed that whether there had been a complaint from the public or not would not as such be material for deciding the question, though if there was one, it would be a piece of evidence in deciding whether the interests of the public had suffered by reason of the breaches. The Court also took the view that nearly five years had elapsed since the building was completed and, therefore, in such circumstances, while dismissing the appeal filed by the Corporation, the Court held that after lapse of such a time, an order of demolition was not called for in the interest of the public.

In our opinion, this decision is also of no avail to the respondents as the same was in the facts of that case and was a case of solitary building alleged to have been constructed in violation of the provisions of the Kolkata Municipality Act. The Supreme Court took the view that five years had elapsed and only because the public complained about the same by itself would not be a ground to demolish the building, if demolition was not the only resort available to the Corporation.

Vemareddy Kumaraswamy Reddy and another v. State of Andhra Pradesh, (2006) 2 SCC 670, has been relied upon to fortify the submission that when the words in the statute are clear and there there is no obscurity or any ambiguity and the intention of the legislature is also clearly conveyed then there is no scope for the Court to take upon itself the task of amending or altering the statutory provisions. In the said case,

the Supreme Court was considering the scope and ambit of Rule 11 of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Rules 1974. The appellants of that case were holding the land in excess of the limit prescribed under the Andhra Pradesh Land Reform (Ceiling on Agricultural Holdings) Act, 1973. The surplus land was surrendered by the appellants which had cashew nut tree plantation. On the surrendered land the trees were fruit bearing trees. The dispute related to the amount payable in respect of the fruit bearing trees standing on the land which were surrendered by the appellant. The number of trees was not in dispute. The amount payable for the land vested in the government and the amounts had been paid. With regard to the amount payable for the fruit bearing trees a commissioner was appointed, who submitted a report regarding the number of fruit bearing trees and other trees standing on the land so surrendered. The Commissioner of Land Reforms, Urban Ceiling, Hyderabad, directed the District Collector to issue necessary instructions not to fix the compensation payable in respect of the trees under the Rules till further orders. According to the authorities, the payment was to be made for one year only and not for 30 years so claimed by the appellant.

In the aforesaid background, the Supreme Court held that the elementary principle of interpreting or construing a statute is to ensure the *mens* or *sententia legis* of the legislature. The Court held that it was well settle principle in law that the Court cannot read anything into a provision which is plain and unambiguous.

This decision is relied upon in support of the submission

that there is nothing in the notification of 2006 to even remotely suggest that if there is violation or breach of the conditions of the notification then there cannot be any deemed environmental clearance. In our opinion, although there cannot be any dispute with regard to the proposition of law explained by the Supreme Court yet we have dealt with this aspect in details and have taken the view that plain reading of the notification itself makes it clear that it is only after the expiry of 45 days that it would be permissible to start with the project on the strength of deemed environmental clearance. However, if before the deemed environmental clearance comes into force the project is already undertaken then it could definitely be said to be in violation of the terms of notification and subsequent grant of the deemed environmental clearance would not save the situation.

A Division Bench of this High Court in the case of B.K.Sharma v. Union of India, AIR 2005 (Gujarat) 2003, has been relied upon in support of the submission that if the units are non-polluting units and if they have obtained individual requisite permissions and clearances then it would be open for the unit holders to start with their construction and operate their units. In the said case, a public interest litigation was filed bringing it to the notice of the Court, more particularly, by a declaration to the effect that the *ex-post facto* approval dated 27.10.2005 granted in favour of the industry was null and void and that the breach was comprising of blast furnace and pipe manufacturing facility was an integrated project forming part of the foundry. It was prayed to demolish the buildings/factory plant at the project site and to restore the land to its original condition and also to demolish the blast-

furnace. The main contention before the Court was that the construction work was carried out by the industry without obtaining the environmental clearance and thereby had violated the provisions of law. In the facts of that case, the Court posed a question as to whether the pipe manufacturing breach also required environmental clearance if the industry had obtained clearance for the blast furnace. The Court observed that indisputably the industry had applied for the environmental clearance from the Central Government only in support of the project of blast furnace and, therefore, the procedure contemplated for the grant of clearance under the notification of 1984 was followed in support of blast furnace covered under item 13 of the schedule to the said notification, and not in respect of any other item falling in that schedule including item 28 of "foundries". The Court also took the view that the public hearing was also in support of the blast furnace for which the application was made. The clearance of the project of blast furnace could not have been treated as a clearance granted for any breach other than of the blast furnace. In the facts of that case, the Court reached to the conclusion that the clearance granted by the authorities in support of the blast furnace could not have been treated as *ex-post facto* clearance and, therefore, there was no question of demolition of the construction made for the blast furnace project.

This decision is also of no avail to the respondent as the same was in the facts of that case and has no application to the issue with which we are concerned of deemed environmental clearance.

We are of the view that none of the decisions relied upon on behalf of the respondents is helpful in any manner in fortifying the submissions canvassed by the learned counsel appearing for the respondents.

Reference could be made to a decision of the Supreme Court in the case of Ashwani Kumar Singh v/s. U.P.Public Service Commission and others, reported in (2003)11 SCC 584, in which the Supreme Court has explained as to how courts should place reliance on precedents. Observations made in paragraphs 10, 11, 12 and 13 are referred to hereinbelow:

> "*10. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton (1951 AC 737 at p. 761), Lord Mac Dermot observed :*
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> > "*The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge.*"
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> "*11. In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech . . . . . is not to be treated as if it was a statute definition. It will require qualification in new circumstances.*"

Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2) ((1971) 1 WLR 1062) observed :

> "*One must not, of course, construe even a reserved judgment of Russell, L. J. as if it were an Act of Parliament.*"

In Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said :

> "*There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.*"

12. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

13. The following words of Lord Denning in the matter of applying precedents have become locus classicus :

> "*Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*"

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"*Precedent would be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches, else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.*"

Thus, having given our anxious thoughts and considerations to all the relevant aspects of the matter, more

particularly, the plea of deemed environmental clearance, we are afraid we are unable to accept such plea for the reasons recorded by us in details.

Since we have taken the view that the plea of deemed environmental clearance is not tenable in law, the position that would emerge as on today would be that the MPSEZ has no environmental clearance and the respondent nos.10 to 21 are operating their units in the absence of a valid environmental clearance from the Central Government. Such being the position, we reiterate the principle explained by us in our judgment dated 9th May 2012 rendered in Writ Petition (PIL) No.194 of 2011, which has attained finality and which has been accepted by the petitioner of Special Civil Application No.2621 of 2013, that according to the EIA Notification, 2006, in order to have such right of creation of infrastructural facilities over the land allotted, prior approval of the Central Government is necessary before making any construction, and without having acquired such right, the MPSEZ, the allottee from the Government, could not have conveyed such rights to its lessee. In other words, a lessee cannot have a better right then that of a lessor in the property. There cannot be any valid lease for enjoyment of a right in a property at the instance of MPSEZ before obtaining environmental clearance because such a right was not in existence in its favour, and consequently, not capable of being transferred to the lessee at the time of execution of the lease.

The above takes us to the question as to what should be the final conclusion in the matter.

We are of the opinion that the Central Government, in its

Ministry of Forests and Environment, should look into the matter closely and, more particularly , the aspects which we have highlighted in this judgment.

We are of the view that the Central Government should take a decision of its own as to whether environmental clearance should be granted in favour of the MPSEZ, and if yes, then on what terms and conditions.

In the aforesaid view of the matter, we hold that it is not possible for us to give a declaration as prayed for by the petitioner of Special Civil Application No.2621 of 2013, and accordingly, the same is rejected.

The Writ Petition (PIL) No.21 of 2013 is allowed to a certain extent. The Central Government is directed to take a decision of its own so far as the issue of grant of environmental clearance is concerned considering the position prevailing as on date and also the aspects which have been highlighted by us in this judgment, within a period of thirty days from the date of this judgment without fail.

While taking into consideration the issue of grant of environmental clearance, it would be open for the Central Government to even take into consideration the Sunita Narain Committee report as discussed in our judgment.

Till such appropriate decision is taken by the Central Government, there shall not be any further activity in the form of construction etc. including the functioning of the units in the area in question.

With the above observations and directions, we dispose

of the Writ Petition (PIL) No.21 of 2013. However, in the facts and circumstances of the case, there shall be no order as to costs. In view of the disposal of the main matter, the connected Civil Applications are also disposed of. Direct service is permitted.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

After this judgment was pronounced, the learned counsel appearing on behalf of the respondents in Writ Petition (PIL) 21 of 2013 have prayed for stay of operation of our judgment.

In view of what have been stated above, we find no reason to stay our judgment. The prayer is, therefore, rejected. However, certified copy of this judgment be given today, if applied for.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

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