

PRECAUTIONARY PRINCIPLE AS AN EFFECTIVE JUDICIAL TOOL IN THE PREVENTION AND CONTROL OF WATER POLLUTION IN INDIA

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Introduction

It is axiomatic that water is one of the most invaluable natural resources, which the nature has bestowed on human kind. By the same token, it is a vital life sustaining nature's gift to mankind, which has unfortunately been most defiled with serious deleterious consequences to human welfare. Man's 'ecological misbehavior',¹ which is more predominant in the area of water management than in other areas of vital human concerns, has been the main cause for the growing shortages of fresh water sources through out the world. It may be noted that in many parts of the world, lack of sufficient fresh water is likely to be one of most crucial issues of the twenty-first century. It is apprehended that future wars among the members of the international community might centre around water disputes more than anything else. The importance of water resource for the survival of humanity has been highlighted by the Indian Central Board for Prevention and Control of Water thus:²

The fresh water that is so essential to our lives is only a small portion of the earth's total water supply; it is only about two per cent of the total. Nearly all of this, however, is locked in the masses of ice caps, glaciers and clouds; and constitute about 1.998 per cent of the total. The remaining small fraction of fresh water has accumulated over centuries in the lakes and underground supplies of the world.... Almost 85 percent of the rain falls directly into sea and never reaches land. The small remainder precipitates on land. It is this water that fills the lakes, wells, underground supplies and keeps the rivers flowing and the latter constitutes only 0.00008 per cent of the total. Humanity is left with only one-spoonful of sweet water for every five liters of total water.

Alas, humanity has not been able to preserve and protect this small percentage of this precious and invaluable basic environment element from the menace of pollution.

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1 Barbara Ward and Rene Dubos, *Only One Earth: The Care and Maintenance of a Small Planet*, p xii (1972).

2 See also, UNEP Asia-Pacific Annual Report, p3 (Bangkok: UNEP, May, 1984). According to this report, about 71 percent of the Earth's Surface is covered with Water and the bulk of it (i.e., around 97 percent) is stored in oceans. Of the remaining 3 percent, which is fresh water, 77 percent is in the shape of frozen polar ice caps and glaciers and is thus unavailable for human use and consumption. Around 22 percent is in the shape of groundwater resources, which is at a depth of more than 800 meters and therefore, cannot be exploited by man. It is only 0.4 percent of fresh water in the shape of lakes, streams and atmosphere is available for human consumption.

India, which is comparatively better off in respect of water resource, is in an unenviable position, facing the worst water pollution problem. India's major watercourses, which, among others, consists of fourteen major, fifty five medium and forty four small rivers, have all become highly polluted, evoking national concern for their protection and preservation. This is evident from the Statement of Objects and Reasons of the Water (Prevention and Control of Pollution) Bill, 1974, which reads:³

The problem of pollution of rivers and streams has assumed considerable importance and urgency in recent years as a result of the growth of industries and the increasing tendency to urbanization. It is, therefore, essential to ensure that the domestic and industrial effluents are not allowed to be discharged into the watercourses without adequate treatment as such discharges would render the water unsuitable as source of drinking water as well as for supporting fish life and for use in irrigation. Pollution of rivers and streams also causes increasing damage to the country's economy.

In order to achieve the above stated objects, the Water Act, 1974 and the Water Cess Act, 1977, have been enacted. These laws, which have been intended to combat the menace of water pollution and to restore the wholesomeness of water, have been in operation for almost three decades. Despite this fact, the problem of water pollution has not been mitigated, on the contrary the problem has aggravated mainly due to the lack luster implementation of the legislative mandates by the concerned administrative agencies constituted thereunder. Expressing serious concern at the general executive apathy in the implementation of environmental legislation, the Supreme Court, in *Indian Council for Enviro-Legal Action v. Union of India*⁴, observed:⁵

There are stated to be over 200 Central and State Statutes, which have at least some concern with environment protection, either directly or indirectly. The plethora of such enactments have, unfortunately, not resulted in preventing environmental degradation, which on the contrary, has increased over the years.... Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of the environment, the adverse affect of which will have to be born by the future generations.

It may be appreciated that the entire judicial initiative and effort that has marked the exercise of the writ jurisdiction under Arts 32 and 226 has been not only to strengthen and complement the legislative efforts but also to effect a

3 See, the Statement of Objects and Reasons of the Water (Prevention and Control of Pollution) Bill, 1974.

4 (1996) 5 SCC 281.

5 Id at 293.

viable constitutional balance and harmony between the competing needs of development and the values of environmental protection and preservation. It is a matter of encouragement for the protagonists of environment that the Indian higher judiciary has performed this balancing task admirably by adoption and application of the doctrine of “sustainable development”⁶ which has been implicit in the Indian Constitution Scheme of Parts III and IV of the Indian Constitution, which together go to constitute its conscience.⁷ In other words, the higher judiciary, by its innovative and dynamic approach to the issues of environment and development, has made explicit what has been implicit in the constitutional scheme. This aspect needs a slight elaboration.

It may be appreciated that the India’s fundamental law envisages a perfect harmony and balance between development and environment. While the Constitution enjoins the State to legislatively implement the directive principles of State Policy (Part IV) which means that not only the State should undertake socio-economic developmental programmes and schemes but also encourage the entry of private enterprise into the field of developmental activities, the same document of India’s destiny obligates the State to respect and protect environment.⁸ Again, it may be noted that the Constitution, not only confers on individuals a fundamental right to wholesome environment⁹, but also a duty on them not to defoul environment.¹⁰

It is this constitutional scheme that provides the required harmony and balance between development and environment and it is this harmony that the Indian higher judiciary strived to protect and promote by its innovative judicial strategies. The Courts have shaped and applied different judicial strategies to meet the demands of different judicial remedies sought in the context of different fact-situations that have been brought before them for adjudication and decision. In this context, it may be appreciated that the Courts have asserted their judicial power under Art 32¹¹ and 226¹² of the Constitution to provide not only preventive relief but also remedial relief. This is evident from the Supreme Court’s observation in *MC Mehta v. Union of India*¹³, which is:¹⁴

The Power of the Court is not only injunctive in ambit, that is, preventing the infringement of fundamental right, but it is also remedial in scope and provides relief against a breach of a fundamental right already committed.

6 For its comprehensive import, see, supra, chapter I, the text accompanying fn 111.

7 *Minerva Mills v. Union of India* AIR 1980 SC 1789 at 1807.

8 Article 48 A. See, supra, chapter II, fn 7.

9 Article 21. See, supra, chapter II, fns 52, 54, 56 and 58.

10 Article 51 A (g). See supra, chapter II, fn 8.

11 Article 32. See, supra, chapter II, fn 6.

12 Article 226. See, supra, chapter II, fn 12.

13 AIR 1987 SC 1086.

14 Id at p 1091.

In tune with this judicial assertion of their power and duty to protect the fundamental right to wholesome environment by giving both preventive and remedial relief to those seeking the enforcement of their rights, the Supreme Court and the High Courts have used both “precautionary Principle” and the “Polluter Pays” principle, which are essential aspects of the concept of “Sustainable Development” recognised, adopted and enforced at the international level¹⁵, by asserting that they have become part of the environmental jurisprudence of the country.¹⁶ While the former principle has been used to give preventive relief¹⁷, the latter has been used to accord remedial relief.¹⁸ The Courts have also used public trust doctrine and the doctrine of intergenerational equity to give remedial relief.¹⁹ The Courts have sought to enforce the “Polluter Pays” principle not only by imposing strict and absolute liability on the polluter²⁰ but also for awarding both simple and exemplary damages/compensation for the damage caused to the environment.²¹ In this paper the discussion is mostly confined to the use of “Precautionary Principle” as an effective judicial tool to combat Water Pollution

Precautionary Principle: An Effective Prevention Judicial Tool

(a) A Brief Legislative Format For Water Pollution Control

Before a discussion of the development and judicial application of the “Precautionary Principle” is undertaken, it may not be inappropriate to give a brief picture of legislative format of water Pollution Control.

The Water Act requires every person seeking to establish or take any steps to establish any industry, operation or process or any treatment and disposal system or an extension or addition thereto, which is likely to discharge sewerage or trade effluents into a stream or well or sewer or on land to obtain the previous consent of the State Pollution Control Board which is dependent upon the fulfillment of the conditions specified by the Boards.²² Failure on the part of

15 See Stockholm Declaration, Rio Declaration and GH Brundtland Report of the World Commission on Environment and Development, “*Our Common Future*”, 43 (1987). For a discussion of these see, supra, chapter I of the study.

16 See Justice Kuldip Singh’s observation in *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715, at p 2722.

17 See, *APPCB v. MV Nayudu* AIR 1999 SC 812 and *Vijay Nagar Educational Trust v. Karnataka State Pollution Control Board* AIR 2002 Kant 123.

18 See, *MC Mehta v. Union of India* (1987) 1 SCC 395; *Indian Council for Enviro-legal Action v. Union of India* AIR 1996 SC 1446; *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715; *MC Mehta v. Union of India* AIR 2002 SC 1515; *MC Mehta v. Kamal Nath* AIR 2000 SC 1997; and *Re Bhavani River* AIR 2002 SC 2578.

19 *MC Mehta v. Kamal Nath* AIR 2000 SC 1515 and (1997) 1 SCC 388.

20 *MC Mehta v. Union of India* (1987) 1 SCC 395; *Indian Council for Enviro-legal Action v. Union of India* AIR 1996 SC 1446; *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715.

21 *MC Mehta v. Union of India* AIR 2002 SC 1515.

22 The Water (Prevention and Control of Pollution) Act, 1974, s 25.

the person concerned to obtain the consent will entitle the State Pollution Control Board to serve notice on the person imposing conditions on establishment, outlet or discharge of effluents.²³

Again, it may be mentioned that under the Environment Protection Act, 1986²⁴, the Central Government passed the Environment Impact Assessment Notification, 1994, requiring environmental clearance of projects.²⁵ The notification makes it mandatory to get environmental clearance from the Ministry of Environment and Forests (MOEF) before undertaking any new project in India or before undertaking expansion or modification of any activity that tends to increase in existing emissions, liquid effluents and solid or semi-solid wastes in industries/ projects specified in Schedule of the notification.²⁶ It may also be noted that the same Ministry issued another similar notification in 1992²⁷ requiring environmental clearance from the Central Government, as the case may be, the State Government concerned in accordance with the procedure specified therein for the expansion or modification of any existing industry or new project listed in Schedule I or Schedule II of the notification²⁸ Clause (2) of the notification declared that notwithstanding anything contained in Schedule II, any project proposed to be located within 10 kilometers of the boundary of reserved forests, or a designated ecologically sensitive area or within 25 kilometers of the boundary of national park or sanctuary will require environmental clearance from the Central Government.²⁹

It may also be noted that in order to protect ecologically sensitive coastal areas of the country, the Union Ministry of Environment and Forests issued the Coastal Zone Regulation (CZR) notification in 1991, declaring coastal areas as coastal regulation zones. The notification, while prohibiting certain activities within the coastal regulation zones, (i.e., zones extending over a strip of land up to 500m from the High Tide Line (HTL) along the entire Indian Coast) sought to regulate certain other permissible activities.³⁰ The original notification has been amended several times by issuance of amending notifications.³¹ These

23 Id s 30.

24 See s 3(1) and (2) (v) read with Rule 5(iii) of the Environment Protection Rules, 1986.

25 SO 60 (E), published in the Gazette of India Extraordinary, Part II, s 3(1) dated 27th January, 1994.

26 Id, Schedule II, clause 2 (1) (a).

27 SO No 85 (E), published in the Gazette of India, Extraordinary Part II, s 3(i), dated 29th January, 1992.

28 Id clause (1).

29 Id clause (2).

30 The Coastal Regulation Zone Notification, 1991 was issued by the Central Government in exercise of its powers under s 3(1) and (2) (v) of the Environment (Protection) Act, 1986 read with Rule 5 (3) (d) of the Environment (Protection) Rules, 1986.

31 See Coastal Regulation Zone Notification (Amendment) 1991, 1994 and 1997; the CRZ Amendment Notification of 21/10/1997; the CRZ Amendment Notification of 20/ 04/ 1998; the CRZ Amendment Notification of 30/09/ 1998; the CRZ Amendment Notification of 29/ 12/ 1998; and the CRZ Amendment Notification of 5/ 2/ 1999, 12/02/1999, 28/ 05/ 1999, 30/06/1999, 13/07/1999, 03/08/1999 and 05/08/ 1999.

regulations, which are popularly known as CRZ Regulations, seek to impose severe restrictions on developmental activities through out the extensive Indian coastline.

In a few cases, the higher courts have been approached, seeking enforcement of these notifications/regulations on the ground that laxity and failure on the part of administrative authorities who are meant to implement them with the seriousness they deserve has resulted in the degradation of the environment affecting their right to healthy environment in the Country. In these cases the Courts have given preventive relief by invoking the application of the "Precautionary Principle".

(b) *Development of 'Precautionary Principle'*

It may be appreciated that the "Precautionary Principle" has now not only become part of the rules of customary international law but also become part of the Indian environmental jurisprudence.³² The development of the evolution of this principle from Stockholm Conference in 1972 to Rio Conference in 1992 has been marked by the replacement of the "assimilative capacity" principle by this principle which has been prompted by the idea that the "Precautionary Principle" is more a viable tool for the prevention of environmental harm in certain uncertain situations. While the "assimilative capacity" principle, as envisaged in Principle 6³³ of the Stockholm Declaration, is founded on the assumption that the environment has the capacity, to some extent, to assimilate substances so as to render them harmless, the "Precautionary Principle", as embodied in Principle 15³⁴ of the Rio Declaration, is based on the premise "that it is better to err on the side of caution and prevent environmental harm than to run the risk of irreversible harm".³⁵

32 See, supra fn 19.

33 Stockholm Declaration 1972, Principle 6 reads: "The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems".

As the text of this principle indicates that the "assimilative principle" as embodied in the Declaration is primarily concerned with the halting of discharge of toxic substances or release of heat beyond the carrying capacity of the environment.

34 Rio Declaration, 1992, Principle 15 states: "In order to protect the environment, precautionary approach shall be widely applied by States according to their capacities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."

35 See, P Leelakrishnan and NS Chandrasekharan, *Environmental Expertise and Judicial Review: Need for Strategy Shift and Law Reform*, 41 JILI, p 357, 362 (1999). The learned authors opine: "Precautionary approach was not an uncommon doctrine in the pre-Rio era of international environmental law. Lack of scientific certainty on the consequences of depletion of ozone layer and on the green house effects did not obstruct international conventions and protocols to propose prohibitory and regulatory measures. In the maintenance of the marine environment, the principle is conspicuously entrenched. Prevention of pollution from land based sources, prohibition of dumping into the sea, moratorium on commercial

(c) *Judicial Enunciation and Application of "Precautionary Principle"*

Since *Vellore Citizens Welfare Forum v. Union of India*³⁶, is the first case in which the Supreme Court not only explained the linkage between development and environment by infusing into the Indian environmental jurisprudence the concept of sustainable development but also enunciated the "Precautionary Principle" as its essential feature, it will be appropriate to begin with this case.

In this case, a petition was filed by the Vellore Citizens Welfare Forum seeking a direction to the tanneries³⁷ and other industries which caused pollution by enormous discharge of untreated effluent in the state of Tamil Nadu. It was alleged that the tanneries were discharging untreated effluent into agricultural fields, roadsides, waterways and other areas. The Palar River, into which the untreated effluent was discharged, was highly polluted, making its water highly unpotable. The petitioner stated that an independent survey conducted by Peree Members', a non-governmental organization, covering 13 villages of Dindigal and Peddalar Chatram, revealed that 350 wells out of total of 4678 used for drinking and irrigation purposes had been polluted and that women and children had to walk miles to get drinking water. Justice Kuldip Singh, who delivered the judgment of the Court, after examining various reports, affidavits of the parties and the relevant provisions of the Water Act and Environmental Protection Act, 1986, expressed his anguish and disappointment with Central Government's performance in respect of the discharge of its statutory duties.³⁸ His Lordship issued directions for setting up an authority under s 3(3) of the Environment Protection Act, 1986 to deal with polluting industries in the State of Tamil Nadu³⁹ and directed the Madras High Court to constitute a 'Green Bench' to deal with this case and other environmental matters.⁴⁰

whaling and opposition to the use of drift nets that threaten sustainable fisheries are ideas generating the significance of the precautionary principle."

36 AIR 1996 SC 2715.

37 According to the affidavit filed by Member Secretary, Tamil Nadu Pollution Control Board there were 584 tanneries in North Arcot District. There were 900 of them in five districts of Tamil Nadu.

38 See, supra, fn 39 at 2724. His Lordship expressed his disappointment thus: (at 2724) "It is thus obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under s 3(3) of the Act with adequate powers to control pollution and protect environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of s 3(3) read with the other provisions of the Act is being done by this Court and other Courts in the country. It is high time that the Central Government realizes its responsibility and statutory duty to protect the degrading environment in the country. If the conditions in the five districts of Tamil Nadu, where Tanneries are operating, are permitted to continue then in the near future all rivers/canals shall be polluted, underground waters contaminated, agricultural lands turned barren and the residents of the area exposed to serious diseases. It is, therefore, necessary for this Court to direct the Central Government to take immediate action under the provisions of the Environment Act."

39 Ibid.

40 Id at p 2727.

His Lordship recognised the vital importance of leather industry to the country's development. Rejecting the traditional idea that development and ecology were opposed to each other, His Lordship stated that the only answer to the conflict between environment and development was the concept of "Sustainable Development" which was accepted and adopted as a viable concept in the Stockholm Declaration of 1972.⁴¹ His Lordship held⁴²:

"Sustainable Development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. "Sustainable Development" as defined by the Brundtland Report means "Development that meets the need of the present without compromising the ability of the future generations to meet their own needs". We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the Customary International law though its salient features have yet to be finalized by the International Law Jurists. Some of the salient features of "Sustainable Development", as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of National Resources, Environmental Protection, the Precautionary Principle, the Polluter Pays Principle, Obligation to assist and co-operate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays" principle are essential features of "Sustainable Development".

Explaining the import of "precautionary principle", the learned judge observed⁴³:

The "Precautionary Principle" in the context of municipal law means:

- (i) Environmental measures- by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation.
- (ii) Where there are threats of serious irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- (iii) The "Onus of Proof" is on the actor or the developer / industrialist to show that his action is environmentally benign.

Dealing with the import of "the Polluter Pays" principle, his Lordship referred with approval, to the view taken in *Indian Council for Enviro-Legal*

41 Id at 2720.

42 Id at pp 2720-21.

43 Ibid.

Action v Union of India,⁴⁴ and declared that the Principle meant that “absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of ‘Sustainable Development’ and as such polluter is liable to pay the cost of the individual sufferers as well as the cost of reversing the damaged ecology”.⁴⁵

According to Justice Kuldip Singh, these two principles had become part of Indian municipal law by virtue of their being part of the customary international law.⁴⁶ After examining the scope of Arts 21, 47, 48A and 51A (g) of the Constitution and the Water and Air Acts, he expressed the view that “[i]n view of the above constitutional and statutory provisions we have no hesitation in holding that the precautionary principle and polluter pays principle are part of the environmental law of the country”.⁴⁷

His Lordship, taking into consideration all the aspects of environmental law, issued comprehensive directions to meet the demands of the situation.⁴⁸

44 See Supra, f n 39 at 2724.

45 AIR 1996 SC 1069.

46 In India it is an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. See *Jolly George Varghese v. Bank of Cochin* AIR 1980 SC 470; *ADM Jabalpur v. Shivakant Shukla* AIR 1976 SC 1207; *Gramophone Company of India Ltd v. Birandra Bahadur Pande* AIR 1984 SC 667. The recent judicial trend has been to give due regard not only to the rules of international customary law but also to the international conventional law. (Vide) *Vishaka v. State of Rajasthan* AIR 1997 SC 3011; *People's Union for Civil Liberties v. Union of India* AIR 1999 SC 1203 and *Apparel Export Promotion Council v. AK Chopra* AIR 1999 SC 625.

47 See Supra, fn 39 at pp 2721-22.

48 Id at pp 2726-27. The following directions have been issued:

- (a) The Central Government shall constitute an authority under s 3 (3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. The authority shall be headed by a retired judge of the High Court and it may have other members — preferably with expertise in the field of pollution control and environment protection — to be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue directions under s 5 of the Environment Act and for taking measures with respect to the matters referred to in Clauses (v), (vi), (vii), (viii), (ix), (x) and (xii) of subsection (2) of s 3. The Central Government shall constitute the authority before September 30, 1996. Such authority known as Loss of Ecology (Prevention and Payment of Compensation) Authority for State of Tamil Nadu has since been constituted.
- (b) The authority so constituted by the Central Government shall implement the “precautionary principle” and the “polluter pays” principle. The authority shall, with the help of expert opinion and after giving opportunity to the concerned polluters assess the loss to the ecology/ environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.
- (c) The authority shall compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names

In *MC Mehta v. Union of India*,⁴⁹ the Supreme Court followed the ratio laid down in *Vellore Citizens Welfare Forum*⁵⁰ case regarding the concept of

of the polluters from whom the amount is to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collector/District Magistrates of the area concerned. The Collector/District Magistrate shall recover the amount from the polluters, if necessary, as arrears of land revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.

- (d) The authority shall direct the closure of the industry owned/managed by a polluter in case he evades or refused to pay the compensation awarded against him. This shall be in addition to the recovery from him as arrears of land revenue.
- (e) An industry may have set up the necessary pollution control device at present but it shall be liable to pay for the past pollution generated by the said industry which has resulted in the environmental degradation and suffering to the residents of the area.
- (f) We impose pollution fine of Rupees 10,000/- each on all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai MGR. The fine shall be paid before October 31, 1996 in the office of the Collector/District Magistrate concerned. We direct the Collectors/District Magistrates of these districts to recover the fines from the tanneries. The money shall be deposited, along with the compensation amount recovered from the polluters, under a separate head called "Environment Protection Fund" and shall be utilised for compensating the affected persons as identified by the authorities and also for restoring the damaged environment. The pollution fine is liable to be recovered as arrears of land revenue. The tanneries which fail to deposit the amount by October 31, 1996 shall be closed forthwith and shall also be liable under the Contempt of Courts Act.
- (g) The authority in consultation with expert bodies like NEERI, Central Board, Board shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the State of Tamil Nadu. The State Government under the supervision of the Central Government shall execute the scheme/schemes so framed. The expenditure shall be met from the "Environment Protection Fund" and from other sources provided by the State Government and the Central Government.
- (h) We suspend the closure orders in respect of all the tanneries in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai MGR. We direct all the tanneries in the above five districts to set up CETPs or Individual Pollution Control Devices on or before November 30, 1996. Those connected with CETPs shall have to install in addition the primary devices in the tanneries. All the tanneries in the above five districts shall obtain the consent of the Board to function and operate with effect from December 15, 1996. The tanneries that are refused consent or who fail to obtain the consent of the Board by December 15, 1996 shall be closed forthwith.
- (i) We direct the Superintendent of Police and the Collector/ District Magistrate/Deputy Commissioner of the district concerned to close all those tanneries with immediate effect who fail to obtain the consent from the Board by the said date. Such tanneries shall not be reopened unless the authority permits them to do so. It would be open to the authority to close such tanneries permanently or to direct their relocation.
- (j) The Government order No. 213 dated March 30, 1989 shall be enforced forthwith. No new industry listed in Annexure-I to the Notification shall be permitted to be set up within the prohibited area. The authority shall review the cases of all the industries, which are already operating in the prohibited area, and it would be open to authority to direct the relocation of any of such industries.
- (k) The standards stipulated by the Board regarding total dissolved solids (TDS) and approved by the NEERI shall be operative. All the tanneries and other industries in the State of Tamil Nadu shall comply with the said standards. The quality of ambient waters has to be maintained through the standards stipulated by the Board.

49 (1997) 3 SCC 715.

50 See *Supra*, fn 39.

‘Sustainable Development’. In this case, in order to prevent environmental degradation around Badkhal and Surajkund lakes in the State of Haryana which are popular tourist resorts almost next door to the capital city of Delhi and in order to protect them from environmental degradation the Supreme Court ordered that no construction of any type should be permitted now onwards within 1 km radius of Budkhal and Surajkund lakes.⁵¹ This order was in modification of earlier order prohibiting any construction activity within 5 kms radius of these two lakes. The present order was based upon two expert reports prepared by the Central Pollution Control Board and the National Environmental Engineering Research Institute (NEERI) where in it was opined that large scale construction in the vicinity of these tourist resorts might disturb the rain water drain which in turn might badly affect the water level as well as the water quality of these water bodies. Such construction might also cause disturbance to the aquifers, which are the source of ground water, besides causing disturbance to hydrology of the area.⁵²

In this case the Court referred with approval to the “Precautionary Principle” which makes it mandatory for the State Government to anticipate, prevent and attack the causes of environmental degradation and which has become not only part of the Indian Municipal Law but also part of Indian Environmental Law. According to the Court this was so because of Arts 21, 47, 48A and 51A(g) of the Indian Constitution which give a clear mandate to the state to protect and improve the environment and to safe guard the forests and wildlife of the country.⁵³

It may also be noted that in an earlier case of *MC Mehta v. Union of India*⁵⁴ the Supreme Court gave among other things, directions to stop mining operations within the radius of 5 kms from the tourist resorts of Badkhal lake and Surajkund in the State of Haryana.

In *S Jagannath v. Union of India*⁵⁵ which is known as *the Shrimp Culture Case*, a petition under Art 32 of the Constitution was filed by the petitioner

51 See Supra, fn 53 at pp 720-21.

52 Id at 718.

53 Id at 720.

54 (1996) 8 SCC 462.

55 (1997) 2 SCC 87. The Supreme Court passed several interim orders and issued several notices to different authorities since the writ petition was filed in 1994. Thus, the Court passed orders on 3/10/1994, 27/03/1995, 09/05/1995, 04/08/1995 and 24/08/1995 before it finally heard the petition on 17/10/1995. It may be noted that in *S Jagannath v. Union of India* 1995 (3) SCALE 126, the Supreme Court issued, in May 1995, an interim injunction in the *Shrimp Culture* case, prohibiting the setting up of new Shrimp farms or the conversion of agricultural lands for aquaculture purposes in the coastal stretches of Andhra Pradesh, Tamil Nadu and Pondicherry. Again, in *S Jagannath v. Union of India* 1995 (5) SCALE 66, this interim injunction was extended to all coastal states in August, 1995 till the final disposal of the case. Similarly, in *Indian Council for Enviro-Legal Action v. Union of India*, 1995

who was the Chairman, Gram Swaraj Movement, a voluntary organization working for the weaker sections of the society. He sought the enforcement of the Coastal Zone Regulation Notification, 1991 by stopping of the intensive and semi-intensive types of prawn farming in the ecologically fragile coastal areas and by prohibiting the use of waste lands / wet lands for prawn farming. The petitioner also sought court's direction for the constitution of National Coastal Management Authority to safeguard the marine and Coastal areas.

Justice Kuldip Singh who delivered opinion of the Supreme Court, highlight the fact that the new trend of more intensified shrimp farming in certain parts of the country without much control of feeds, seeds and other inputs and water management practices- has brought to the fore a serious threat to the environment and ecology.⁵⁶

His Lordship, after referring to the Reports of Alagaraswami⁵⁷, NEERI⁵⁸, the Suresh Committee⁵⁹, the United Nation's study⁶⁰, and to the Stockholm

(2) SCALE 120, taking note of the widespread breaches of the law, the Court imposed a general interim ban on all activities of development within 500m of the High Tide Line (HTL). However, after four months, the Supreme Court lifted the ban and required strict enforcement of the CRZ Regulations. The Court ordered that all "the activities that have been declared as prohibited within the Coastal Regulation Zone shall not be undertaken by any of the respondent – States. The regulation of permissible activities shall also be meticulously followed."

See also *Indian Council for Enviro-Legal Action v. Union of India* AIR 1995 SC 2252 at 2253. It may also be noted that in *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCALE 579, the Supreme Court declared an amendment of 1994 which sought to amend the Coastal Zone Regulation Notification issued in 1991 by reducing the width of the NDZ for rivers, creeks and backwaters from 100m to 50m invalid. The Court also declared the discretionary power conferred, by the amending notification, on the Central Government to permit constructions, at its discretion, within the 200 meters NDZ invalid. The Court observed: (at p 590) "The Central Government, has, thus, retained absolute power of relaxation of the entire 6,000kms long coast line and this in effect, may lead to the causing of serious ecological damage as the said provision gives unbridled power and does not contain any guidelines as to how and when the power is to be exercised. The said power is capable of abuse.... We, accordingly, hold that the newly added proviso in Annexure III in paragraph 7 in sub-paragraph (1) (item i) which gives the Central Government arbitrary, uncanalized and unguided power, the exercise of which may result in serious ecological degradation and may make the NDZ ineffective is ultra vires and is hereby quashed. No suitable reason has been given which can persuade us to hold that the enactment of such a proviso was necessary, in the larger public interest, and the exercise of power under the said proviso will not result in large-scale ecological degradation and violation of Art 21 of the citizens living in those areas."

56 Id at pp 104-106.

57 Dr K Alagaraswami's Report was in fact a research paper titled "*The Current Status of Aquaculture in India*", which he presented at a workshop organized by FAO of the UNO. This was part of a Report published in April 1995 on Regional Study and Workshop on the Environmental Assessment and Management of Aquaculture Development. The Court made use of this Report.

58 The Court directed NEERI to visit Coastal areas of Andhra Pradesh and Tamil Nadu and submit a report. See, Id at p 93.

59 This was a report prepared by an expert group headed by Justice H Suresh, a retired judge of the Bombay High Court, titled "*Expert Committee Report on Impact of Shrimp Farms Along the Coast of Tamil Nadu and Pondicherry*". See, Id p 126.

60 This is a report prepared and published by the United Nations Research Institute for Social Development

Conference and Stockholm Declaration, the Brundtland Report,⁶¹ the relevant Constitutional⁶² and statutory⁶³ provisions and the case law⁶⁴ in which the importance of the import of the concept of “sustainable development” along with its core features of “Precautionary Principle” and “Polluter Pays” principle, as viable judicial strategies to give both preventive and remedial relief, has been explained, declared:⁶⁵

We are of the view that before any shrimp industry or shrimp pond is permitted to be installed in the ecology fragile coastal area it must pass through a strict environmental test. There has to be a high-powered “Authority” under the Act to scrutinize each and every case from the environmental point of view. There must be an environmental impact assessment before permission is granted to install commercial shrimp farms. The conceptual framework of the assessment must be broadbased primarily concerning environmental degradation linked with shrimp farming. The assessment must also include the social impact on different population strata in the area. The quality of the assessment must be analytically based on superior technology. It must take into consideration the inter-generational equity and the compensation for those who are affected and prejudiced.

Finally, His Lordship, while deprecating that “the authorities responsible for the implementation of various statutory provisions are wholly remiss in the performance of their duties under the said provisions”,⁶⁶ issued several directions.⁶⁷

in collaboration with the World Wide Fund for Nature International, which had conducted the study. The Report was titled “*Some Ecological and Social Implications of Commercial Shrimp Farming in Asia, 1995*”. See, Id p 137.

61 Id at pp 144-145.

62 The Learned Judge referred to Arts 21, 47, 48 (A) and 51 A (g) of the Constitution. Id at p 145.

63 Sections 2, 7, 8, 15 of the Environment (Protection) Act, 1986; Rule 5 of the Environment (Protection) Rules, 1986; The Statement of objects and Reasons and Ss 2 and 25 of the Water (Prevention and Control of Pollution) Act, 1974; the Fisheries Act, 1897; the Wild Life Protection Act, 1972; the Forest Conservation Act, 1980 and the Air (prevention and Control of Pollution) Act, 1981.

64 *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647 and *Indian Council for Enviro – Legal Action v. Union of India* (1996) 3 SCC 212.

65 Id at p 147.

66 Id at p 143.

67 Id at p 147 to 150. The regulations are:

1. The Central Government shall constitute an authority under section 5(3) of the environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to protect the ecologically fragile coastal areas, sea shore, water front and other coastal areas and specially to deal with the situation created by the shrimp culture industry in the coastal states/Union Territories. The authority shall be headed by a retired Judge of a High Court. Other members preferably with expertise in the field of aquaculture. Pollution control and environment protection shall be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue directions under section 6 of the Act and for taking measures with respect to the matters referred to in clauses (v), (vi), (viii), (ix), (x) and (xii) or sub-section (2) of Section 3. The Central Government shall constitute the authority before January 15, 1997.

The New Innovative Contours of Precautionary Principle.

In *AP Pollution Control Board v. MV Nayudu*⁶⁸, which is one of the landmark decisions of the Supreme Court in the area of environmental

2. The authority so constituted by the Central Government shall implement "the Precautionary Principle" and "the Polluter Pays" principles.
3. The shrimp culture industry/the shrimp ponds are covered by the prohibition contained in para 2(1) of the CRZ Notification. No shrimp culture pond can be constructed or set up within the coastal regulation zone as defined in the CRZ notification. This shall be applicable to all seas, bays, estuaries, creeks, rivers and backwaters. This direction shall not apply to traditional and improved traditional types of technologies as defined in Alagarswami report, which are practiced in the coastal low lying areas.
4. All aquaculture industries/shrimp culture industries/shrimp culture ponds operating/set up in the coastal regulation zone as defined under the CRZ Notification shall be demolished and removed from the said area before March 31, 1997. We direct the Superintendent of Police/Deputy Commissioner of Police and the District Magistrate/Collector of the area to enforce this direction and close/demolish all aquaculture industries/shrimp culture industries/shrimp culture ponds on or before March 31, 1997. A compliance report in this respect shall be filed in this Court by these authorities before April 15, 1997.
5. The farmers who are operating traditional and improved traditional systems of aquaculture may adopt improved technology for increased production, productivity and return with prior approval of the "authority" constituted by this order.
6. The agricultural lands, salt pan lands, mangroves, wetlands, forest lands, land for village common purpose and the land meant for public purposes shall not be used/converted for construction of shrimp culture ponds.
7. No aquaculture industry/shrimp culture industry/shrimp culture ponds shall be constructed/set up within 1000 meter of Chilk Lake, Pulicat Lake (including Bird Sanctuaries namely Uadurapattu and Nelapattu)
8. Aquaculture industry/shrimp culture industry/shrimp culture ponds already operating and functioning in the said area of 1000 meter shall be closed and demolished before March 31, 1997. We direct the Superintendent of Police/Deputy Commissioner of Police and the District Magistrate/Collector of the area to enforce this direction and demolish aquaculture industries/shrimp culture industries, shrimp culture ponds on or before March 31, 1997. A compliance report in this respect shall be filed in this Court by these authorities before April 15, 1997.
9. Aquaculture industry/shrimp culture industry/shrimp culture ponds other than traditional and improved traditional may be set up/constructed outside the coastal regulation zone as defined by the CRZ notification and outside 1000 meter of Chilk and Pulicat Lake with the prior approval of the "authority" as constituted by this Court. Such industries which are already operating in the said areas shall obtain authorisation from the "Authority" before April 30, 1997 failing which the industry concerned shall stop functioning with effect from the said date. We further direct that any aquaculture activity including intensive and semi-intensive which has the effect of causing salinity of soil, or the drinking water or wells and/or by the use of chemical feeds increases shrimp or prawn production with consequent increase in sedimentation which, on putrefaction is a potential health hazard, apart from causing siltation turbidity of water course and estuaries with detrimental implication of local fauna and flora shall not be allowed by the aforesaid authority.
10. Aquaculture industry/shrimp culture industry/shrimp culture pond which have been functioning/operating within the coastal regulation zone as defined by the CRZ Notification and within 1000 meter from Chilk and Pulicat Lakes shall be liable to compensate the affected persons on the basis of the "polluter pays" principle.
11. The authority shall, with the help of expert opinion and after giving opportunity to the concerned polluters assess the loss to the ecology/environment of the affected areas and shall compensate all individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.

jurisprudence in the country, the Supreme Court had the opportunity to further clarify the import of the "Precautionary Principle" beyond what was expounded in *Vellore Citizens Welfare Forum's* case⁶⁹. This is evident from the following observation:⁷⁰

The *Vellore* Judgment has referred to these principles briefly but, in our view, it is necessary to explain their meaning in more details, so that Courts and tribunals or environmental authorities can properly apply the said principles in matters which came before them.

In this case, the Surana Oils and Derivatives (India) Ltd (SODL), which sought to establish a factory to manufacture castor oil derivatives sought consent of the Andhra Pradesh Pollution Control Board by an application to that effect. Unfortunately for the respondent company, the consent was refused by the Board on the ground that the factory was located at a place which was very close to Himayat sagar lake which supplied water to Hyderabad. The refusal was questioned before the Appellate Authority established under s 28 of the Water Act, 1974.

The Appellate Authority, reviewing the decision of the Board, directed the latter to grant consent. This direction was challenged in a PIL before the

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12. The authority shall compute the compensation under two heads namely for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names of the polluters from whom the amount is to be recovered, the amount recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collector/District Magistrate of the area concerned. The Collector/District Magistrate shall recover, the amount from the polluters, if necessary, as arrears of land revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.
 13. We further direct that any violation or non-compliance of the directions of this Court shall attract the provisions of the Contempt of Courts Act, in addition.
 14. The compensation amount recovered from the polluters shall be deposited under a separate head called "Environment Protection Fund" and shall be utilized for compensating the affected persons as, identified by the authority and also for restoring the damaged environment.
 15. The authority, in consultation with expert bodies like NEERI, Central Pollution Control Board, respective State Pollution Control Boards shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the coastal States/Union Territories. The scheme/schemes so framed shall be executed by the respective State Governments/Union Territory Governments under the supervision of the Central government. The expenditure shall be met from the "Environment Protection Fund" and from other sources provided by the respective State Governments/Union Territory Governments and the Central Government.
 16. The workmen employed in the shrimp culture industries which are to be closed in terms of this order, shall be deemed to have been retrenched with effect from April 30, 1997 provided they have been in continuous service (as defined in Section 258 of the Industrial disputes Act, 1947) for not less than one year in the industry concerned before the said date. They shall be paid compensation. The compensation shall be paid to the workmen before May 31, 1997. The gratuity amount payable to the workmen shall be paid in addition.

68 AIR 1999 SC 812.

69 AIR 1996 SC 2715.

70 See, supra, fn 73 at p 820.

AP High Court, which declined to interfere with the decision of the Appellate Authority. Against the decision of the High Court a Special leave appeal was preferred to the Supreme Court under Art 136⁷¹ of the Constitution.

Justice Jagannatha Rao, who spoke for the Court, infused new insights into the import, significance and role of the concept of “Precautionary Principle” in the context of the issue of assessment of the adverse impact of new industrial or other projects on environment. Being conscious of the fact that the Courts and other environmental authorities have been facing considerable difficulty in adjudicating upon correctness of the technological and scientific opinions presented to the courts as evidence in favour of or against the new developmental projects in the context of the issue of their adverse environmental effects,⁷² his Lordship projected the importance of the “Precautionary Principle” as a viable judicial tool for the protection of environment. The principle as articulated is based on the premise that it “is better to err on the side of caution and prevent environmental harm which may indeed become irreversible”.⁷³ After tracing its development from Stockholm Conference in 1972 to Rio-Conference 1992, his Lordship articulated its import thus:⁷⁴

It is to be noticed that while the inadequacies of science have led to the ‘precautionary principle’, the said ‘precautionary principle’ in its turn, has led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed is placed on those who want to change the status quo.... This is often termed as a reversal of burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less-polluted State should not carry the burden of proof and the party who wants to alter it, must bear this burden.... The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.

71 Article 136 (1) of the Indian Constitution reads: “(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.”

72 See, *supra*, fn 48 at p 818.

73 *Id* at pp 820-21.

74 *Id* at 821.

More importantly, the “Precautionary Principle” as enunciated by the judicial innovation, has been used as a judicial tool to reform the rules of evidence in order to expound the new concept ‘burden of proof’ in environmental matters. Articulating this new insight of the “Precautionary Principle”, the learned Judge observed:⁷⁵

The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty. Environmental protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential.

It may be appreciated that the core aspect of the “special principle of burden of proof”, as enunciated in *Nayudu*’s case lies in its insistence that it is on the developer / industrialist who seeks to alter the environmental status quo to prove that his action is environmentally benign. To quote, again, the learned Judge:⁷⁶

It is also explained that if the environmental risks being run by regulatory inaction are in some way “uncertain but non-negligible”, then regulatory action is justified. This will lead to the question as to what is the ‘non-negligible risk’. In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a “reasonable ecological or medical concern”. That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection. ... The required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a ‘reasonable persons’ test.

The ratio, dealing with the scope of judicial review of administrative environmental decisions, laid down in *Nayudu* case is also significant in the sense that it breaks a new ground in effecting departure from the past judicial practice⁷⁷ which was based on the limited concept of judicial review of

75 Ibid.

76 Ibid.

77 In *Sachidanad Pande v. State of West Bengal* AIR 1987 SC 1109 (Calcutta Taj Hotel Case), the Supreme Court observed: (at p 1115) “The least that the court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases the court may go further but how much further must depend on the circumstances of the case. The court may always give necessary directions. However, the court will not attempt to nicely balance relevant considerations.

administrative decisions based upon the 'Wednesbury' rule.⁷⁸ The Court being alive to the fact that these bodies, as their composition indicates, are bereft of the required expertise to adjudicate matters involving science and technology issues, disapproved steadfast adherence to such a detached "Wednesbury" review.⁷⁹ The Court, while referring the scientific and technical aspects of the dispute in question for investigation and decision of the National Appellate Authority established under the National Environmental Authority Act, 1997 which combines in its self both legal and scientific and technological expertise, suggested suitable amendments to all the relevant environmental laws to effect structural changes to environmental courts, authorities and tribunals to ensure that these bodies should consist of judicial and technical personnel well versed in environmental laws and matters.⁸⁰ To quote the relevant passage:⁸¹

Different statutes in our country relating to environment provide appeals to appellate authorities. But most of them still fall short of a combination of judicial and scientific needs. ...Good Governance is an accepted principle of international and domestic law. It comprises of the rule of law, effective State institutions, transparency and accountability in public affairs, respect for human rights and the meaningful participation of citizens – (including scientists) – In the political processes of their countries and in decisions affecting their lives. It includes the need for the State to take the necessary 'legislative, administrative and other actions' to implement the duty of prevention of environmental harm...Of paramount importance, in the establishment of environmental Courts, Authorities and Tribunals is the need for the providing adequate judicial and scientific inputs rather than leave complicated disputes regarding environmental pollution to officers drawn only from the Executive...There is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of judicial and also Technical personnel well versed in environmental laws. Such defects in the constitution of these bodies can certainly undermine the very purpose of those legislations.

When the question involved the nice balancing of relevant considerations, the court may feel justified in resigning itself to acceptance of the decision of the concerned authorities." See also *Dahanu Taluka Environmental Protection Group v. Bombay Suburban Electricity Supply Company Ltd.* 1991 (2) SCC 539 at p 541; *Tehri Bandh Virodhi Sangarsh Samiti v. State of Uttar Pradesh* 1992 Suppl (i) SCC 44 and *Shivrao Shantaram Wagle v. Union of India* AIR 1988 SC 952.

78 Wednesbury rule was laid down in *Associated Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223.

79 Wednesbury rule looks at bad faith, dishonesty, unreasonableness, and reliance on extraneous circumstances, failure to consider relevant matters and disregard of public policy as grounds of judicial review of administrative decision.

80 See, supra, fn 73, at p 822.

81 Id pp 821-22.

In *M/s Vijay Nagar Educational Trust v. KSPC Board, Bangalore*,⁸² the Karnataka High Court gave a new dimension to the “Precautionary Principle”. In that case the petitioner filed a writ petition under Art 226 of the Indian Constitution, questioning the correctness of the order dated 9 June 2000 of the Karnataka Pollution Control Board and of the appellate authority, which dismissed the petitioner’s appeal. The petitioner, by an application on 27 November 1999, sought permission/ clearance and consent of the PCB to establish a medical college and hospital. On 9 February 2000, by a communication the Board officials sought petitioner’s cooperation for its site inspection, which was responded to positively by a letter on 26 February 2000. Thereafter there was no response from the Board until 9 June 2000 when the Board passed an order refusing permission to establish the proposed medical college along with the hospital. Meanwhile, since the petitioner did not hear anything from the Board, it obtained the sanction from the Bangalore Metropolitan Regional Development Authority (BMRDA) and started construction of the buildings for the medical college and the hospital and spent about 5 cores of rupees without waiting for the consent of the Board. One Mr Bhat filed writ petition against the proposed project on environmental considerations. In response to the writ petition, the High Court of Karnataka, stayed further construction which was questioned in vain before the Appellate Authority and the High Court and the Supreme Court under Art 136 of the Constitution. Against the order of the PCB, the petition preferred an appeal to the Appellate authority which initially did not consider the appeal on the ground that the writ petition filed by Mr. Bhat was pending before the High Court. The High Court disposed of the petition and directed the Appellate authority to consider all aspects involved in the appeal. The Appellate authority after considering the matter dismissed the appeal. It is against this appeal that the present writ petition was filed.

The Board (PCB), acting under s 25(4) (b)⁸³ of the Water Act, 1974, refused permission/ consent/ clearance, inter-alia,⁸⁴ on the ground that the site of the proposed project was located on the Banks of Kumudavathi River which joined the TG Halli Reservoir which was the major source of drinking water to the Bangalore city and that, therefore, the site was located in a sensitive area and that the direct and indirect discharges from the activities of the hospital

82 AIR 2002 Kant 123.

83 Section 25 (4) (b) of the Water Act, 1974 states: “The State Board may – refuse such consent for reasons to be recorded in writing.”

84 The other reason was that the petitioner started construction of the medical college and hospital without obtaining clear permission of the Board as required by the provisions of Water (Prevention and Control of Pollution) Act, 1974.

and the public attending the hospital were likely to join the river and were likely to affect the water quality of the reservoir which would prove health hazard.⁸⁵

The High Court held that the reason advanced by the Board was legally untenable and allowed the appeal, quashing the orders passed by the PCB and the Appellate authority. The Court also declared:⁸⁶

It is, however, open to the Board to make a detailed study of all the potential pollutants and direct the petitioner as provided under s 25(5) of the Water (Prevention and Control of Pollution) Act, 1974 and the rules made thereunder to take all precautionary measures to offset any danger that may be caused by establishment of the college and hospital.

As regards the first part of the reason advanced by the PCB for its refusal to grant consent, the Court declared it legally untenable on the ground that since there was no publication of any notification declaring the area in question as a sensitive area either by the State Government or Central Government, the PCB could not arrogate to itself that power.⁸⁷

As to the second part of the above reason advanced by the PCB, the High Court held that the petitioner was neither "called upon nor was he provided the opportunity to dispel any reasonable concern that the Board may have about the potential danger that the industry would have caused".⁸⁸

In the context of the fact situation that obtained in this case the High Court held that since the medical college and the hospital had not commenced operations, the issue in question could be "determined only with reference to the 'Precautionary Principle' which ... has now emerged as the law governing matters of environment and finds expression in Art 47,48A and 51A(g) of our Constitution. This concept has now come to be recognized as part of our domestic law. The new concept places the burden of proof on the developer to show that establishment of an industry would not expose the environment to serious or irreversible damage".⁸⁹

The court held that since the "Precautionary Principle" shifts the burden of proof to the developer to prove that his proposed industry does not pose serious or irreversible damage to environment, he must be given an "opportunity to discharge the burden and present evidence to alleviate the concern against

85 See, *supra*, fn 87, at p 131.

86 See, *supra*, fn 87 at p 134.

87 *Id* at p 132.

88 *Ibid*.

89 *Id* at p 130.

the level of uncertainty”⁹⁰. The Court held that such as opportunity was not given to the petitioner in this case⁹¹.

Making a distinction between the fact situation that obtained in this case and the one that obtained in *Nayudu*’s case, the Court held:⁹²

When it can be reasonably said that the establishment of the hospital does pose an ‘uncertain’ risk TO environment, it cannot be said, applying the same yardstick of ‘reasonableness’, that the potential risk is ‘negligible’ or ‘non-negligible’. In the case of *A.P. Pollution Control Board*, the Apex Court has every reason to believe that the potential danger to the environment was ‘non-negligible’. In the present case it cannot be said even with a modicum of certainty that the risk involved is ‘non-negligible’.

After referring to the decisions of the Supreme Court in *Nayudu*’s and *Lakshmi Sagar*⁹³, the High Court held:⁹⁴

What emerges from all these pronouncements of the Apex Court is that there should be some ‘non-negligible’ potential danger to the environment if the permission sought could be refused. Where it is not possible to draw a reasonable inference from the records of such ‘non-negligible’ danger to environment, I am of the considered view that the principle of ‘sustainable development’ would come to play. Hospital being an institution that is essential to improve the quality of human life, its establishment subject to ensuring the carrying capacity of the supporting ecosystems, I feel, is the right answer to the question in issue...and it is not possible to ascertain any potential non-negligible danger to environment which would call for adopting the ‘precautionary principle’.

Conclusion

In spite of the fact that the Water Act, which is a law ‘par excellence’⁹⁵, has been in operation for almost three decades, the condition of water pollution

90 Ibid.

91 Ibid.

92 Id at 132.

93 *M/s DLF Universal Ltd v. Prof A Lakshmi Sagar* AIR 1998 SC 3369. In this case the Supreme Court upheld the State’s permission to convert the land situated near Arkavati River and Thippagondanahalli Reservoir for non-agricultural purposes (i.e., for construction of a residential colony). Rejecting the objection on the ground of possibility of pollution of waters, rivers and the water reservoir, the Court held: (at para 16) “We are unable to hold that on the basis of material on record the State Government could not reasonably take the view that the proposed scheme would not affect the availability of water for supply to the city of Bangalore and would not result in pollution of water of river Arkavati and Thippagondanahalli Water Reservoir.”

94 See, supra, fn 87 at 132.

95 See, SN Jain, *Legal Control of Water Pollution in India*, in SL Agarwal, (ed), *Legal Control of Environmental Pollution*, p 21.

in the country has not improved. On the contrary, it has worsened. The responsibility for this sorry state of affairs rests, primarily, with the administrative agencies responsible for the Act's implementation, which have failed to discharge their responsibilities. The Supreme Court, while expressing its anguish at this callous indifference on the part of the authorities, has observed that but for their "remiss in the performance of their duties", the higher judiciary would not have taken up the mantle of playing the over-reacting judicial role for the protection of environment.⁹⁶ The Supreme Court has not only been aware of the fact that the day-to-day enforcement of the environmental laws is not its function but is also conscious of the fact that it is ill-equipped for that purpose.⁹⁷ It may be appreciated that in spite of this awareness and consciousness, the Supreme Court has undertaken day-to-day enforcement of environmental laws by issuing various interim orders and directions of different kinds which in normal circumstances would not have been given without being branded as usurper of the executive and legislative functions. These orders and directions have been issued primarily to safeguard the fundamental rights of the people.⁹⁸

The callous indifference on the part of the administrative authorities, entrusted with the job of implementation of environmental laws, has been highlighted, by the Karnataka High Court in *M/s Vijay Nagar Educational Trust v. K.S.P.C. Board, Bangalore*⁹⁹, where the Karnataka PCB did not care to respond to the respondent's application for grant of consent for more than six months while the maximum statutory period for such response is four months.¹⁰⁰

In *Vellore Citizens Forum*¹⁰¹ case, Justice Kuldip Singh innovatively expounded, adopted and applied the "Precautionary Principle" and the "Polluter Pays" principle which are the core features of the concept of "Sustainable Development" for giving both preventive and remedial reliefs to the victims of environmental degradation by passing appropriate directions.¹⁰²

The *Jagannath* and *Indian Council for Enviro-Legal Action* cases project the judicial concern for the strict enforcement of the CRZ Regulations, which is reflected in the issuance of several orders and directions to protect the

96 See, supra, fn 39 at p 2724.

97 *Indian Council for Enviro - Legal Action v. Union of India* (1996) 5 SCC 281 at 293-94.

98 Ibid.

99 AIR 2002 Kant 123.

100 Section 25 (7) of the Water Act, 1974 states: "The consent referred to in sub section (1) shall, unless given or refused earlier, be deemed to have been given unconditionally on the expiry of a period of four months of the making of an application in this behalf complete in all respects to the State Boards."

101 Supra, n. 39.

102 Supra, n. 36.

ecologically fragile coastal areas of the country. The Supreme Court showed its concern and disapproval of not only the Central Government's amending regulation, reducing the width of the zone from 100m to 50m by declaring it illegal but also the regulation conferring discretionary power on the Central Government to relax the operation of the regulations at any place throughout coast line. Interestingly, as evident from the *Indian Council for Enviro-Legal Action* case, the Central Government which is meant strictly to enforce the CRZ Regulations has shown callous remiss in discharge of its duties which evoked prompt remedial judicial response. Again, it may be submitted that it is the responsibility of the Central and State Governments to take their functions more seriously, which they have not done. This has resulted in further ecological degradation of coastal areas.¹⁰³

The *Nayudu's* case, which is a landmark case with regard to the exposition of the scope and application of the "Precautionary Principle", illustrates different dimensions of this principle in its operation for the protection of environment. In this case, it may be noted that the application of this principle has resulted in the ultimate rejection of the clearance to the proposed project of the respondent company¹⁰⁴. It may also be appreciated that in the resolution of the conflict between the competing claims of development and environment, the "Precautionary Principle" when applied as a judicial tool, takes the side of environment and operates against the undue claims of development. The *Nayudu's* case projects the need for the appointment of judicial and technical personnel well versed in environmental matters on the environmental courts, authorities and tribunals which is necessary to have an effective and meaningful application of the "Precautionary Principle". It is gratifying to note that the Supreme Court in *Nayudu's* case suggested suitable amendments to the relevant environmental laws. While welcoming this suggestion, it is submitted that "there is equally urgent need for amendment of provisions relating to the structure and constitution of pollution control boards if they are to act as an important environmental protection agencies in the State".¹⁰⁵

The *M/s Vijaynagar Educational Trust* case presents a new dimension of "Precautionary Principle". The Karnataka High Court, in this case sought to

103 In this case Justice Saghir Ahmed also made a similar observation, which is: (at p 2002) "The sine qua non for punishment of imprisonment and fine is a fair trial in a competent court. The punishment of imprisonment or fine can be imposed only after the person is found guilty.... In view of the above, it is difficult for us to hold that the pollution fine can be imposed upon M/S Span Motels without there being any finding that M/S Span Motels was guilty of the offence under the Act and are therefore liable to be punished with imprisonment or with fine."

104 It appears that the Supreme Court has rejected the respondent's claim and approved the rejection of clearance to the project.

105 *Supra*, n. 28, at p. 366.

draw the attention of the PCB to the need to expedite its decision on the application by a developer / industrialist to the PCB for grant of consent under s 25¹⁰⁶ of the Water Act, 1974. The Court also held that whenever the state PCB considers the consent application under the above statutory provision the board is duty bound to afford the applicant an opportunity to discharge the burden of proof which is implicit in the operation of the “Precautionary Principle”¹⁰⁷. This case is significant in the sense that it lays down the proposition that the PCB cannot refuse to grant consent without providing any occasion for the “Precautionary Principle” to operate.

106 *Supra*, n. 88.

107 *Supra*, n. 87, at p. 131. While deprecating the attitude of the PCB, the High Court observed: at 131 “The Board which is charged with the solemn duty of protecting the environment has done precious little in discharge of its duty and has displayed an indolent attitude in examining the request of the petitioner for grant of consent. It appears to have woken up from its bureaucratic slumber only after the filing of the Public Interest Litigation.”