

SUPREME COURT OF INDIA

Research Foundation for Science Technology and Natural Resources Policy

Vs

Union of India

Writ Petition (Civil) 657 of 1995 [With Slp (C) No.16175 of 1997 and Civil Appeal No.7660 of 1997]

(Y.K.Sabharwal and S.H.Kapadia)

05/01/2005

JUDGMENT

Y. K. SABHARWAL, J.

Considering the alarming situation created by dumping of hazardous waste, its generation and serious and irreversible damage as a result thereof to the environment, flora and fauna, and also having regard to the magnitude of the problem as a result of failure of the authorities to appreciate the gravity of situation and the need for prompt measures being taken to prevent serious and adverse consequences, a High Powered Committee (HPC) was constituted by this Court with Prof. M.G.K. Menon as its Chairman, in terms of order dated 30th October, 1997. The Committee comprised of experts from different disciplines and fields and was required to examine all matters in depth relating to hazardous waste.

On consideration of the detailed reports submitted by the HPC various directions have been issued by this Court from time to time. Presently, we are concerned with the presence of hazardous waste oil in 133 containers lying at Nhava Sheva Port as noticed by HPC. On the directions of this Court, the oil contained in the said 133 containers was sent for laboratory test to determine whether same is hazardous waste oil or not. It has been found to be hazardous waste.

On consideration of report of HPC, the result of laboratory test and entire material on record, this Court came to the prima facie conclusion that importers illegally imported waste oil in 133 containers in the garb of lubricating oil. In terms of the order dated 25th September, 2003, notices were directed to be issued to 15 importers who imported the said consignment as also to the Commissioner of Customs.

The importers were directed to show cause why the consignment shall not be ordered to be re-exported or destroyed at their cost. Since, the Ministry of Environment and Forests had spent a sum of Rs. 6.35 lakhs on the laboratory tests, the importers were also required to show cause why the said amount be not recovered from them and why all of them shall not be directed to make payment of compensation on polluter pays principle and other action taken against them.

The affidavits showing cause were filed by the importers. During the course of hearing, one of the contentions urged on behalf of the importers was that in respect of consignments in question, adjudicating proceedings were pending before Commissioner of Customs, Mumbai and this Court may, therefore, defer the decision on the aspect of re-export or destruction of the goods. In the order dated 11th March, 2004, it was observed that for the purpose of present proceedings, it is strictly not necessary to await the final decision of adjudication proceedings but a report from the Commissioner of Customs may assist the court in deciding the aspects indicated in the order dated 25th September, 2003.

In this view, the Commissioner of Customs was directed to sent a report to this Court on the question whether the consignment in issue is waste oil within the meaning of the term 'waste oil' as per Basel Convention or Hazardous Waste Rules, 1989 as amended in the year 2000 and/or as amended in the year 2003 also having regard to the relevant notifications issued on this aspect. The Commissioner of Customs was directed to give reasonable opportunity to the importers to put forth their viewpoint before him while examining the matter and was further directed to associate the Monitoring Committee that was constituted in terms of orders dated 14th October, 2003 reported in 2003 (9) SCALE 303. The question whether any further testing is required to be done as claimed by the importers was left to be decided by the Commissioner in consultation with the Monitoring Committee.

Detailed reports have been filed by Commissioner of Customs (Imports), Mumbai and the Monitoring Committee. We have perused the relevant material including those reports and have heard learned counsel for the petitioner, learned Additional Solicitor General appearing for the Ministry of Environment and Forests as also learned counsel appearing for the Commissioner of Customs and other learned counsel representing the importers. It deserves to be noted that the question to be determined in these proceedings is limited to the environment issue.

The issue is in regard to the appropriate directions for dealing with the consignments in question, having regard to the precautionary principle and polluter pays principle. The main question is whether directions shall be issued for the destruction of the consignments with a view to protect the environment and, if not, in what other manner the consignments may be dealt with.

The report of the Commissioner of Customs sets out a brief history of the case, history of various Conventions and Laws formulated thereupon from time to time, correlating the same to the various test findings. The brief history, inter alia, states that:

"In the month of August-September 2000, the Central Intelligence Unit, New Custom House, Mumbai developed intelligence that large volumes of Furnace Oil were to be imported as containerized cargo, at the Jawaharlal Nehru Port at undervalued prices. Accordingly the Central Intelligence Unit maintained a discreet watch at such consignments of Furnace Oil imported at JN Port. Emphasis was laid on Furnace oil stuffed in containers, as the same was quite unusual. Furnace Oil is basically imported in bulk on account of its large volumetric requirements by the industry and its relatively low value makes its import as containerized cargo economically unviable unless the value is suppressed, or some other mis-declaration was restored to, to offset the increased cost of packing and transportation in containers. True to the intelligence gathered, a large number of consignments of Furnace oil, packed in containers arrived at JN port in Aug-Sept and the same were detained for further investigation. In all these cases the declared prices were in the range of US\$ 90 to 125 per MT as against the erstwhile international price of US\$ 150, when imported in bulk.

During the course of the investigation, samples were sent to the departmental laboratory for conducting tests. The standard reference parameters available pertained to those of Fuel Oil under BIS 1593-1982. Under these standards certain characteristics like Acidity, Ash content, Flash point, Kinematic viscosity, Sulphur content and Water content for Fuel oils have been prescribed by the Bureau of Indian Standards and depending on the specifications the fuel oils get divided into four grades.

It is pertinent to note that these standards do not define waste oil or hazardous wastes. Initial testing of samples, by the Custom House Laboratory, drawn from some of the consignments indicated that the goods were not Furnace oil. The Laboratory, however, could not categorically state whether the samples were used/waste oil, as they did not have the standards/specifications of used/waste oil. Inquiries made with I.O.C. and H.P.C.L also revealed that though they could test and report whether the oil was conforming to the standards of Fuel/Furnace oil but they were not in a position to state whether the same were used/waste oil.

As categorical test reports were not forthcoming it was decided to get the samples tested and an opinion obtained from the Central Revenue Control Laboratory (CRCL), New Delhi. Fourteen samples, pertaining to Vidya Chemical Corporation, PCS Petrochem, Shiv Priya Overseas, Royal Implex, Eleven Star Escon and Valley International, were accordingly forwarded to CRCL for testing and their opinion on 24.08.2000. The test results forwarded by the CRCL in all the 14 samples indicated that none of the samples tallied with the specifications of Furnace Oil and all were off specification material i.e. waste oil

Thereafter the CIU seized all the consignments involving 158 containers. One consignment comprising of 25 containers was conditionally released on execution of Bank Guarantee for the

differential Duty. Thus a total of 133 containers were left.

*On 5.10.2001 the MPCB forwarded a final report from the IIP to the Custom House wherein it was stated that the halogen content tests were done at the Shriram Institute of Industrial Research (SIIR), New Delhi and the PCB content tests were done at the National Institute of Oceanography, Goa. The report concluded that all the 20 samples sent to the IIP were found to be hazardous. In all these cases, where SCNs had earlier been issued, addendums were issued afresh keeping in view the fact that since hazardous wastes imported in violation of the provisions of the Environment (Protection) Act, 1986 had to be re-exported or dealt with as provided for in the Hazardous Wastes (Management and Handling) Rules, 1988. Personal hearings were held in several cases by the Commissioner, Mumbai for adjudication of these cases." **

In regard to Basel Convention, the report states as under:

"The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted by the conference of the Plenipotentiaries on 22.03.1989. Article I of the Convention, dealing with the scope of the convention, defined 'Hazardous Wastes' as follows:

(a) Wastes that belong to any category contained in Annexure I, unless they do not possess any of the characteristics contained in Annexure III; and

(b) Wastes that are not covered under paragraph (a) but are defined as or are considered to be, hazardous wastes by the domestic legislation of the party of export, import or transit. In the Annexure I to the Convention, referred to above at dealing with categories of wastes to be controlled, the following categories of Wastes are pertinent to the subject matter:

(a) Y8 Waste mineral oils unfit for their originally intended use (b) Y9 Waste oils/water, hydrocarbons/ waste mixtures, emulsions (c) Y10 Waste substances and articles contained or contaminated with polychlorinated biphenyls (PCBs) and/or polychlorinated terphenyls (PCTs) and/or polybrominated biphenyls (PBBs)

Annex III gives the list of Hazardous Characteristics such as Explosive, Flammable liquids, Flammable solids, Substances or wastes liable to spontaneous combustion, Substances or wastes which in contact with water emit flammable gases, Oxidizing, Organic Peroxides, Poisonous, Infectious substances, Corrosives, Liberation of toxic gases in contact with air or water, Toxic (Delayed or Chronic), Ecotoxic.

The wastes are further specifically covered under Annex VIII in List A which states that 'Wastes contained in this Annex are characterized as hazardous under Article I, paragraph 1(a), of this Convention, and their designation on this Annex does not preclude the use of Annex III to demonstrate that a waste is not hazardous.' In this List A specific attention is drawn towards the

category A3 which deals with 'Wastes containing principally organic constituents, which may contain metals and inorganic materials.' Sub-division A 3020 of this category deals with 'Waste mineral oils unfit for their originally intended use.'

It is nobody's case that the material imported is not mineral oil or of mineral origin. In other words the category of Wastes to be concentrated upon is A 3020 as it specifically deals with mineral oils. After identifying the exact category of the material it remains to be seen whether the imported material possesses any of the characteristics as mentioned in Annex III to the Convention. All the test reports obtained from the Indian Institute of Petroleum, Dehradun, indicate that the materials have PCB.

In respect of the impact of the presence of PCBs on the waste oil, reference is made to the 'Technical Guidelines on Hazardous Waste: Waste Oils from Petroleum Origins and Sources (Y8)' issued by the Basel Convention. Paragraph 10, outlining the characteristics of PCBs is reproduced for reference Particular concern centers on a family of substances known as polychlorinated biphenyls (PCBs) which combine excellent insulation and heat transfer characteristics, with high stability and non-inflammability. However they are environmentally extremely persistent and bio-accumulative, toxic (and a suspected carcinogen), and if burned under unsuitable conditions, will give rise to toxic products of combustion including dioxins and dibenzofurans. Paragraph 30 indicates that several countries have brought about Legislation to define the concentration of the PCB below which no concern need be felt and that 50 ppm is the fairly established limit.

All these definitions and various clauses in the Convention indicate that the contents of the convention cannot be seen in isolation to the follow-up laws framed in this regard by the individual member countries. The contents of the Convention are only in the form of guidelines to the member nations and the final question of whether the material is Hazardous Waste or not cannot be answered on the basis of the contents of the Convention alone. With reference to the presence of PCBs in waste oils, the National Laws framed need to be examined to categorically state whether the subject cargo is hazardous or not.

*The contention of all the importers that their material had not violated the 50 ppm limit prescribed in the Basel Convention and were thus not Hazardous Waste has not strength if the same are not examined in the light of the Laws framed by the Country in the process of aligning with the recommendations of the Convention as the contents of the Convention are by themselves not any Law that could be implemented (to be discussed later)." **

The report makes a detailed reference to The Hazardous Wastes (Management and Handling) Rules, 1989 as introduced in 1989 and amendments effected in January 2000 and in the year 2003. In regard to amendments made in January 2000 whereafter the imports were made, the report notices as under :

"For the purpose of import, Rule 3(i) (c) defined Hazardous Waste as those listed in List 'A' and 'B' of Schedule-3 (Part A) if they possessed any of the hazardous characteristics listed in Part-B of

Schedule.

*List A of Schedule 3 is a reflection of List A as Annex III of the Basel Convention and the hazardous wastes appearing in this list of Schedule 3 are restricted and cannot be allowed to be imported into the country without DGFT Licence. In this list attention is drawn to the entry 'Waste mineral oils unfit for their originally intended use' against Basel No A 3020. Such Waste mineral Oils would be characterized as hazardous if they possess any of the Characteristics enumerated in Part B of Schedule 3. The presence of PCB contents in Waste mineral oils renders the material carcinogenic, bio accumulative and ecotoxic. Therefore, any consignment of Waste mineral Oil having PCB would be rendered Hazardous." § * (Emphasis supplied).*

Thus, from the rules, it is clear and evident that the presence of PCB contents in any consignment of waste mineral oil would render such oil as hazardous waste.

On the aforesaid basis, most of the consignments have been found to be hazardous waste. The only consignment imported by Eleven Star Esscon was found not to be hazardous but off specification fit for re-refining. In respect of one container of Oil imported by Royal Implex though the samples were not sent to the IIP for further analysis in respect of Organic halides and PCB determination, the report concluded that it would not be advisable to conduct those tests at that late stage as the prolonged storage may have deteriorated material further and on the basis of the test results available it was obvious that the material was not fit for re-refining.

The report of the Commissioner of Customs has characterized the goods as hazardous waste. The conclusions arrived at by Commissioner of Customs are as under:

"The erstwhile Law therefore had enough provisions to determine whether any given sample of Fuel Oil had hazardous characteristics or not. And based on the directions inherent in these Laws, it has been conclusively proved that all the subject 133 containers of Furnace oil contain Hazardous Waste Oil.

*It is also abundantly clear that this conclusion was arrived at under the provision of the Law prevalent at that time. The importers had therefore imported Hazardous Wastes in complete and flagrant violation of the Law. I, therefore, hold and conclude that the goods, viz. Furnace oil imported and contained in the said 133 containers are hazardous." **

Noticing that the entire cargo had been imported without proper licence and its movement to the Country is illegal, reference has been made in the report to Rule 15(2) which provides that (i) the waste in question shall be shipped back within thirty days either to the exporter or to the exporting country or (ii) shall be disposed of within thirty days from the date of off-loading subject to inability to comply with sub-rule 2(i), in accordance with the procedure laid down by the State Pollution Control Board or Committee in consultation with Central Pollution Control Board.

In regard to the possibility of re-export of the cargo, reference has been made to Article 9(2)(a) of the Basel Convention which provides that in the case of illegal traffic as a result of conduct on the part of the exporter, the state of export shall ensure that the waste in question is taken back by the

exporter within 30 days from the time the state of export was informed. It has been stated that even though there are provisions, both in international Conventions, like Basel Convention, and in our national laws, a holistic view needs to be taken in view of the prevailing circumstances.

The exporters of the cargo may not take the cargo after 4 years. Besides a whole range of time consuming protocol measures may be involved. The re-export of cargo at this point of time and under the conditions in which the cargo was lying has been ruled out also stating that issues like transportation charges and the ownership and acceptability of the cargo at the destination point may be highly vexed and difficult to surmount. In this backdrop, the possibility of disposal locally as a one-time measure was examined.

Regarding the disposal of the imported hazardous waste, the report states that certain drastic one-time measures are required to be taken. Both the modes of disposal, i.e. by subjecting the waste to re-cycling and alternatively by incinerating it, were examined. It has been suggested that overlooking the PCB presence up to 50 ppm, if the waste oil conformed to the other specifications mentioned in schedule 6, then such consignments may be considered for recycling.

These consignments could be adjudicated and released to the importers only under the condition that they would get the material recycled, under the control and supervision of the Central Pollution Control Board authorities, in Units registered with MOEF and having consent/authorization from by the State Pollution Control Board. Further suggestion is that consignments not conforming to the specifications of Schedule 6 and/or having PCB in excess of 50 ppm may be subjected to incineration at the importer's cost at the Hazardous Incinerator under supervision of the State Pollution Control Board.

In cases where the cargo is required to be incinerated, besides cleaning the pollution caused due to leakages, the suggestions is that the importer may also be directed to bear the cost of transportation to the incineration site, its handling there and its incineration costs till final disposal. Further, the report recommends that the importers may be directed to pay all the testing charges incurred by MPCB (Rs. 6.5 lakhs) and Customs (Rs. 7.5 lakhs approximately) from the initial stage and till final disposal of goods. It also notices that the two importers did not appear for personal hearing despite several reminders. All the 15 importers have been divided into five different categories.

In category one, there are 10 importers in respect whereof recommendations is for recycling or incineration. One importer Indochem has been placed in category two in which though sample passed other tests, but presence of PCB rendered the goods hazardous. The recommendation is for release of goods to the importer. The sample of Royal Impex has higher lead content and not fit for recycling. Sample was not tested for PCB contents. Placing it in category three, recommendation is that request for re-export may be considered by this Court. The import of Eleven Star Esscon has been placed in category four.

These goods have been confiscated absolutely. The goods have heavy metal concentrations but within recycling limits and do not have organic holds and PCBs. Recycling has been recommended.

The two importers who were proceeded exports have been placed in category five and recommendation is that action on above lines be taken. The attention of this Court has been drawn to the condition of the waste oil stock lying in the Customs area pointing out that many of the drums have exploded and the contents are spread in the area which is definitely a fire hazard and is also causing grave damage to the environment.

The report further points out that in addition to the 133 containers, another group of imports by various parties comprising of an additional 170 containers, which had been imported after the import of 133 containers, are also lodged with the Custodians in the same area and are more or less in the same condition. It has also been pointed out that the importers of these 170 containers have not filed any import clearance documents with the Customs so far.

The aforesaid report of Commissioner of Customs has been considered by the Monitoring Committee. The Monitoring Committee has recommended disposal of all consignments except one by incineration in consultation with two Pollution Control Boards mentioned in its report. It has noticed that adequate facilities are not available even with registered refiners for re-refining oil containing PCBs. Notice has also been taken of the fact that the Director, IIP, Dehradun has mentioned that since all 133 containers have been lying at Mumbai Port since 2000, the oil would have undergone considerable degradation in last four years. Another important factor that has been taken into consideration is about the cost of re-refining being exorbitant and, therefore, it was not economically feasible to re-refine the oil in question.

In respect of consignments of category one, learned counsel for importers sought to contend that PCBs were within the limits prescribed by the Basel Convention and also that the same were of small quantity, it being minimal and negligible and, therefore, the recommendation of the Monitoring Committee for destruction of oil by incineration does not deserve to be accepted. Reference was also made to Technical Guidelines on Hazardous Waste: Waste Oils From Petroleum Origins and Sources [(Y8) Basel Convention] to contend that the presence of PCBs and waste oil as a secondary fuel upto 50 PPM was fairly acceptable in respect of marketing and use. On this basis and with reference to the test report, it was contended that since the PCB in the consignments in question being minimal and negligible, there was no contravention of the Basel Convention.

It was contended that as per recommendations of Commissioner of Customs re-refining was possible but the Monitoring Committee has only recommended destruction by incineration without any legal basis. The Monitoring Committee comprises of experts in the field. It has recommended destruction of the consignment by incineration. The PCBs may be within permissible limit insofar as parameters of Basel Convention are concerned but, at the same time, it has to be kept in view that parameters fixed by the Basel Convention are only guidelines and the individual countries can provide different criterion in their national law to lay down the limits of concentration of PCBs so as to label it as hazardous waste. Even European Community is considering to reduce PCBs concentration from 50 PPM to 20 PPM to make it consistent with the limits on oils being used as fuel. Be that as it may, insofar as our country is concerned, the provision is that the presence of PCBs shall be of non-detectable level. The national law laying stricter condition has to prevail.

The Commissioner of Customs, on detailed examination, has concluded that the import was in

complete and flagrant violation of law. The import is of hazardous waste. In the garb of furnace oil, hazardous waste has been imported. Further, many of the drums have exploded and the contents spread in the area which besides being a fire hazard is also causing grave damage to the environments. PCBs are environmentally extremely persistent and bio-accumulative, toxic (and a suspected carcinogen), and if burnt under unsuitable conditions, will give rise to toxic products of combustion including dioxins and dibenzofurans. Great care is required in assessing and selecting disposal options for such oils.

The CPCB which is implementing the Registration Scheme for actual users of hazardous wastes including used/waste oil, is of the opinion that adequate facilities are not available even with registered refiners for re-refining oil containing PCBs. That apart, oil regeneration technologies depend to some degree of quality of waste oil. Regeneration process involves the application of reasonably sophisticated technology and require care and expertise in their operation.

The illegally imported oils remained on the Port for four years and would have undergone considerable degradation during this period. Nothing tangible has been shown so as to take a view different than the one recommended by the Monitoring Committee. Learned counsel appearing for Royal Impex contended that in the consignment imported by it only Ash contents were more as per the test report on record and, therefore, the consignment may be released to the importer.

It was also contended that the sample was not sent to IIP for further test in respect of organic halides and PCB determination. The report, however, states that it may not be feasible to conduct those tests now as prolonged storage may have deteriorated the material further. According to the report of the Commissioner of Customs on the basis of the test results available, the material was not fit for recycling. Our attention was drawn by learned counsel for the importer to the test report of New Custom House Laboratory which only shows that ash contents were more and contention urged was that the conclusion arrived by the Commissioner of Customs that the material was off specification and on account of higher lead contents, it was not fit for recycling is without any basis.

It was contended that the test report of Central Revenue Control Laboratory (CRCL) was not on record and on that basis, submission made is that the conclusion that the samples were tested at CRCL which showed that lead contents exceeded the limits prescribed for re-refining was wholly untenable. On directions of this Court, learned counsel for the Commissioner of Customs has filed before us a copy of the report of CRCL which shows the lead MG/LIT being 2824.87.

This high percentage of lead was against the prescribed used oil specification for re-refining being 100 PPM. Further, from the reply dated 7th May, 2004 sent to the show cause notice dated 13th April, 2004, the importer did not ask for testing of oil to determine PCB contents. On the other hand, the stand in the said reply is that if sample is tested after passage of four years, the nature of oil would have changed considerably and the oil may have certain impurities and, therefore, the testing of oil will not be an accurate method to ascertain the genuineness of the oil at the time it was imported. Even before us, the submission is not that the sample should now be sent for testing. We do not think that at this stage, the consignment can be allowed to be re-exported though agreed to by the Monitoring Committee. It also cannot be allowed to be recycled. The oil deserves to be incinerated.

In respect of import effected by Eleven Star Esscon, heavy metal concentrations are within recycling limits. It does not have organic halides and PCBs. Recommendation of the Commissioner of Customs is for its recycling. The Monitoring Committee has, however, recommended its incineration possibly in view of its deterioration for about four years when the consignment was lying at the Port. The consignment has been confiscated absolutely.

It is now the Government's property. Learned counsel for the importer Eleven Star Esscon has not challenged the confiscation and has rather contended that his client has no intention to challenge the same. In view of the finding that the heavy metals are within recycling limits, there were no organic halides and the PCBs and the consignment has been found to be fit for recycling, we feel that the recycling deserves to be permitted as recommended by Commissioner of Customs but the same shall be done under the supervision of the Monitoring Committee. Having so permitted, we may note that the cost of recycling may be very exorbitant and it may not be economically viable.

If recycling is not considered advisable by the Government, the consignment shall have to be destroyed by incineration in the same manner as other consignments. The decision whether the Government desires the consignment to be recycled shall be taken within a period of four weeks failing which the consignment shall be destroyed by incineration along with other consignments. The cost of incineration shall be paid by the Government.

According to the Monitoring Committee, the cost of incineration will be at the rate of Rs. 12/- per kilo which also include the cost of transport to be paid by the importers in advance.

The liability of the importers to pay the amounts to be spent for destroying the goods in question cannot be doubted on applicability of precautionary principle and polluter pays principle. These principles are part of the environmental law of India. There is constitutional mandate to protect and improve the environment. In order to fulfill the constitutional mandate various legislations have been enacted with attempt to solve the problem of environmental degradation.

In respect of the precautionary principle, Rio Declaration (Principle No.15) provides that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost effective measures to prevent environmental degradation.

This principle generally describes an approach to the protection of the environment or human health based around precaution even where there is no clear evidence of harm or risk of harm from an activity or substance. It is a part of principle of sustainable development, it provides for taking protection against specific environmental hazards by avoiding or reducing environmental risks before specific harms are experienced. Having regard to the aforesaid principle, the import of waste oil containing PCBs of detectable limit has been banned in India. The fact that PCBs content in the consignments was only marginal or minimal and under Basel Convention its permissible limit is 50

PPM, is of no consequence. Judging by Indian conditions, our law has provided the limit of PCBs which if of detectable limits, the import is not allowed. The national law has to apply and shelter cannot be taken under guidelines of Basel Convention.

The polluter pays principle basically means that the producer of goods or other items should be responsible for the cost of preventing or dealing with any pollution that the process causes. This includes environmental cost as well as direct cost to the people or property, it also covers cost incurred in avoiding pollution and not just those related to remedying any damage. It will include full environmental cost and not just those which are immediately tangible. The principle also does not mean that the polluter can pollute and pay for it. The nature and extent of cost and the circumstances in which the principle will apply may differ from case to case.

The observations in *Deepak Nitrite Ltd. v. State of Gujarat and Others* [] that 'mere violation of the law in not observing the norms would result in degradation of environment would not be correct' is evidently confined to the facts of that case. In the said case the fact that the industrial units had not conformed with the standards prescribed by the pollution control board was not in dispute but there was no finding that the said circumstance had caused damage to environment.

The decision also cannot be said to have laid down a proposition that in absence of actual degradation of environment by the offending activities, the payment for repair on application of the polluter pays principle cannot be ordered. The said case is not relevant for considering the cases like the present one where offending activities has the potential of degrading the environment.

In any case, in the present case, the point simply is about the payments to be made for the expenditure to be incurred for the destruction of imported hazardous waste and amount spent for conducting tests for determining whether it is such a waste or not. The law prescribes that on the detection of PCBs in the furnace or lubricating oil, the same would come within the definition of hazardous waste. Apart from polluter pays principle, support can also be had from principle 16 of the Rio Declaration, which provides that national authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interests and without distorting international trade and investment.

Further, learned counsel for the petitioner strenuously contended that the exemplary and/or penal damages shall also be levied on the offending importers. In a given case, it may be possible to levy such damages depending as well upon the nature and extent of offending activity, the nature of offending party, the intention behind such activity but in the present case in absence of clear finding on these aspects, it is unnecessary to examine this aspect in depth. It is, however, to be borne in mind that in India the liability to pay compensation to affected persons is strict and absolute and the rule laid down in *Rylands v. Fletcher* has been held to be not applicable.

In *M.C.Mehta and Anr. v. Union of India and Others* [] a Constitution Bench has held that the rule in *Rylands v. Fletcher* laid down the principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to

another, he is liable to compensate for the damage caused. This rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is a statutory authority.

This rule evolved in the 19th century at a time when all the developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. In a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to be carried on as part of the developmental programme, Court should not feel inhibited by this rule merely because the new law does not recognize the rule of strict and absolute liability in case of an enterprise engaged in hazardous and dangerous activity. Law has to grow in order to satisfy the needs of the fast-changing society and keep abreast with the economic developments taking place in the country. Law cannot afford to remain static.

The Court cannot allow judicial thinking to be constricted by reference to the law as it prevails in England or in any other foreign country. Though the Court should be prepared to receive light from whatever source it comes but it has to build up its own jurisprudence. It has to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. If it is found that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, the Court should not hesitate to evolve such principle of liability because it has not been so done in England. An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone.

The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident as a part of the social cost for carrying on such activity, regardless of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads. The enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards.

The polluter pays principle was applied in *Indian Council for Enviro-Legal Action and Others v. Union of India and Others* [3] to fasten liability for defraying the costs of remedial measures. The task of determining the amount required for carrying out the remedial measures, its

recovery/realization and the task of undertaking the remedial measures was placed in this case upon the Central Government. In the present case the approximate expenditure to be incurred for destroying the hazardous waste has been mentioned in report.

In *Vellore Citizens' Welfare Forum v. Union of India and Others* [5] the precautionary principles and polluter pays principle were held to be part of the environmental law of the country. It was held that the polluter pays principle means that the 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.

In this very case, i.e., *Research Foundation For Science Technology National Resource Policy v. Union of India & Anr.* [2003 (9) SCALE 303] while examining the precautionary principle and polluter pays principle, the legal principles noticed in brief were :-

"The legal position regarding applicability of the precautionary principle and polluter pays principle which are part of the concept of sustainable development in our country is now well settled. In Vellore Citizens' Welfare Forum v. Union of India & Ors. [(1996) 5 SCC 647], a three Judge Bench of this Court, after referring to the principles evolved in various international conferences and to the concept of "sustainable development", inter alia, held that the precautionary principle and polluter pays principle have now emerged and govern the law in our country, as is clear from Articles 47, 48-A and 51- A (g) of our Constitution and that, in fact, in the various environmental statutes including the Environment (Protection) Act, 1986, these concepts are already implied.

These principles have been held to have become part of our law. Further, it was observed in Vellore Citizens' Welfare Forum's case that these principles are accepted as part of the customary international law and hence there should be no difficulty in accepting them as part of our domestic law. Reference may also be made to the decision in the case of A.P. Pollution Control Board Vs. Prof. M.V. Nayudu (Retd.) and Ors. [(1996) 5 SCC 718] where, after referring to the principles noticed in Vellore Citizens' Welfare Forum's Case, the same have been explained in more detail with a view to enable the Courts and the Tribunals or environmental authorities to properly apply the said principles in the matters which come before them.

In this decision, it has also been observed that the principle of good governance is an accepted principle of international and domestic laws. It comprises of the rule of law, effective State institutions, transparency and accountability and public affairs, respect for human rights and the meaningful participation of citizens in the political process of their countries and in the decisions affecting their lives. Reference has also been made to Article 7 of the draft approved by the working group of the International Law Commission in 1996 on "Prevention of Trans- boundary Damage from Hazardous Activities" to include the need for the State to take necessary "legislative, administrative and other actions" to implement the duty of prevention of environmental harm. Environmental concerns have been placed at same pedestal as human rights concerns, both being traced to Article 21 of the Constitution of India. It is the duty of this Court to render justice by

taking all aspects into consideration.

It has also been observed that with a view to ensure that there is neither danger to the environment nor to the ecology and, at the same time, ensuring sustainable development, the Court can refer scientific and technical aspects for an investigation and opinion to expert bodies. The provisions of a covenant which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can be relied upon by Courts as facets of those fundamental rights and hence enforceable as such {see People's Union for Civil Liberties Vs. Union of India & Anr. [(1997) 3 SCC 433]}.

*The Basel Convention, it cannot be doubted, effectuates the fundamental rights guaranteed under Article 21. The rights to information and community participation for protection of environment and human health is also a right which flows from Article 21. The Government and authorities have, thus to motivate the public participation. These well-shrined principles have been kept in view by us while examining and determining various aspect and facets of the problems in issue and the permissible remedies." **

The afore-noted precautionary principles are fully applicable to the facts and circumstances of the case and we have no manner of doubt that the only appropriate course to protect environments is to direct the destruction of the consignments by incineration in terms discussed above and as recommended by the Monitoring Committee. #

It seems that by disposal of the oil under the supervision of Monitoring Committee at the incinerators which have adequate facilities to destroy the oil at a required temperature, there would be no impact on environments.

In regard to 170 containers referred to in the report of the Commissioner of Customs which are also lodged in the same premises in more or less same condition, the Monitoring Committee has noted that these containers have not been claimed by the importers. The details of the importers of these consignments are not on record. Before we issue directions in respect of these 170 containers, it would be necessary to have on record the details of these imports. The concerned authorities, i.e., Jawaharlal Nehru Port or Mumbai Port and all other concerned Departments are directed to furnish to the Monitoring Committee within four weeks up to date information as to the import of the 170 containers, how the consignment was dealt with right from the date of the arrival till date.

The Monitoring Committee shall file a report along with its recommendations and on consideration thereof, necessary directions in regard to 170 containers would be issued.

The aforesaid 133 containers are directed to be expeditiously destroyed by incineration as per the recommendations of the Monitoring Committee and under its supervision subject to and in terms of this order. The cost of incineration shall be deposited by the importers with the Monitoring Committee within four weeks. The Monitoring Committee will ensure the timely destruction of the

oil at the incinerators mentioned in its report. After the destruction of the oil in question, a compliance report shall be filed by the Monitoring Committee. All concerned are directed to render full assistance and cooperation to the Monitoring Committee.

In regard to the consignment of Eleven Star Esscon, in case option for recycling is exercised by the Government, the recycling would be done under the supervision of the Monitoring Committee. If the request for recycling is not received by the Monitoring Committee within four weeks, the said consignment would also be destroyed in the same manner as the other consignments.