In Re: Construction of Park at Noida Near Okhla Bird Sanctuary and Ors

v.

(Supreme Court Of India)

HON'BLE JUDGE S.H. KAPADIAHON'BLE JUDGE AFTAB ALAMHON'BLE JUDGE K.S. PANICKER RADHAKRISHNAN

In Re: Construction of Park at Noida Near Okhla Bird Sanctuary and Ors v.

I.A. Nos. 2609-2610 of 2009 in Writ Petition (Civil) No. 202 of 1995, I.A. Nos. 2896 and 2900/10 in I.A. Nos. 2609-2610 of 2009 and I.A. No. 2928/10 in I.A. Nos. 2609-2610/09 in W.P. (C) No. 202 of 1995 | 03-12-2010

Aftab Alam, J.

1. At the centre of the controversy is a very large project of the Uttar Pradesh government at NOIDA. Objecting to the project are the two applicants who are residents of Sector 15A, NOIDA, U.P. They claim to be public spirited people, committed to the cause of environment. According to them, the project, undertaken at the instance of Uttar Pradesh Government is a "huge unauthorized construction". The applicants state that a very large number of trees were cut down for clearing the ground for the project. The trees that were felled down for the project formed a "forest" as the term was construed by this Court in its order dated December 12, 1996 in Writ Petition (C) No. 202 of 1995; T.N. Godavarman Thirumulkpad v. Union of India and Ors. (1997) 2 SCC 267 and the action of the Uttar Pradesh Government in cutting down a veritable forest without the prior permission of the Central Government and this Court, was in gross violation of Section 2(ii) of the Forest (Conservation) Act, 1980 (hereafter "the FC Act"). The project involved massive constructions that were made without any prior environmental clearance from the Central Government based on Environment Impact Assessment. The constructions were, therefore, in complete breach of the provisions of the Environment Protection Act, 1986 (hereafter "the EP Act") and the notification issued under the Act. More importantly, the project was causing great harm, and was bound to further devastate the delicate and sensitive ecological balance of the Okhla Bird Sanctuary to which the site of the project lay adjacent. The project was, thus, in complete disregard of this Court's directions concerning 'buffer zones'.

2. The State of Uttar Pradesh, of course denies, equally strongly, all the allegations made by the applicants. According to the State, it was setting up a park that would develop and beautify the area in a unique way. The park was conceived as a fine blend of hard and soft landscaping with memorial structures and commemoration pieces. The construction of the park did not violate any law or the order of the Court. There was no infringement of the provisions of the FC Act or the EP Act or the notification made under it. Further, the setting up of the park caused no harm to the bird sanctuary. The applicants' objections to the construction of the park were fanciful and imaginary and actuated by oblique motives.

THE PROJECT:

3. Before proceeding to examine the arguments of the two sides in greater detail it would be useful to take a look at the project and to put at one place the basic facts concerning it that are admitted or at any rate undeniable.

i. The project is sited at sector 95, Noida. According to the applicants, at the site of the project previously there used to be five parks on the Yamuna front, namely, Mansarovar, Nandan Kanan, Children's Park, Smriti Van and Navagraha, opposite Sectors 14A, 15A and 16A, Noida.

ii. The project site, on its western side, lies in very close proximity to the Okhla Bird Sanctuary. The bird sanctuary was formed as a large water body with the adjoining land-mass of the embankment as a result of the construction of the Okhla Barrage. It falls partly in Delhi and partly (400 hectares in area) in the district of Gautam Budh Nagar, U.P. The administrative control of the area of the Sanctuary is under the Uttar Pradesh Irrigation Department and its management is with the Uttar Pradesh Forest Department. The Sanctuary is home to about 302 species of birds. According to the Bombay Natural History Society, out of the bird species found here, 2 are critically endangered, 11 are vulnerable and 7 are nearly threatened. About 50 species are migratory in nature and come here mainly during the winter months. The annual population/visit is estimated as under:

2006- 2007 - 24166

2007-2008 - 17111

2008-2009 - 21272

This haven for birds was declared a bird sanctuary ("the Okhla Bird Sanctuary") vide notification dated May 8, 1990 issued by the State of Uttar Pradesh under Section 18 of the Wildlife (Protection) Act, 1972. The project, subject of the present controversy, is sited in very close proximity to the Okhla Bird Sanctuary on its eastern side. The applicants refer to it as adjoining the left afflux bund of the Okhla Bird Sanctuary but to be accurate it lies about 35-50 metres away from the outer limit of the Sanctuary. According to the applicants, the boundary of the project site is as under:

North- Delhi-UP DND Toll Road

South- Not clearly stated

East- Dadri Road

West- Okhla Bird Sanctuary, left afflux bund

i. The project is spread over an area of 33.43 hectares, equal to 334334.00 square metres of land surrounded by a boundary wall made of stone, 2 metres in height and 0.3 metres in thickness. The estimated cost of the project is Rupees 685 crores.

ii. At the site of the project there used to be a tree cover, thin to high- moderate in density and for clearing the ground for the project six thousand one hundred and eighty six (6186) trees were cut down and one hundred and seventy nine (179) were "shifted". These trees were of Subabul, Bottle Brush, Bottle Palm, Morepankhi, Ficus benjamina, Cassia siamia, Eucalyptus, Fishtail palm, Rubber plant, Silver oak, etc.

iii. The project, though insisted upon by the Uttar Pradesh Government is nothing but a 'recreational park', involves the construction of dedicatory columns, commemorative plaza, national memorial, plinth with sculptures, larger than life-size statues on tall pedestals, large stone tablets with tributary engravings, pedestrian pathways, service block, boundary wall, hard landscape, soft landscape, etc. As initially planned the breakup of the area under different uses was as under:

Image

i. According to the State Government, the work on the project commenced in January 2008. The applicants filed IA No. 1179 before the Central Empowered Committee (hereafter "CEC") constituted by this Court on March 5, 2009. They filed IA Nos. 2609-2610 of 2010 (presently in hand) before this Court on April 22, 2009. According to the State Government, by that time 50% of the construction work of the project was complete. The report from the CEC was received in this Court on September 4, 2009 and on October 9, 2009, this Court by an interim order restrained the State Government from carrying on any further constructions till further orders. By that time, according to the government, 70-75% of the construction work of the project was completed.

i. In course of hearing of the matter, on a suggestion made by the Court, the State Government modified the layout plan increasing the soft/green area from 47% to 65.28% of the total area of the project. The revised layout plan is as under:

Image

Under the amended plan, around 7300 trees, more than 4 years of age and measuring 8-12 feet in height, belonging to the native species such as Neem, Peepal, Pilkhan, Maulsari, Imli, Shisham, Mango, Litchi and Belpatra will be planted in the project area.

4. According to the State Government, the revised plan that includes planting of trees in such large numbers would not only restore the tree cover that was in existence at the site earlier but would make the whole area far better, more beautiful and environment friendly. The applicants however, would have none of it. On their behalf it is contended that the whole project is bad and illegal from every conceivable point of view; its construction was started and sought to be completed at a breakneck speed in flagrant violation of the laws. According to the applicants therefore, all the structures at the project site, complete, semi-complete or under construction must be pulled down and the project site be restored to its original state.

THE PROJECT AND SECTION 2 OF THE FC ACT:

5. Mr. Jayant Bhushan, learned senior counsel appearing for the applicants submitted that over six thousand trees were admittedly cut down for clearing the area for the construction of the project and it was, thus, clearly a case of forest land being put to use for non-forest purpose in complete violation of Section 2(ii) of the FC Act.

Section 2 of the FC Act, in so far as relevant for the present, provides as follows:

2. Restriction on the de-reservation of forests or use of forest land for non-forest purpose.- Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing.

(i) xxxxxxx

(ii) that any forest land or any portion thereof may be used for any non-forest purpose.

(iii) xxxxxxx

(iv) xxxxxxx

Explanation.- For the purpose of this section "non-forest purpose" means the breaking up or clearing of any forest land or portion thereof for-(a) the cultivation of tea, coffee, spices, rubber, palms, oil bearing plants, horticulture crops or medicinal plants; (b) any purpose other than re-afforestation, but does not include any work relating or ancillary to conservation, development and management of forests and wild-life, namely, the establishment of check-posts, wire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purposes.

The restriction imposed by Section 2(ii) is in respect of forest land. It, therefore, needs to be ascertained whether the project area can be said to be forest land where there was a forest that was cut to make the site clear for the project.

6. In support of the contention that the trees that were cleared for the construction of the project comprised a forest, the applicants rely heavily on the order passed by this Court on December 12, 1996 in the case of T.N Godavarman Thirumulkpad [Writ Petition (C) No. 202 of 1995), (1997) 2 SCC 267], being the first in a series of landmark orders passed by this Court in an effort to save the fast diminishing forest cover of the country against the greedy and wanton plundering of its natural resources. In that order the Court gave a number of directions. One such direction, at serial No. 5 to each of the State Governments, is as under:

Each State Government should constitute within one month an Expert Committee to:

(i) Identify areas which are "forests", irrespective of whether they are so notified, recognized or classified under any law, and irrespective of the ownership of the land of such forest;

(ii) identify areas which were earlier forests but stand degraded, denuded or cleared; and

(iii) identify areas covered by plantation trees belonging to the Government and those belonging to private persons.

7. In pursuance of the direction of the Court, the Uttar Pradesh Government constituted the State Level Expert Committee for identifying forests and forest-like areas. The Committee in its report dated December 12, 2007 framed certain parameters for identification of forest-like areas according to which, in the plains, any stretch of land over 2 hectares in area with the minimum density of 50 trees per hectare would be considered as "forest". On January 11, 2008 (as taken note of in the order of that date) it was reported to this Court that the guidelines were issued for identification of forest-like areas and steps would be taken to identify "forest-like areas" in all the districts in the State of Uttar Pradesh within four months and such areas would be handed over to the forest department, excepting the private areas, if any. As the process of search and identification of forest like areas in the districts of Uttar Pradesh proceeded, the District Level Committee headed by the District Collector, Gautam Budh Nagar, by its letter dated February 26, 2008 addressed to Conservator Forests & Regional Director intimated that there was no forest-like area in the district and consequently the project site was not identified as a forest or forest-like area by the State Level Expert Committee constituted in pursuance of this Court's order dated December 12, 2006.

8. It was in this background that the project started, according to the State Government, in January 2008. When the work on the project became noticeable from the outside the applicants filed their complaint before the CEC on March 5, 2009. As the controversy erupted with regards to "large scale construction near the Okhla Bird Sanctuary by the State Government" the Ministry of Environment and Forests (hereafter "MoEF") asked the Chief Conservator of Forests (CCF), Central Region, Lucknow, to make a site inspection of the project and to give his report. The CCF in his report dated July 10, 2009 did not accept the stand of the State Government that there was no forest on the project site. He stated that 6000 trees were "sacrificed" in an area of 32.5 hectares and that showed that the area had sufficiently dense forest cover and would qualify as "forest" according to the dictionary meaning of the word and as directed by the Supreme Court. He, however, suggested that before taking a final view on the matter a report may be called for from the Forest Survey of India (hereafter "FSI") in order to verify the vegetation cover over the area before the construction work started there. In light of the report by the CCF, the MoEF noted that the number of cut trees, in ratio to the project area, was apparently more than three times in excess of the criterion fixed by the State Level Expert Committee for identification of forest like areas (i.e., minimum of 50 trees per hectare). As suggested by the CCF, therefore, the MoEF called for a report from the FSI based on satellite imagery and properly analysed by GSI application from the year 2001 onwards (vide letter dated July 17, 2009 from the Dy. Conservator of Forest (C) to the Director, Forest Survey of India). The FSI gave its report on August 7, 2009 which we shall examine presently. In light of the report of the CCF and the report from the FSI, the MoEF in its first response to applicants' complaint before the CEC (under covering letter that is undated, received at the CEC on August 12, 2009) stated that at the project site "there was good patch of forests and which could be treated as deemed forest". It further said that the report of the FSI showed that the forest cover existed there up to 2006 and the felling of trees might have taken place after that only.

9. In the meeting convened by the CEC on the applicants' complaint on August 12, 2009, the Chief Conservator of Forests (CCF) MoEF, Lucknow stated that the plantation done in the project area was naturalized and having regard to the number of trees that existed in the area, the project area should be seen as "deemed forest" and, therefore, it attracted the provisions of the FC Act, and any non-forest use of the land required prior approval of the Central Government. In view of the stand taken by the CCF, the CEC by its letter of August 13, 2009 requested the MoEF to give its response on the issue. Here it may be noted that till that stage the stand of the MoEF, based on the reports of the CCF and the FSI, though tentative seemed to be definitely inclined towards holding that the trees that were felled for clearing the site comprised a forest/deemed forest and the construction at the project site was hit by the provisions of the FC Act. But now in a perceptible shift in its stand the MoEF informed the CEC by its letter of August 22/24, 2009 that in its view, the project site did not attract the provisions of the FC Act. It referred to the order of this Court dated December 12, 1996 and pointed out that the project site did not appear in the list of deemed forest land identified by the State Level Expert Committee in pursuance of the order of the Court. It concluded by saying as follows:

In view of the above, it is informed that the area under discussion is neither recorded as forest nor deemed forest and actually an urban tree park. Therefore, construction work in this area does not attract the provision of the Forest (Conservation) Act, 1980.

10. The letter dated August 22/24, 2009 from the MoEF was followed by another letter of September 2, 2009. This was purportedly to put the observation in the previous letter that "...Construction work in this area does not attract the provisions of the Forest (Conservation) Act 1980" in context. This letter referred to the satellite images provided by the FSI and the reports submitted by the CCF but in the end, "given the sensitivity of the matter and the high degree of public interest" left it to the CEC to draw appropriate conclusions from the materials furnished to it.

11. The CEC on a consideration of all the materials made available to it, including the report of the FSI (on which the applicants heavily rely), came to hold and find that the project site was not a forest or a deemed forest or a forest-like area in terms of the order of this Court dated December 12, 1996. In its report to this Court dated September 4, 2009 it observed in this regard as follows:

28. ...In the present case, even though as per the Report of the Forest Survey of India, the area was having good forest/tree cover and the project area had more than 6000 trees, it does not fall in the category of "forest" for the purpose of Section 2 of the Forest (Conservation) Act and therefore does not require any approval under the Forest (Conservation) Act. The project area does not have naturally grown trees but planted trees. The area has neither been notified as "forest" nor recorded as "forest" in the Government record. In the exercise carried out by the State of Uttar Pradesh, after detailed guidelines for identification of deemed forest were

laid down, the project area was not identified to be deemed forest. The CEC does not agree with the Regional Chief Conservator of Forests, MoEF, Lucknow that the plantation done in the area has naturalised because of natural regeneration and therefore now falls in the category of deemed forest. Most of the trees are of species such as Subabul, Bottle Brush, Bottle Palm, Morepankhi, Ficus benjamina Cassia siamia, Eucalyptus, Fishtail Palm, Rubber plant, Silver oke etc which are not of natural regeneration. As such hardly any tree of natural regeneration exist.

29. As per the definition of "forest" as held by the Hon'ble Supreme Court in its order dated 12.12.1996, the project area therefore cannot be treated as "forest" for the purpose of the Forest (Conservation) Act.

(emphasis added)

12. Mr. Jayant Bhushan strongly assailed the finding of the CEC as erroneous. Learned Counsel stated that the CEC took the view that the project area could not be described as "forest" and did not attract the provisions of FC Act mainly because the trees in the project area that were cut down for making space for the constructions were planted trees and not naturally grown trees. He contended that the reason given by the CEC was quite untenable being contrary to the judgments of this Court where it is held that forest may be natural or man-made. He further submitted that the view that in order to qualify as forest the trees must be "naturally grown" is fraught with grave consequences inasmuch as a very large portion of the forests in India are planted forests and not original, natural forests. Further, any afforested area would also cease to be recognized as a forest if the view taken by the CEC were to be upheld.

13. The other reasons given by the CEC for holding that the project area was not a forest was that it was neither notified as "forest" nor recorded as "forest" in the Government record and even in the exercise carried out by the State of Uttar Pradesh, after detailed guidelines for identification of deemed forest were laid down, the project area was not identified to be deemed forest. Mr. Bhushan contended that these reasons were as misconceived as the previous one. The area was not notified or recorded as forest meant nothing since this Court had passed a series of orders with the object to bring such areas within the protection of the FC Act that were not notified or recorded as forest. In the same way the failure of the State Level Expert Committee to identify the project area as forest even though it fully satisfied the criterion set by the Committee itself for the purpose will not alter the true nature and character of the area as forest land.

14. Mr. K.K. Venugopal, learned senior counsel appearing for the State of U.P. strongly supported the view taken by the CEC. Learned Counsel submitted that the omission to identify the trees at the project site as forest or deemed forest was not due to any mistake or

by chance. He pointed out that in the parameters set out by the State Level Expert Committee for identification of forests or forest-like areas it was clarified that "trees mean naturally grown perennial trees" and it was further stipulated that "the plantation done on public land or private land will not be identified as forest like area". Mr. Venugopal submitted that the guidelines made by the Expert Committee were reported to this Court and accepted by it on December 12, 2007. The project site clearly did not come within the parameters fixed by the Expert Committee and it was rightly not identified as a forest like area. The parameters fixed by the expert committee for identification of forests or forest like area were never challenged by anyone and now it was too late in the day to question those parameters, more so after those were accepted by this Court. Mr. Venugopal contended that the non inclusion of the project site as a forest or forest-like area by the State Level Expert Committee should be conclusive of the fact that the area was not forest land and the trees standing there were no forest.

15. Mr. Bhushan contended that a tract of land bearing a thick cluster of trees that would qualify as forest land and forest as defined by the orders of this Court would not cease to be so simply because the parameters adopted by the Expert Committee were deficient and inconsistent with this Court's orders. In support of the submission that there was actually a forest in that area that was cut down for the project he relied upon the report of the FSI dated August 7, 2009 in which the forest cover status at the project site based on IRS 1D/P6 LI88 III data is shown as follows:

Image

16. In the report it was also stated that the latest forest cover assessment by the FSI was based on satellite data of 2006 and it did not have any data of the later period. It further stated that the felling of trees might have taken place after October, 2006. Mr. Bhushan invited our attention to the order of this Court in the case of T.N. Godavarman v. Union of India (2006) 5 SCC 28 (paragraphs 16, 18, 33, 37, 38) to show that this Court had accepted the reliability of the FSI report based on satellite imagery.

17. Mr. Bhushan also relied upon the report of the CCF, MoEF, Lucknow, a reference to which has already been made above. He also relied upon the first response of the MoEF, where it was stated that at the project site there was a "good patch of forests and which could be treated as a deemed forest" and further that the report of the FSI showed that the forest cover existed there up to 2006 and the felling of trees might have taken place after that only. Mr. Bhushan lastly relied upon the Google image which has a dark patch in approximately 1/3 rd of the area interpreted by him as a dense cover of trees.

18. In support of the submissions learned Counsel relied greatly on the order passed by this Court on December 12, 1996 in the case of T.N Godavarman Thirumulkpad. He also relied

upon the decisions of this Court in Samatha v. State of Andhra Pradesh and Ors. (1997) 8 SCC 191 (paragraphs 119, 120, 121, 123) and M.C. Mehta v. Union of India and Ors. (2004) 12 SCC 118 (paragraphs 55, 56, 57).

19. The point raised by Mr. Bhushan may be valid in certain cases but in the facts of the case his submissions are quite out of context. In support of the applicants' case that there used to be a forest at the project site he relies upon the report of the CCF based on site inspection and the Google image and most heavily on the FSI report based on satellite imagery and analysed by GSI application. A satellite image may not always reveal the complete story. Let us for a moment come down from the satellite to the earth and see what picture emerges from the government records and how things appear on the ground.

20. In the revenue records, none of the khasras (plots) falling in the project area was ever shown as jungle or forest. According to the settlement year 1359 Fasli (1952A.D.) all the khasras are recorded as agricultural land, Banjar (uncultivable) or Parti (uncultivated).

21. NOIDA was set up in 1976 and the lands of the project area were acquired under the Land Acquisition Act mostly between the years 1980 to 1983 (two or three plots were notified under Sections 4/6 of the Act in 1979 and one or two plots as late as in the year 1991). But the possession of a very large part of the lands under acquisition (that now form the project site) was taken over in the year 1983. From the details of the acquisition proceedings furnished in a tabular form (annexure 9 to the Counter Affidavit on behalf of respondents No. 2 & 3) it would appear that though on most of the plots there were properties of one kind or the other, there was not a single tree on any of the plots under acquisition. The records of the land acquisition proceedings, thus, complement the revenue record of 1952 in which the lands were shown as agricultural and not as jungle or forest. There is no reason not to give due credence to these records since they pertain to a time when the impugned project was not even in anyone's imagination and its proponents were no where on the scene. Further, in the second response of the MoEF, dated August 22/24, 2009 there is a reference to the information furnished by the Deputy Horticulture Officer, NOIDA according to which plantations were taken up along with seed sowing of Subabul during the year 1994-95 to 2007-08. A total of 9,480 saplings were planted (including 314 saplings planted before 1994-95). NOIDA had treated this area as an "Urban Park".

22. It is, thus, to be seen that on a large tract of land (33.45 hectares in area) that was forever agricultural in character, trees were planted with the object of creating an urban park (and not for afforestation!). The trees, thus, planted were allowed to stand and grow for about 12-14 years when they were cut down to make the area clear for the project.

23. The satellite images tell us how things stand at the time the images were taken. We are not aware whether or not the satellite images can ascertain the different species of trees, their

age and the girth of their trunks, etc. But what is on record does not give us all that information. What the satellite images tell us is that in October, 2006 there was thin to moderately dense tree cover over about half of the project site. But this fact is all but admitted; the State Government admits felling of over 6000 trees in 2008. How and when the trees came up there we have just seen with reference to the revenue and land acquisition proceedings records. Now, we find it inconceivable that trees planted with the intent to set up an urban park would turn into forest within a span of 10 to 12 years and the land that was forever agricultural, would be converted into forest land. One may feel strongly about cutting trees in such large numbers and question the wisdom behind replacing a patch of trees by large stone columns and statues but that would not change the trees into a forest or the land over which those trees were standing into forest land.

24. The decisions relied upon by Mr. Bhushan are also of no help in this case and on the basis of those decisions the trees planted in the project area can not be branded as "forest".

25. In order dated December 12, 1996 in Godavarman Thirumulkpad this Court held and observed as under:

3. It has emerged at the hearing, that there is a misconception in certain quarters about the true scope of the Forest Conservation Act, 1980 (for short the 'Act') and the meaning of the word "forest" used therein. There is also a resulting misconception about the need of prior approval of the Central Government, as required by Section 2 of the Act, in respect of certain activities in the forest area which are more often of a commercial nature. It is necessary to clarify that position.

4. The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the provisions made therein for the conservation of forests and for matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest: must be understood according to its dictionary meaning. This description covers all statutorily recognized forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof. This aspect has been made abundantly clear in the decisions of this Court in Ambica Quarry Works v. State of Gujarat, Rural Litigation and Entitlement Kendra v. State of U.P. and recently in the order dated 29.11.1996 (Supreme Court Monitoring Committee v. Mussorie Dehradun Development Authority). The earlier decision of this Court in State of Bihar v. Banshi Ram Modi has, therefore, to be understood in the light of these subsequent

decisions. We consider it necessary to reiterate this settled position emerging from the decisions of this Court to dispel the doubt, if any, in the perception of any State Government or authority. This has become necessary also because of the stand taken on behalf of the State of Rajasthan even at this late stage, relating to permissions granted for mining in such area which is clearly contrary to the decisions of this Court. It is reasonable to assume that any State Government which has failed to appreciate the correct position in law so far, will forthwith correct its stance and take the necessary remedial measures without any further delay.

26. In the above order the Court mainly said three things: one, the provisions of the FC Act must apply to all forests irrespective of the nature of ownership or classification of the forest; two, the word "forest" must be understood according to its dictionary meaning and three, the term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. The order dated December 12, 1996 indeed gives a very wide definition of "forest". But any definition howsoever wide relates to a context. There can hardly be a legal definition, in terms absolute, and totally independent of the context. The context may or may not find any articulation in the judgment or the order but it is always there and it is discernible by a careful analysis of the facts and circumstances in which the definition was rendered. In the order the Court said "The term 'forest land occurring in Section 2, will not only include 'forest' as understood in the dictionary sense, but also an area recorded as forest in the Government record irrespective of the ownership

(emphasis added).

Now what is meant by that is made clear by referring to the earlier decision of the court in State of Bihar v. Banshi Ram Modi (1985) 3 SCC 643. In the earlier decision in Banshi Ram Modi the Court had said:

10. ...Reading them together, these two parts of the section mean that after the commencement of the Act no fresh breaking up of the forest land or no fresh clearing of the forest on any such land can be permitted by any State Government or any authority without the prior approval of the Central Government. But if such permission has been accorded before the coming into force of the Act and the forest land is broken up or cleared then obviously the section cannot apply....

27. The observation in Banshi Ram Modi (which again was made in the peculiar context of that case!) was sought to be interpreted by some to mean that once the land was broken in course of mining operations it ceased to be forest land. It was in order to quell the mischief and the subversion of Section 2 of the FC Act that the court in the order dated December 12, 1996 made the observation quoted above italics.

28. In Samatha, this Court was dealing with cases of grant of mining leases to non tribals in reserved forests and forests that were notified as scheduled area under the Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959. It was contended on behalf of the lease holders that the Regulation and the Mining Act do not prohibit grant of mining leases of government land in the scheduled area to non-tribals. The Forest (Conservation) Act or the Andhra Pradesh Forest Act, 1967, does not apply to renewal of leases. The observations in regard to what constitutes a forest made in paragraphs 119, 120, 121 and 123, relied upon by Mr. Bhushan, was made when it was sought to be argued by the leaseholders that unless the lands are declared either as reserved forests or forests under the Andhra Pradesh Forest Act, 1967, the FC Act had no application. Hence, there was no prohibition to grant mining lease or to renew it by the State government. The context in which the Court expanded the definition of forest is, thus, manifest and evident.

29. In M.C. Mehta v. Union of India and Ors. (2004) 12 SCC 118, in the paragraphs relied upon by Mr. Bhushan, this Court was considering the question of permitting mining in Aravalli Hills where large scale afforestation was done by spending crores of rupees of foreign funding in an effort to repair the deep ravages caused to the Aravalli Hills range over the years by mostly illegal mining. The context is once again evident.

30. Almost all the orders and judgments of this Court defining "forest" and "forest land" for the purpose of the FC Act were rendered in the context of mining or illegal felling of trees for timber or illegal removal of other forest produce or the protection of National Parks and wild life sanctuaries. In the case in hand the context is completely different. Hence, the decisions relied upon by Mr. Bhushan can be applied only to an extent and not in absolute terms. To an extent Mr. Bhushan is right in contending that a man made forest may equally be a forest as a naturally grown one. He is also right in contending that non forest land may also, with the passage of time, change its character and become forest land. But this also cannot be a rule of universal application and must be examined in the overall facts of the case otherwise it would lead to highly anomalous conclusions. Like in this case, Mr. Bhushan argued that the two conditions in the guidelines adopted by the State Level Expert Committee, i.e., (i) "trees mean naturally grown perennial trees" and (ii) "the plantation done on public land or private land will not be identified as forest like area" were not consistent with the wide definition of forest given in the December 12, 1996 order of the Court and the project area should qualify as forest on the basis of the main parameter fixed by the Committee. If the argument of Mr. Bhushan is accepted and the criterion fixed by the State Level Expert Committee that in the plains a stretch of land with an area of 2 hectares or above, with the minimum density of 50 trees/hectare would be a deemed forest is applied mechanically and with no regard to the other factors a greater part of Lutyens Delhi would perhaps qualify as forest. This was obviously not the intent of the order dated December 12, 1996.

31. In light of the discussion made above, it must be held that the project site is not forest land and the construction of the project without the prior permission from the Central Government does not in any way contravene Section 2 of the FC Act.

THE PROJECT AND THE EIA NOTIFICATION 2006:

32. Mr. Jayant Bhushan next contended that the construction of the project was started by the U.P. Government (and was sought to be completed in great haste!) without obtaining the prior environmental clearance from the Central Government or the State Level Environment Impact Assessment Authority in complete violation of the notification issued by the Central Government on September 14, 2006 under Section 3(3) of the EP Act.

33. Before proceeding to examine the issue in detail it would be useful to see the views taken by the different authorities, agencies and the MoEF on the question whether the law required prior environmental clearance for the project. It appears that once the controversy was raised, the project proponents, by letter dated April 24, 2009 approached the State Level Environment Impact Assessment Authority, Uttar Pradesh constituted under the EIA notification, 2006, seeking environmental clearance for the project. In reply the SEIAA by its letter dated May 7, 2009 stated that having regard to the nature and the area of the project it was not covered by the schedule of the notification No. S.O.1533 (E) dated September 14, 2006 issued by the Government of India.

34. Before the CEC, the MoEF in its first response dated August 22/24, 2009 took the stand that the project would not require any prior environmental clearance under the EIA notification 2006. It further stated that in the EIA notification 2006, all building/ construction projects/ area development projects and townships, were categorized as category 'B' projects and the 'general condition' prescribed in the notification was not applicable to construction projects. It went on to say that the project did not require any prior environmental clearance under the EIA notification 2006 even though "being within the prescribed distance from a wildlife sanctuary/national park or inter-state boundary". It needs to be stated here that the first response of the MoEF before he CEC was evidently based on the inputs received from the UP Government about the nature of the project and the extent of constructions involved in it.

35. In the second response before the CEC dated September 2, 2009 the MoEF did not appear so sure of its earlier stand. It stated that after its earlier letter of August 22, 24, 2009, the MoEF had received further information about the project from various sources and the fresh findings raised far-reaching issues of public concern that extended beyond the parameters set by the EIA notification of 2006. It further stated that the certificate issued by the SEIAA of UP stated that the total built-up covered area was only 9,542 square metres and the report of the CCF was not clear as to the extent of the covered area vis-à-vis concrete landscaping,

pillar(s), platform(s), lawn(s), tree planting, etc. To put it simply, the MoEF was not fully in possession of the basic facts relating to the project and its likely impact on the environment. It left the decision in the hands of the CEC.

36. The CEC in its report to this Court dated September 4, 2009 held and found that the project was covered by the EIA notification 2006 and it required prior environmental clearance in terms of the notification. In its report, the CEC observed as follows:

30. The CEC does not agree with the stand taken by the State Government as well as the MoEF that the project does not require environmental clearance in terms of the MoEF notification dated 14.9.2006. The MoEF, as well as the State of Uttar Pradesh has taken this view primarily on the ground that the built up area of the project is less than 20,000 sq. meter and therefore the project does not require environmental clearance. The built up area has been calculated by the State of Uttar Pradesh on the basis of its building bye-laws. The CEC is of the view that for the purpose of environmental clearance, the building bye-laws of the State Government have no relevance at all. As per the details provided by the State Government itself, out of 33.43 ha of the project area, 3499.50 sq. meter is being used for memorial building & toilet blocks, 3500 sq. meter is being used for utilities and facilities, 129140.80 sq. meter area is being used for hard landscape including for platforms, plinth, sculptures & surrounded paved area, path etc. Another 34850 sq. meter area is to be used for vehicular movement. The above comes to more than 50% of the project area which in CEC's view qualify to be included in the activity area. The project cost is about Rs. 685 crores. As per the MoEF notification dated 14.9.2006, for building/construction project, in the case of facilities open to the sky, the activity area is to be included in the built up area. In the present case, after including the activity area the total built up area, for the purpose of environmental clearance, far exceeds the threshold limit of 20,000 sq. meter of built up area provided in the Notification. The MoEF, on its own admission, has merely relied on the details of the built up area as provided by the State Government without independently verifying it and has not included the area falling in the category of activity area. In any case, even if there was any doubt in the MoEF regarding the applicability of the environmental clearance in the present case, in view of precautionary principle it should have erred on the side of the caution and should have insisted for the environmental clearance.

37. When the matter finally came up before the Court the MoEF was once again asked to take a clear stand on the issue whether the project was covered by the EIA notification 2006. The MoEF filed a brief affidavit on October 21, 2009 in which it acknowledged that the CEC in its report dated September 4, 2006 had stated that the State of UP should be directed to seek environmental clearance for the project from the MoEF in terms of the notification. The MoEF, however, reiterated its stand in very definite and unequivocal terms that the project in question did not fall within the ambit of the EIA notification 2006 and no environmental clearance was required for such kind of projects. The stand of the MoEF was based on the premise that the area of the project (33.43 hectares) was less than 50 hectares and its built up area (9,542 square metres) was less than 20,000 square metres. Having thus made its stand

clear, the MoEF went on to say that in case the Court desired the project to be appraised from the environmental angle it would do so and submit its recommendations. It, however, put in a caveat that such appraisals were made before the commencement of the construction activity at the site and in the present case the project was already in the advanced stage of construction.

38. On April 22, 2010, this Court passed an order in which after extracting the relevant passage from the affidavit it directed the MoEF, to make a study of the environmental impact of the project. The MoEF was further directed to suggest measures for undoing the environmental degradation, if any, caused by the project and the amelioration measures to safeguard the environment, with particular reference to the adjacent bird sanctuary.

39. As directed by the Court, the MoEF asked the project proponents to submit the details concerning the project in the format prescribed under the EIA notification. It also asked the project proponents to have the environmental impact assessment of the project done by some expert agencies. As required by the MoEF, NOIDA submitted the requisite details concerning the project and the reports on the environmental impact assessment of the project based on studies made by three different agencies (We shall have the occasion to consider those reports in the latter part of the judgment). Thereafter, the Expert Appraisal Committee (EAC) constituted by the Central Government for the purpose of the EIA notification examined the project in its 88th meeting held on June 28-29, 2010 and gave its report which is brought on record along with an affidavit filed by the State Government on July 22, 2010. In this report the EAC made as many as 15 recommendations to check any environmental degradation or any harm to the Okhla Bird Sanctuary by the project.

40. The MoEF filed yet another affidavit before the Court on August 19, 2010 in which it tried to explain the distinction between clauses 8(a) and 8(b) in the schedule to the EIA notification, 2006 without changing its stand that the project in question did not come within the ambit of the notification.

41. In course of the oral hearing as well, Mr. Raval, learned ASG, firmly maintained that the project did not come under the notification and no prior environmental clearance was required for it under the notification.

42. Mr. Harish Salve, learned amicus curiae and Mr. Jayant Bhushan, Counsel appearing for the applicants, both staunchly contended that the stand of the MoEF was patently wrong and incorrect. The project clearly fell within the ambit of the EIA notification 2006. The CEC had taken the correct view on the issue. And to start the construction of the project and take it into an advanced stage of construction without obtaining prior environmental clearance from the Central Government was in blatant violation of the provisions of the notification. Mr. Salve

also criticized the Central Government for taking a shifting and inconsistent stand on the issue.

43. Now is the time to take a closer look at the provisions of the EIA notification No. S.O.1533(E). dated September 14, 2006 issued by the Central Government under Section 3(3) of the EP Act and to consider the submissions advanced by the two sides on that basis. Section 3(3) of the EP Act provides as follows:

3. Power of Central Government to take measures to protect and improve environment.

(1) xxxxxx

(2) xxxxxx

(3) The Central Government may, if it considers it necessary or expedient so to do for the purpose of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under Section 5 of the Central Government under this Act and for taking measures with respect to such of the matters referred to in Sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise and powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

44. In exercise of the powers conferred by the above provision the Central Government in the Ministry of Environment and Forests issued notification No. S. Order 1533(E) on September 14, 2006, which in so far as relevant for the present is reproduced below:

MINISTRY OF ENVIRONMENT AND FORESTS

Notification

New Delhi, the 14th September, 2006

Image

2. Requirements of prior Environmental Clearance (EC): The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:

i All new projects or activities listed in the Schedule to this notification;

(ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;

(iii) Any change in product - mix in an existing manufacturing unit included in Schedule beyond the specified range.

3. xxxxxx

4. Categorization of projects and activities:

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

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

(iii) All projects or activities included as Category 'B' in the Schedule, including expansion and modernization of existing projects or activities as specified in sub paragraph (ii) of paragraph 2, or change in product mix as specified in sub paragraph (iii) of paragraph 2, but

excluding those which fulfill the General Conditions (GC) stipulated in the Schedule, will require prior environmental clearance from the State/Union territory Environment Impact Assessment Authority (SEIAA). The SEIAA shall base its decision on the recommendations of a State or Union territory level Expert Appraisal Committee (SEAC) as to be constituted for in this notification. In the absence of a duly constituted SEIAA or SEAC, a Category 'B' project shall be treated as a Category 'A' project;

5. xxxxxx

6. xxxxxx

7. Stages in the Prior Environmental Clearance (EC) Process for New Projects:

7(i) xxxxxx

I. Stage (1) - Screening: In case of Category 'B' projects or activities, this stage will entail the scrutiny of an application seeking prior environmental clearance made in Form 1 by the concerned State level Expert Appraisal Committee (SEAC) for determining whether or not the project or activity requires further environmental studies for preparation of an Environmental Impact Assessment (EIA) for its appraisal prior to the grant of environmental clearance depending up on the nature and location specificity of the project . The projects requiring an Environmental Impact Assessment report shall be termed Category 'B1' and remaining projects shall be termed Category 'B2' and will not require an Environment Impact Assessment report. For categorization of projects into B1 or B2 except item 8 (b), the Ministry of Environment and Forests shall issue appropriate guidelines from time to time.

8. xxxxxx

9. xxxxxx

10. xxxxxx

11. xxxxxx

12. xxxxxx

SCHEDULE

(See paragraph 2 and 7)

LIST OF PROJECTS OR ACTIVITIES REQUIRING PRIOR ENVIRONMENTAL CLEARANCE

Image

Note:

General Condition (GC):

Any project or activity specified in Category 'B' will be treated as Category A, if located in whole or in part within 10 km from the boundary of: (i) Protected Areas notified under the Wild Life (Protection) Act, 1972, (ii) Critically Polluted areas as notified by the Central Pollution Control Board from time to time, (iii) Notified Eco-sensitive areas, (iv) inter-State boundaries and international boundaries."

Specific Condition (SC):

xxxxxx

(I) Basic Information

xxxxxx

(II) Activity 1. Construction, operation or decommissioning of the Project involving actions, which will cause physical changes in the locality (topography, land use, changes in water bodies, etc.)

Image

45. In substance the EIA notification provides that all projects and activities enumerated in its Schedule would require prior environmental clearance before any construction work or preparation of land for the project is started on the project or activity. The projects and activities depending upon various factors such as the potential hazard to environment, location, the extent of area involved, etc. are categorized in categories 'A' or 'B'. For projects or activities falling in category 'A', the competent authority to grant prior environmental clearance is the MoEF and for projects or activities falling in category 'B', the State Environment Impact Assessment Authority (SEIAA). The constitution of the SEIAA is provided for in Clause 3 of the notification with which we are not concerned in this case. In certain cases a project or activity, though categorized in category 'B' may be treated as category 'A' by application of the general condition (on account of its location being within a distance of ten km from a protected area notified under the Wildlife (Protection) Act etc.). In other words, if a project or activity attracts the general condition, the competent authority to grant prior environmental clearance in that case would be the Central Government, even though, the project or activity may figure in the Schedule in category 'B'. Further, projects or activities categorized as category 'B' may or may not require an environmental impact assessment before the grant of environmental clearance depending on the nature and location specificity of the project. The projects requiring an EIA report shall be termed as category 'B1' and the remaining shall be termed as 'B2' and will not require an EIA report. For categorization of projects into B1 and B2, the MoEF would issue appropriate guidelines from time to time. The schedule to the notification has a table that is divided into five columns. The first column contains the serial numbers, and the second the description of the project or activities; the third column lists those projects or activities that fall in category 'A' and the fourth, those falling in category 'B'; the fifth column against each item indicates whether any general or specific condition applies to the project or activity described in that item. In some cases where the project or the activity is shown in column 4 as category 'B', the application of the general condition is expressly indicated in column 5 of the table.

46. For the project under consideration, the relevant entries in the schedule are 8(a) and 8(b). Both items 8 (a) and 8 (b) are listed in column 4, i.e., in category 'B'. In column 5, against any of the two items, there is no mention of application of the general condition but it is expressly said that all projects in item 8(b) would be appraised as category 'B1', that is to say, for a project under item 8(b) the prior environmental clearance must be preceded by an environmental impact assessment.

47. Item 8(a) deals with Building and Construction projects and the threshold mark that would bring the project within the ambit of the notification is equal to or more than 20,000 square metres and less than 1,50,000 square metres of 'built-up area'. It is further clarified that the aforementioned figures relate to built-up area for covered construction; in case of facilities open to the sky, the built up area would be the activity area. Item 8(b) deals with Townships and Area Development projects and the threshold mark for the project to come within the ambit of the notification is an area equal to or more than 50 hectares or built-up area of more than 1,50,000 square metres.

48. Mr. Jayant Bhushan, supported by the amicus curiae forcibly argued that the project under consideration would clearly fall under item 8 (a) of the Schedule. He submitted that though the area of covered construction in the project was only 6999.50 square metres, the project by its very nature provided facilities open to the sky and in that case, the whole of the activity area would constitute the built-up area. He then referred to the definition of activity [that includes (i) permanent or temporary change in land use, land cover or topography including increase in intensity of land use (with respect to local land use plan), (ii) clearance of existing land, vegetation and buildings? (iii) creation of new land uses? and (iv) pre-construction investigations e.g. bore houses, soil testing?]. He contended that in view of the definition of activity, virtually the entire area of 33.43 hectares from where over 6000 trees were removed for clearing the project site would come within the 'activity area' and would, thus, form the built-up area under item 8 (a) of the schedule. Further, since the project was located adjacent to the Okhla Bird Sanctuary, it would, without doubt, attract the general condition which provided that any project or activity specified in category 'B' will be treated as category 'A', if located within 10km from the boundary of protected areas notified under the Wildlife (Protection) Act, 1972. Mr. Bhushan insisted that the general condition would apply to the project by virtue of its very close proximity to the Okhla Bird Sanctuary, regardless of the fact that in column 5 of the table there is no mention of application of the general condition against item 8(a). The application of the general condition would take the project out of category 'B' and put it in category 'A' for which the competent authority to grant prior environmental clearance is the MoEF. He then referred to the office memo dated December 2, 2009 issued by the MoEF which in course of hearing was, in all fairness, produced by Mr. Raval, learned ASG, appearing for the MoEF. The office memorandum inter alia provides that ".....while granting environmental clearance to projects involving forestland, wildlife habitat (core one of elephant/tiger reserve, etc.) and or located within 10km of the National Park/ Wildlife Sanctuary (at present the distance of 10km has been taken in conformity with the order dated 4.12.2006 in Writ Petition No. 460 of 2004 in the matter of Goa Foundation v. Union of India), a specific condition shall be stipulated that the environmental clearance is subject to their obtaining prior clearance from forestry and wildlife angle including clearance from the Standing Committee of the National Board for Wildlife as applicable.... Mr. Bhushan submitted that the project under consideration thus does not only require a prior environmental clearance but also a clearance from forestry and wildlife angle including clearance from the Standing Committee of the National Board for Wildlife as precondition for the grant of environmental clearance by the MoEF.

49. Mr. Bhushan's arguments proceed in four steps. He first puts the project in item 8(a) of the Schedule as a Building and Construction project. Then, in the second step, in order to cross the threshold marker he refers to the definition of "activity" to contend that since the project provides facilities open to sky its entire area of 33.43 hectares would constitute the built-up area. In the third step, he brings in the general condition (even though in regard to item 8(a) its application is not mentioned in column 5 of the table) that would make the Central Government as the competent authority for granting prior environmental clearance for the project. And lastly, in the fourth step he refers to the office memorandum dated December 2, 2009 to contend that a clearance from the Standing Committee of the National

Board for Wildlife was a precondition for the grant of the prior environmental clearance by the MoEF.

50. Long and elaborate submissions were made from both sides in regard to the application of the general condition to this project. Mr. Venugopal, senior counsel appearing for the State of U.P. and Mr. Raju Ramachandran, senior counsel appearing for NOIDA submitted that the general condition would have no application to projects under items 8(a) or 8(b) for the simple reason that in regard to those items there was no mention of the general condition in column 5 of the table. Mr. Venugopal submitted, and not entirely without substance that if the general condition were to apply to items 8(a) and 8(b) without being mentioned in column 5 of the table then it would not make any sense to expressly mention it in column 5 in respect of some other projects and activities classified in category 'B' in the schedule.

51. Mr. Raval, learned ASG, produced before the Court, the draft notification No. S.O. 1324E, published in the Gazette of India: Extraordinary of September 15, 2005. In the draft notification there were two general conditions, GC1 and GC2 and in regard to (a) "Construction of all projects (residential and non residential)", and (b) "New Townships and Settlement Colonies, the application of GC2 was expressly indicated in column 5 of the table. Later on, in a meeting held on July 6, 2006, chaired by none else than the Prime Minister, it was decided to leave all construction and township projects, housing and area development projects in the hands of the State Government. It was further decided that for all projects involving more than 1,50,000 square metres of built up area and/or covering more than 50 hectares, the EIS requirements should correspond to category 'A, even though the clearance would be granted by the State Government. Mr. Raval submitted that in light of the decision taken in that meeting, in the final notification issued on September 14, 2006, the application of general condition was removed in respect of items 8(a) and 8(b) in the schedule. In view of the changes made in the two items in the final notification, Mr. Raval also contended that the general condition has no application to items 8(a) and 8(b), regardless of the project's proximity to any sanctuary or reserved area.

52. But before considering the latter three limbs of Mr. Bhushan's arguments it is necessary to examine whether the project in question can be legitimately categorized as a Building and Construction project falling under item 8(a) of the schedule which is the first premise of his arguments.

53. In the schedule to the notification "Building and Construction projects" and "Townships and Area Developments projects" are enumerated separately, the former in item 8(a) and the latter in item 8(b). This would normally suggest that the notification treats those two kinds of projects separately and differently. It would, therefore, be reasonable to say that an "Area Development project" though involving a good deal of construction would yet not be a "Building and Construction project". When it was pointed out to Mr. Bhushan that the project in question may be put more appropriately in category 8(b) as an "Area Development project"

rather than a "Building and Construction project" under category 8(a), in reply he took a line that nullifies any distinction between the two. Mr. Bhushan submitted that so far as construction projects are concerned there is no qualitative difference between items 8(a) and 8(b) and the difference between the two items was only quantitative. Projects were categorized under items 8(a) or 8(b) as "Building and Construction projects' or "Townships and Area Development projects" not on the basis of their nature and character but depending upon the extent of construction. Learned Counsel pointed out that the upper limit under item 8(a) (1,50,000 square metres of built-up area) was the threshold mark under item 8(b) and contended that this was a clear indication that projects with built up area up to 1,50,000 square metres would be defined as "Building and Construction projects" and projects with built up area in excess of 1,50,000 square metres would be categorized as "Townships and Area Development projects". In support of the contention, Mr. Bhushan gave the example of a "Building and Construction project", consisting of a number of multi-storied buildings, the aggregate of the built-up area of which exceeds 1,50,000 square metres. Mr. Bhushan submitted that since the total built-up area of the project crosses the upper limit of item 8(a) the project would not fall within that item. But at the same time since the project is a "Building and Construction project" and not a "Township and Area Development project", it would not come under item 8(b) and this would be indeed a highly anomalous position where a project with a smaller built-up area would fall within the ambit of the notification, whereas a project with a larger built-up area would escape the rigours of the notification.

54. The amicus, also arguing in the same vein, submitted that as far as building and construction projects are concerned there was no qualitative difference in items 8(a) and 8(b) of the schedule to the notification. A combined reading of the two clauses of item 8 of the schedule would show the continuity in the two provisions; 1,50,000 square metres of built up area that was the upper limit in item 8(a) was the threshold marker in item 8(b). This clearly meant that building and construction projects with built-up area/activity area between 20000 square metres to 1,50,000 square metres would fall in category 8 (a) and projects with built up area of 1,50,000 square metres or more would fall in category 8 (b). The amicus further submitted that though it was not expressly stated, the expression "Built Up area" in item 8(b) must get the same meaning as in item 8(a), that is to say, if the construction had facilities open to sky the whole of the "activity area" must be deemed to constitute the "built-up area".

55. It is extremely difficult to accept the contention that the categorization under items 8 (a) and 8 (b) has no bearing on the nature and character of the project and is based purely on the built up area. A building and construction project is nothing but addition of structures over the land. A township project is the development of a new area for residential, commercial or industrial use. A township project is different both quantitatively and qualitatively from a mere building and construction project. Further, an area development project may be connected with the township development project and may be its first stage when grounds are cleared, roads and pathways are laid out and provisions are made for drainage, sewage, electricity and telephone lines and the whole range of other civic infrastructure. Or an area development project may be completely independent of any township development project as

in case of creating an artificial lake, or an urban forest or setting up a zoological or botanical park or a recreational, amusement or a theme park.

56. The illustration given by Mr. Bhushan may be correct to an extent. Constructions with built up area in excess of 1,50,000 would be huge by any standard and in that case the project by virtue of sheer magnitude would qualify as township development project. To that limited extent there may be a quantitative correlation between items 8(a) and 8(b). But it must be realized that the converse of the illustration given by Mr. Bhushan may not be true. For example, a project which is by its nature and character an "Area Development project" would not become a "Building and Construction project" simply because it falls short of the threshold mark under item 8 (b) but comes within the area specified in item 8 (a). The essential difference between items 8(a) and 8(b) lies not only in the different magnitudes but in the difference in the nature and character of the projects enumerated there under.

57. In light of the above discussion it is difficult to see the project in question as a "Building and Construction project". Applying the test of 'Dominant Purpose or Dominant Nature' of the project or the "Common Parlance" test, i.e. how a common person using it and enjoying its facilities would view it, the project can only be categorized under item 8(b) of the schedule as a Township and Area Development project". But under that category it does not come up to the threshold marker inasmuch as the total area of the project (33.43 hectares) is less than 50 hectares and its built-up area even if the hard landscaped area and the covered areas are put together comes to 1,05,544.49 square metres, i.e., much below the threshold marker of 1,50,000 square metres.

58. The inescapable conclusion, therefore, is that the project does not fall within the ambit of the EIA notification S.O. 1533(E) dated September 14, 2006. This is not to say that this is the ideal or a very happy outcome but that is how the notification is framed and taking any other view would be doing gross violence to the scheme of the notification.

59. Since it is held that the project does not come within the ambit of the notification, the other three arguments based on the activity area, the application of general condition and the application of the office memorandum dated December 2, 2009 become irrelevant and need not be gone into in this case.

THE PROJECT AND THE OKHLA BIRD SANCTUARY:

60. Mr. Bhushan next raised the issue of the project being located virtually adjoining the Okhla Bird Sanctuary. The very close proximity of the project site to the bird sanctuary actually raises issues of serious concern and poses a dilemma. On the one hand the project

proponents can not be said to have broken any law or violated a definite order or direction of the court but on the other hand the project may possibly cause serious and irreparable harm to the bird sanctuary.

61. Before the CEC the State Government took the plea that the project area was situated well outside the boundaries of the bird sanctuary and the construction of the project had caused no adverse impact on the Sanctuary. It was further stated that NOIDA which was the project proponent was equally conscious about its responsibility in regard to the preservation and conservation of the habitat of the Sanctuary. A management plan for the Sanctuary was being prepared by the Wildlife Institute of Dehradun for which NOIDA had released Rs. 17,35,350.00 in favour of the Institute and the NOIDA was also planning to set up a corpus for the Scientific and effective implementation of the Management Plan.

62. On this issue the MoEF in its responses before the CEC put the blame squarely on the State Government. It stated that despite its letter of May 27, 2005 followed by a number of reminders the Government of Uttar Pradesh did not submit its proposal for declaration of "Eco-sensitive Zone" around the Sanctuaries and National Parks. It further stated that the State Government failed to take any steps in this regard even after the order of this Court passed on December 4, 2006 in Writ Petition (Civil) No. 460/2004 by which the MoEF was directed to give all the States final opportunity to send their proposals for declaration of "Eco-sensitive Zones" to the MoEF within four weeks. The MoEF made the accusation that in the case of the present project the State Government of Uttar Pradesh was trying to take advantage of its own omission. In its second response dated August 22-24, 2009, however, the MoEF, though still blaming the UP Government for its failure to notify the "Eco-sensitive Zones" conceded that "till Eco-sensitive zone is declared the construction work did not seem to violate any law/Act". But it went on to say that having regard to its location the project was better suited to be made part of extension of the bird sanctuary.

63. The State Government of Uttar Pradesh took the stand that no proposals were sent from its side because the MoEF failed to issue the necessary guidelines for the purpose. On behalf of the State of UP, reference was made to a meeting called by the Director General of Forests and Special Secretary, MoEF on May 13, 2010. In that meeting it was decided that the Director General of Forests, MoEF would constitute a committee of officers to finalize the guidelines for declaration of eco-sensitive zones. A reference was also made to a subsequent meeting held on July 4, 2010 at Lucknow in which the attention of the Government of India was drawn to the decision taken in the earlier meeting. Yet, no guidelines were issued by the Government of India so far.

64. The CEC in its report to the Court dated September 4, 2009 put the blame on the State Government of UP for its omission to identify the Eco-sensitive zones but like the MoEF seemed to accept that in the absence of a decision/notification there was no legal bar against

the construction of the project on the ground that it was sited adjacent to the bird sanctuary. In its report to the Court, the CEC observed as follows:

32. The issue regarding identification/notification of Eco-Sensitive Zone around the National Park and Sanctuaries is presently pending for consideration before this Hon'ble Court. The National Board of Wild Life (NBWL) had earlier decided that area within 10 km around National Parks/Sanctuaries should be the Eco-Sensitive Zone. Later on, it was decided by the NBWL that Eco-Sensitive Zone should be specific to each National Park/Sanctuary. The CEC had recommended that 500 meter around National Park/Sanctuary should be declared as Eco-Sensitive Zone. The recommendation of the CEC has not so far been accepted by the Hon'ble Supreme Court after the Learned Amicus Curiae took a view that 500 meter may not be adequate. Pursuant to this Hon'ble Supreme Court order dated 4.8.2006 in the TWP matter, mining is presently prohibited up to a distance of one kilometre from the boundary of National Parks/Sanctuaries. For other projects, no restriction has so far been imposed. The MoEF has time and again requested the States/UT's to identify the eco-sensitive zone around the National Parks/Sanctuaries. However, the State of Uttar Pradesh has so far not prepared any proposal in this regard. The CEC is of the view that in the absence of a decision/notification, presently there is no legal restriction against the implementation of the project on the ground that the project is adjacent to the Okhla Bird Sanctuary.

33. However, it has to be borne in mind that the project area is hardly at a distance of 50 meter from the Okhla Bird Sanctuary and that in all probability the project site would have fallen in the Eco-Sensitive Zone, had a timely decision in this regard been taken by the State Government/ MoEF.

(emphasis added)

65. The report of the CEC succinctly sums up the situation. Though everyone, excepting the project proponents, views the construction of the project practically adjoining the bird sanctuary as a potential hazard to the sensitive and fragile ecological balance of the Sanctuary there is no law to stop it. This unhappy and anomalous situation has arisen simply because despite directions by this Court the authorities in the Central and the State Governments have so far not been able to evolve a principle to notify the buffer zones around Sanctuaries and National Parks to protect the sensitive and delicate ecological balance required for the sanctuaries.

66. But the absence of a statute will not preclude this Court from examining the project's effects on the environment with particular reference to the Okhla Bird Sanctuary. For, in the jurisprudence developed by this Court Environment is not merely a statutory issue. Environment is one of the facets of the right to life guaranteed under Article 21 of the Constitution, M.C. Mehta v. Union of India and Ors. (1987) 4 SCC 463, M.C. Mehta and

Anr. v. Union of India and Ors. AIR 1988 SC 1115, Chhetriya Pardushan Mukti Sangarsh Samiti v. State of U.P. AIR 1990 SC 2060, Subhash Kumar v. State of Bihar AIR 1991 SC 420, Virender Gaur v. State of Haryana (1995) 2 SCC 577, B.L. Wadehra v. Union of India (1996) 2 SCC 594, Vellore Citizens Welfare Forum v. Union of India AIR 1996 SC 2715, Andhra Pradesh Pollution Control Board v. M.V. Nayudu (1999) 2 SCC 718, Narmada Bachao Andolan v. Union of India (2000) 10 SCC 664, T.N. Godavarman Thirumulkpad v. Union of India : (2002) 10 SCC 606, Ramji Patel v. Nagrik Upbhokta Marg Darshak Manch (2000) 3 SCC 29, State of M.P. v. Kedia Leather & Liquor Ltd. (2003) 7 SCC 389. Environment is, therefore, a matter directly under the Constitution and if the Court perceives any project or activity as harmful or injurious to the environment it would feel obliged to step in. The question of the likelihood of the project causing any adverse effects on the Okhla Bird Sanctuary must, therefore, be examined from this angle.

67. We may note here that Mr. Venugopal presented before us some photographs trying to show the situation on the western boundary of the Okhla Bird Sanctuary at its Delhi end. In the photographs there is a road, about forty to sixty feet wide, (The Kalindikunj-Irrigation Colony-Batla Road) running right next to the wire mesh fencing of the Sanctuary. Next to the road is a long row of cheek by jowl concrete structures/houses that seem to lean against one another. The road has the bustling traffic of Delhi where all kinds of vehicles (and cattle!) appear jostling for space. The situation on the western boundary of the Sanctuary is indeed deplorable but that is no reason to strangulate the Sanctuary from the NOIDA side as well.

68. Earlier in the judgment, it is noted that on April 22, 2010, the Court had asked the MoEF to make a study of the environmental impact of the project and to suggest measures for undoing the environmental degradation, if any, caused by the project and the amelioration measures to safeguard the adjacent bird sanctuary. In pursuance of the Court's directions the MoEF had asked the project proponents to have the environmental impact assessment of the project done by some expert agencies. NOIDA, the project proponent got three studies made of the impact assessment of the project. One is a joint study prepared by the Salim Ali Centre for Ornithology and Natural History (SACON), Deccan Regional Station, Hyderabad and the All India Network Project on Agricultural Ornithology, Aacharya N.G. Ranga Agricultural University, Hyderabad (Annexure II of Paper book Volume IV); the other by the Wildlife Institute of India (WII) (Annexure III of Paper book Volume IV); and the third by a group of three individuals that was vetted by the Indian Institute of Technology, New Delhi (Annexure IV of Paper book Volume IV).

69. The SACON, in its report practically gave a clean chit to the project and made the following observations in connection with the felling of trees and the impact of the project construction on the Okhla Bird Sanctuary:

• The Okhla Bird Sanctuary is primarily an urban wetland and supports primarily water birds majority of them migrating and using in the winter season. These are confined to the water

bodies and peripheral marshy vegetation and were not nesting or roosting on the trees of the adjacent parks. The extent of terrestrial habitat is the sanctuary is very small or insignificant.

• The entire development works including removal of trees and construction had taken place outside the boundary of the sanctuary and the construction and felling of trees in the project site has not altered or interfered with the wetland ecosystem of the OBS and the area was undisturbed.

• The birds in the wetland of Okhla Bird Sanctuary are estimated during the month of January by the Wildlife Wing of U.P. Forest Department during winter, which is the period for the migratory birds. The estimation of birds are as under:

2007-08: 17,111

2008-09: 21,272

2009-10: 22,004

• The clearing of the project site for construction and landscaping was started in the month of the January, 2008 and continued till 9th October, 2009. The bird estimates during migratory season clearly shows that there has been no reduction in the number of birds in the sanctuary despite developmental activities in the park. This clearly shows that the construction and felling of trees in the project site has no impact on OBS.

• It appears that the existence of High tension line along the boundary wall of the project site before the start of the project might have been a barrier for movement of the birds from OBS as high electro magnetic influence would restrict the movement of birds. Hence, the construction and the felling of trees in the project site has minimal influence on the OBS.

In view of the above, we are of the opinion that felling of trees and construction have no perceptible impact on the OBS habitat.

70. The SACON suggested certain proactive environmental measures (see Paper book Volume IV, page 110) that would form part of this judgment.

71. The other report by the Wildlife Institute of India (WII) is not so sanguine about the project's impact on the bird sanctuary. In the WII report under the heading "Assessment of the Impact" it was observed as under:

...From this, it is concluded that the erstwhile woodland would have been used by 51-101 species of terrestrial birds and was an extended habitat for the wildlife of the Okhla Bird Sanctuary, primarily terrestrial birds. Some of these birds may be using the erstwhile woodland for breeding as well....

... The erstwhile woodland was acting as a buffer against these disturbances. The project area which was in continuation with the vegetation along the left afflux bund was providing a green belt approximately 2 km long and 218 m wide on and average. Before the felling of trees this patch might have acted as a protective green belt of approximately 190 m width with a tree density of 203.5 trees/ ha (density of trees felled) which is now reduced to approximately 28 m (between the western wall of the project and OBS boundary of left afflux dam). From this it is concluded that the Sanctuary lost its buffer of around 33.43 ha that will have significant impact on the OBS and its tranquility....

...Such carbon sequestration value of the erstwhile woodland was lost, though the NOIDA has already taken up ameliorative steps in form of afforestation in and around the project site....

...With the loss of buffer and increased artificial light at the project site, it is likely that the migratory bird population may get affected in long run. Bird friendly diffused light with blue tinge may reduce the negative impacts, though much research on this aspect is required.

72. The WII also suggested certain mitigation measures (see Paper book Volume IV, page 134) that would form part of this judgment.

73. The IIT, New Delhi in its review of the report prepared by the group of three people does not record any serious negative finding in regard to the effects that the project may have on the Sanctuary.

74. Finally, the Expert Appraisal Committee (EAC) constituted by the Government of India, MoEF in its 88th meeting held on June 28-29, 2010, reviewed the project in question in light of the aforementioned reports and made a number of recommendations (Paper book Volume III, page 32) that would form part of this judgment.

75. It is significant to note that none of the expert bodies has taken the view that the project is so calamitous or ruinous for the bird sanctuary that it needs to be altogether scrapped in order to save the Sanctuary. The expert bodies have given recommendations which allow the completion of the project subject to certain conditions. On behalf of the State of U.P. it is unequivocally stated that all the conditions laid in the reports of the Expert Bodies are acceptable to the State Government/NOIDA in their entirety. In light of the two study reports and the report submitted by the EAC, we see no justification for directing the demolition of the constructions made in the project, as prayed for on behalf of the applicants. We would rather allow the project to be completed, subject, of course to the conditions suggested by the three expert bodies and further subject to the directions contained herein below.

76. It may be noted that the report of the WII has focused on the felling of trees resulting in the disappearance of the woodland that acted as a protective buffer for the bird sanctuary and its first recommendation is to compensate the loss of vegetation. It has secondly focused on the increased artificial light at the project site, which is likely to affect the migratory bird population in the long run. Apart from this, we feel that the extent of stone and concrete constructions in the name of "hard landscaping" is highly out of proportion. In the modified layout plan, the project proponents have reduced the area under hard surface to 35.54% of the total project area. In our opinion, even that is unacceptable from the environmental point of view. The area under hard surface, whether covered, uncovered (including pathways and boundary wall etc.) or of any kind whatsoever must not exceed 25% of the total project area; of the rest, 25% should be used for soft/green landscaping and the remaining, preferably 50% must have a thick cover of trees of the native variety, a list of which is given by the State of UP (Annexure 4(b), Paper book Volume IV) The plantation of trees should be especially dense towards the Okhla Bird Sanctuary on the western side of the project area. Any construction work should commence only on completion of the planting of the trees.

77. In order to ensure full compliance with the recommendations of the expert bodies (which form part of the judgment) and the directions of this Court, the construction of the project needs to be overseen by an expert committee. One member of the committee, preferably an ornithologist will be nominated by the MoEF, the other member will be nominated by the CEC in consultation with the amicus and the Chairman-cum-CEO of NOIDA will be the member-secretary of the committee. The committee should be constituted within two weeks from today.

78. It is made clear that the above directions are given in the peculiar facts of this case and nothing said in the judgment shall form precedent when the court is hearing the matter of the "buffer zones".

79. Before putting down the records of the case a few observations may not be out of place. The EIA notification dated September 14, 2006 urgently calls for a close second look by the concerned authorities. The projects/activities under items 8(a) and 8(b) of the schedule to the

notification need to be described with greater precision and clarity and the definition of built-up area with facilities open to the sky needs to be freed from its present ambiguity and vagueness. The question of application of the general condition to the projects/activities listed in the schedule also needs to be put beyond any debate or dispute. We would also like to point out that the environmental impact studies in this case were not conducted either by the MoEF or any organization under it or even by any agencies appointed by it. All the three studies that were finally placed before the Expert Appraisal Committee and which this Court has also taken into consideration, were made at the behest of the project proponents and by agencies of their choice. This Court would have been more comfortable if the environment impact studies were made by the MoEF or by any organization under it or at least by agencies appointed and recommended by it.

80. The IAs stand disposed of with the above observations and directions.

In Re: Construction of Park at Noida Near Okhla Bird Sanctuary and Ors v.