

**BEFORE THE NATIONAL GREEN TRIBUNAL
(WESTERN ZONE) BENCH, PUNE
APPLICATION NO.19/2013**

CORAM :

**HON'BLE SHRI JUSTICE V.R. KINGAONKAR
(JUDICIAL MEMBER)**

**HON'BLE DR. AJAY A.DESHPANDE
(EXPERT MEMBER)**

B E T W E E N:

1. RAMDAS JANARDAN KOLI,
& others, ParamparikMacchimarBachao
Kruti Samiti, Office: At Hanuman Koliwada,
Post N.S. Karanja
Tal. Uran
District Raigad-400704.

....APPELLANTS

A N D

**1. SECRETARY, MINISTRY OF ENVIRONMENT AND
FORESTS**

ParyavaranBhavan,
CGO Complex, Lodhi Road,
New Delhi 110 003.

2. THE SECRETARY, MINISTRY OF SHIPPING,

Ministry of Shipping,
ParivahanBhavan, 1, Sansad Marg,
New Delhi-110001.

**3. THE PRINCIPAL SECRETARY RELIEF &
REHABILITATION,**

Relief & Rehabilitation,
Revenue Department,
Mantrayala, Mumbai-400 032.

4. The Secretary (A.D.F.)

Agricultural & A.D.F. Department
Mantralaya, Mumbai-400 032.

5. THE SECRETARY ENVIRONMENT DEPARTMENT

Mantrayala, Mumbai-400 032.

6. THE COLLECTOR OF RAIGAD,

Alibag, Raigad-402201.

7. The Managing Director CIDCO,

CIDCO Bhavan, CBD Belapur,
Navi Mumbai-400614.

8. THE CHAIRMAN JNPT,

Administration Bldg. Sheva,
Tal Uran, Navi Mumbai-400707.

9. THE GENERAL MANAGER, ONGC

Uran Plant, Uran,
Raigad-400702.

10. THE CEO NMSEZ PVT LTD.,

Jay Tower, 6th Floor, Sec.15,
CBD Belapur,
Navi Mumbai-400614.

.....**RESPONDENTS**

Counsel for Applicant(s):

In Person.

Counsel for Respondent(s):

Ujwala Pawar, DGP, Mr. A.S. Mulchandani AGP, Mr Sunil Dongare Advocate for Respondent No.2.

Mr.D.H. Patil Advocate a/w S.K.Hule Assistant Commissioner for Respondent No.4.

Mr. D.M.Gupte Advocate a/w Supriya Dangare Advocate for Respondent No.5.

Pavidra Patil, Naib Tehsildar, Uran, for Respondent No.6.

Mr. Krishna D. Kelkar Advocate for Respondent No.7.

**Mr Kelvic Setalvad Additional Solicitor General,
Mr. Bhalwal Advocate Mr Mahendra Jawale Advocate for
Respondent No. 8.**

Mr. Sagar Ghogre, Advocate a/w Mr. Pradeep Sancheti Advocate for Respondent No.9.

Mr. A.V.Bhuskile Advocate a/w Mr. Surendra Jiban Dash Vice President for Respondent No.10.

Mr. Ajay Fulmali, Scientist-I, for MCZMA.

Date: February 27th, 2015

J U D G M E N T

1. This is a classic example of civil action brought before this Tribunal by traditional fishermen, who are residents of villages, known as “Hanuman Koliwada, Uran Koliwada, Gavhan Koliwada, and Belpada Koliwada” situated in Uran and Panvel Talukas of Raigad districts.

2. The nomenclature “Koliwada” means habitats of fishermen who are called “Kolis” in vernacular of the area in Maharashtra. They are seeking compensation under Section 15 of the National Green Tribunal Act, 2010, for loss of livelihood due to project activities of the Respondents, as well as implementation of rehabilitation of their families, who are unsettled on account of the projects in question. They allege that 1630 families of traditional fishermen have been affected from four such traditional localities of fishermen due to projects undertaken by the Respondents, particularly, by the Respondent Nos.7, 8, 9 and 10. The claim for compensation and right for rehabilitation, is mainly sought by them as traditional right to catch fishes from the sea area, where now land is being reclaimed,

postulated under development due to project activities of the above Respondents, which allegedly adversely impair regular tidal water exchanges, egress and ingress of fishermen boats to the sea area through creek near the Jawaharlal Nehru Port Trust (For short, “ JNPT”) and, thus, deprive them of daily earnings due to deprivation of their traditional rights. They further allege that the reclamation of land, removal of such Mangroves in the area by above Respondents caused huge destruction of all surrounding mangroves, therefore, breeding of fishes is substantially reduced or obliterated and narrowed the navigational route of the traditional boats, which has also added to their misery.

PRECLUDE

3. It is of common knowledge that originally Mumbai, (“Bombay” as it was then called during the British regime), comprised of seven islands viz.,(a) Colaba, (b) Old Women Island, (c) Dongri, (d) Mazgaon, (e) Mahim, (F) Worali and (g) Parel. These islands were not homogeneous and located on a flat land. All the islands were surrounded by Arabian Sea. Obviously reclamation had to be taken phase-wise. In fact, Mumbai was an island of which physical out lines were subjected change due to successive reclamation. It is a fictitious city, whose present landmass has style of affinity to what existed before organize course of man begin in its physical history. Somewhere in 1710, beaches in the north were closed by water and main bays and creeks filled by closing of beaches between Worli and Mahim. The process of

reclamation went ahead as and when demand of lands increased. The Bombay Municipal Corporation (BMC) was formed to govern infrastructure in 1865. Population of city was ever growing. The Bombay Municipal Corporation carried out important projects of various nature. In substance, all activities of reclamation have not only altered the urban topography and could lie at the root of urban situation but, have also contributed to the changes in the configuration, underwater topography and underwater circulation in the harbors and its bays. This was obviously followed by reclamation and destruction of mangroves alongside of beaches of seashore.

4. The area of Brihan-Mumbai and Suburbs in Mumbai was, however, unable to cater more and ever demanding need of the population, as well as the development which was found essential. Consequently, Government of Maharashtra acquired lands under the Land Acquisition Act, 1894 and vested them in City & Industrial Development Corporation of Maharashtra Ltd, (In short "CIDCO"). "CIDCO" was appointed as New Town Development authority for the area comprising the city of Navi Mumbai, vide Notification dated 28th March, 1971. Thereafter, CIDCO floated various tenders of global and National level for development of New Mumbai. According to version of CIDCO, it has developed land demarcated on the coast by constructing bunds prior to about 30 to 35 years, which was delivered to NMSEZ on lease. Also, CIDCO has built holding

ponds to take care of flood in Dongri area. It is submission of CIDCO that reclamation and all activities of the project are carried out and governed by the SEZ Act and the Rules 2006.

5. In its defence, CIDCO has come out with a case that all the development activities and projects carried out by it are as per the CZMP and SEZ with due approval of concerned authorities. CIDCO, in short, denied that SEZ project carried out by it has caused damage to environment and right of the traditional fishermen. The case of the CIDCO further is that coastal zone management plan (CZMP) of Navi Mumbai project was approved by the MoEF, vide Notification No.ZH/17011/18/96-A/III (PT) dated 1st January, 2009, and accordingly, development is carried out towards land ward side of the sea shore, which is away from the high tide line (HTL), as sanctioned under the CZMP of Navi Mumbai. The boundary wall was constructed by CIDCO is towards landward side and as such, it does not in any manner interfere with the inter-tidal currents/waves of water in the sea near JNPT area or creeks, thereof. The CIDCO, therefore, disowned any liability to pay compensation to the fishermen families i.e. class of the Applicants, even though; any kind of loss is established by them, because it has no responsibility for the alleged environmental degradation.

6. Focus of main claim of the Applicants is against “Jawaharlal Nehru Port Trust” (For short, JNPT, Respondent

No.8) and “Oil & Natural Gas Corporation” (in short “ONGC”, Respondent No.9). It is, but natural, therefore, to examine contentions of the Applicants as against these two Respondents in the first phase, and thereafter, to appreciate the responses given by the latter.

7. Undisputedly, JNPT has proposed extension of 4th berth in the area of its port. The project work would include widening and deepening of the main channel to allow navigation of the Containerships, Boats or Cruzes, as the case may be. Alongside such work, project activity could be further associated with putting up interval small bridges/ponds, piles of cement pipes to control excessive water flow in the area of 4th berth, in order to avoid any untoward incident of capsizing of the ships/boats etc, which will cause obstructions to the free tidal current in the region. Simultaneously, JNPT would need removal of such mangrove patches and laying of service road to monitor the project for expansion of that 4th berth, by carrying out certain reclamation.

8. The case of Applicants is that, due to project of widening, deepening of the sea for 4th additional berth at port of JNPT, inter-tidal sea water exchanges, flow of the sea water in Nhava creek will be substantially affected. Destruction of mangroves alongside beaches, as a result of the impugned project activity would cause loss to spawning and breeding grounds of fishes. Hence, stock of grown

fishery will be unavailable to them for earning their livelihood.

9. The Applicants further allege that JNPT has now further gone ahead to narrow down the mouth of the creek which previously was of larger width allowing free egress and ingress of traditional boats in the seawater with free tidal currents. With the result, their traditional boats are unable to navigate freely as usual within the area of seawater around proposed project of berth No.4. Traditional boats find difficulty and hindrance to return route due to presence of wet grass and/or rocks, when the tide recede in the area and the water goes at lower level. Narrowing of the creek further as a part of the proposed project activity is intended to create bottle-neck in the natural route and free movements of the traditional boats and thereby to cause loss to their daily livelihood. They depend upon the income of fishery which is traditionally allowed to be earned from the sea fish-catch and is recognized since ancient times. They acquired such customary rights to fishing from like tribals living in areas such as, creeks of Sheva, Nhava, Gavhan, Belpada, Sonari, Jaskhar, Panje, Dongri, Funde, Uran and Elephanta. Out of them, Nhava-Sheva, Panje and Dongari islands has approximately 23,542Ha tidal area having good wealth of fishery.

10. The Applicants allege that their right to fisheries was governed under The Mahul Creek (Extinguishment of Rights) Act, 1922. The Indian Fishery Act, 1897 also recognized

their rights, but did not take away any right which was available earlier. According to them, they have right to live with human dignity under the Human Rights Act, 1993 and to earn livelihood by carrying traditional business as per the recognized custom which has become a source of law. They have given various features of coastal dynamics including mud banks, rocky foreshores, estuaries, mudflats, deltaic areas, tidal inlets, so on and so forth. It is stated that tidal inlets at confluence of terrestrial tidal exchange systems with the sea play an important role in coastal ecosystems facilitating mixing of water, sediments, nutrients and organisms between terrestrial and marine environments. This system provides water routes between inland waters and open sea, route for marine organism to estuarine habitat breeding and/or spawning. Such tidal exchange system through the creeks and creeklets develop unique coastal ecosystem which are environmentally sensitive with growth of mangroves and significant aquatic life.

11. The Applicants further allege that the coastal map submitted by “CIDCO” (copy of map under the “R.T.I. Act 2005”), indicates that JNPT is planning to reclaim and close down 1500m wide main estuaries of various creeks between Sheva and Nhava islands, which is natural source for tidal flow of water and particularly monsoon water management system within 200 Sq.km area. The project of 4th berth at JNPT is extension of 330m terminal, which would cause reclamation of land, including that of creeks and particularly

would close entry of the traditional fishermen's boats in the sea water. The very fact that when the Port of Bombay was under construction, right of traditional fishermen community was considered and the then Government awarded compensation for loss of their tidal rights on basis of Section 7 of the Land Acquisition Act, 1894, vide provisions of the Mahul Creek (Extinguishment of Rights) Act, 1922, which has to be applied *mutatis -mutandi* in present case and rehabilitation program, is to be implemented with full force, as per the law. They submitted that their rights may be protected and for such purpose they made various representations. Considering recommendations of the fishery department and others, the Collector partly allowed their representation, in following manner.

1. The companies like CIDCO, JNPT, ONGC, NMSEZ have step by step planned various expansion projects on fishing zone of 23,542 hectares. The sanction for the Environmental Impact Assessment (EIA) clearance which is taken stage wise from Environment Department of Central Govt. should be taken back. As all projects are situated at the same place/zone, a Regional Environmental Impact (REI) clearance should be taken. Under the Chairmanship of Collector, Raigad a public hearing should be taken. State Human Right Commission should give effective recommendation for Stay Order for expansion projects of these companies.

2. For keeping and for implementation of the certain rights given by The Indian Fisheries Act, 1897 Maharashtra State Human Right Commission should make recommendations to the Government.
3. As mentioned in para-1, the reclamation made in the fishing zone (land) should be taken out and the fishing zone should be made as before reclamation. Order is given by Hon'ble Supreme Court (Case No.664/93) and High Court, Bombay (Case No.3246/2004) for keeping this land ecologically sensitive. In line with the court order and to protect the Ecologically Sensitive Environment, Maharashtra State Human Right Commission should make recommendations to the State Government for providing capable Govt. authority.

OR

4. Management of Companies like CIDCO, JNPT, ONGC, NMSEZ give the coastal land (fishing zone) on rent to other companies and get land lease about 800crores per year. Out of this land lease income, 5% amount as a share capital should be given to 1630 traditional fishermen families per month for their livelihood till the existence of project but displacement of these four villages should not be done. The Government Policy, "first Rehabilitation should be done, then project should become" shall be effectively implemented."
5. The Respondent Nos. 7,8,9 and 10 have avoided to recognize right of livelihood of the Applicants and have failed to compensate them. Their grievances are not heard appropriately. Hence, they have prayed for following reliefs.

(A) Equal compensation amount of 32542 hectare common tidal land should be given to 1630 project affected local traditional fishermen families according to the current market value (total compensation amount divided by 32542 per family) as per the "The Mahul Creek (Extinguishment of Rights) Act 1922"

OR

20% amount of total tidal land lease amount taken by CIDCO & JNPT yearly from various companies should be given as share of project every year to 1630 project affected local traditional fishermen families till the project lasts.

(B) 15% of the developed land in return of the common tidal land should be given and distributed equally between 1630 project affected local traditional fishermen families.

(C) For getting employment project affected certificate should be given to person (individual) from 1630 project affected traditional fishermen families.

(D) For getting employment training should be given to person (individual) from 1630 affected traditional fishermen families. And give employments without taking any competitive exams.

(E) For the loss of local fishing business 1630 traditional individual fishermen family should be given loss compensation of 10 Lakhs by the four projects.

(F) For livelihood permanently Rupees 10 thousand per month, increased livelihoods per dearth instead of local fishing business should be given to 1630 project affected traditional fishermen families by four projects till the project lasts.

(G) Permanent arrangement for the educational, technical and professional studies of children from 1630 project affected local traditional fishermen families should be made by projects till the project lasts.

(H) Free medical services to 1630 project affected local traditional fishermen families in 4 Koliwada's should be provided permanently by the projects till the project lasts.

OR

(I) If above mentioned A to H demands are not affordable then out of 23542 hectares of fishing zone (coastal land) each family should be given 1 hectare aquaculture (fishing) pond and like this 1630 ponds should be prepared and given.

12. No reply affidavit was filed by the Respondent Nos.1 to 3. However, as stated before, the Collector, Raigad, passed Award for compensation after considering rival claims, which is yet not complied with by the parties as per the liability fixed. The basis for such Award and nature of Award shall be referred at appropriate stage.

13. On behalf of the Respondent No.5, (Environment Department), the State of Maharashtra and Coastal Zone Management Authority (For short, "MCZMA"), affidavit of Scientist-I, Shri. Ajay Fulmali, was filed. His affidavit reveals that on 1st November, 2013, inspection team Members along with the Applicants, visited the site at Jawaharlal Nehru Port Trust (JNPT), and Oil and Natural Gas Corporation (ONGC), underground pipeline at Govan for inspection. His affidavit reveals that Mangroves destruction was observed at Port user building and Custom House by way of reclamation

and garbage dumping ground at Hanuman-Koliwada, as well as at Uran. It is further explicit that the District Collector, Raigad, instructed JNPT, that destruction of Mangroves shall be stopped. Along with affidavit, a copy of communication dated 12.11.2013, issued by the District Collector, Raigad, is also enclosed, in order to elaborate what was observed at that time and action was contemplated due to ongoing destruction of Mangroves. It was further directed by MCZMA that Bandharas (Bunds/barriers) constructed at Belpada village near proposed parking terminal, near Belpada village and Funde-Dongri village, should be dismantled by the JNPT and original creek condition and tidal influx, be restored, to ensure free flow of tidal water into increased vegetation. Another substantial direction was that irreversible damage, as such reclamation near the Custom-House and Port user building, should be stopped and the area should be restored with Mangroves. The MCZMA, gave directions to JNPT on 27.11.2013 to restore the work to its original status and arrangement of Mangroves replantation program at the worksite. So also, specific directions given were as stated below:

“(f): the tidal flow into Nhava creek has been affected and substantial tidal influx, is not there into the mudflats and extensive Mangroves in the area, resulting in degradation of the Mangroves and fisheries.

“(g) As indicted in all permissions for these developmental activities CRZ Rules, are to be strictly

followed and damage to ecologically sensitive coastal ecosystems like mangroves and breeding/nesting sites should be avoided.

14. Thus, it can be culled out from the affidavit of Respondent No.5, - MCZMA, that a major part of allegations regarding destruction of Mangroves, reclamation work, and destruction of ecology due to activities of widening the Port area by JNPT, as alleged by the Applicants, had been started. Investigation Team further visited the site on 31st October, 2013, and noticed that a large number of deficiencies, including destruction of Mangroves around Nhava outlet. The observation at the site, indicated that extension of 330m, expansion of jetty of JNPT, has already reduced width of the creek between Nhava and Sheva, changing flow pattern of the creek water. The investigation report, may not be part of the pleadings, but it may be noted that the site inspection report, is a corroborative of affidavit filed by Scientist-I, Mr. Ajay Fulmali, of the State Environment Department.

15. By filing reply/statement, the Respondent No.4, Secretary of Animal Husbandry, Dairy and Fisheries, office at Mantralaya, Mumbai, supported case of the Applicants, to large extent. The Respondent No.4, states that traditional environment at the sea tidal exchange of water is endangered due to the project of 4th berth of JNPT, and has caused impact on livelihood of the traditional fishermen families and those families are deprived of their bread and

butter. The affidavit shows that a Committee was constituted by the Govt. to take decision regarding issues involved, particularly, adverse effect on rights of the families of fishermen. The affidavit of Respondent No.4, states that the Committee finalized liability of Rs.12448.98 lakhs on JNPT, New Mumbai, Special Economic zone (SEZ) and ONGC. Still, however, JNPT filed Writ Petition No.110 of 2013 in the Hon'ble High Court of Bombay, challenging the liability. The Respondent No.4, alleges that the affidavit has been filed in the Hon'ble High Court in that Writ Petition on 23rd July, 2013, opposing contentions raised by JNPT. From record it appears that the Hon'ble High Court has not granted interim-stay, as far as financial liability is concerned.

16. The affidavit of Respondent No.4, further elaborates that Mahul Creek (Extinguishment of Rights) Act, 1922, provides compensation for lands or damages caused, as a result of destruction of Mahul creek. Under the said Act, the Collector is empowered to grant compensation, likewise the manner provided under Section 7 of the Land Acquisition Act, 1894. It is stated that though CIDCO, has compensated the owners of acquired lands, yet the traditional fishermen have not been compensated, irrespective of the fact that they are deprived of their traditional rights to earn livelihood by doing work of self-employment, namely, collection of fisheries from the sea-area for sale in the market. In support

of the affidavit, a copy of the Mahul Creek (Extinguishment of Rights) Act, 1922, is also annexed. (Ex. 'V').

17. As per directions, given vide order dated November 30th, 2013, by this Tribunal, the Respondent No.5, filed additional affidavit of Scientist-I, Mr. Ajay Fulmali. His affidavit shows that underground pipeline of ONGC and Bharat Petroleum Corporation Limited (BPCL), 330m extension of jetty at JNPT, Nhava-Sheva creek and other sites were visited. His affidavit shows that at the site of JNPT, soil investigation and mobilization activities were in progress, piling operations by equipments mounded on barges were also noted at the site. The land under Bandhara (Bunds) was not restored. The debris was not removed to make water flow free of tidal water entering into the area. Needless to say, that at least, till December 13th, 2013, there was no substantial works on extension project was noticed at the sites of JNPT.

18. We may mention here that again on 18.11.2014, Scientist-I, Mr. Ajay Fulmali, filed an additional affidavit on behalf of MCZMA. In his affidavit, he candidly stated that area at container yard adjoining to Nhava creek, clearly shows cutting of Mangroves that are lying alongside of bank and Mangroves tree trunks are clearly visible at the site, which is also in violation of conditions stipulated in the approval of MoEF. So also, additional affidavit reveals that activity of construction of pipeline outlet structure of holding Pond No.2, at CIDCO, at 'Dronagiri' node, thick Mangroves

vegetation, was observed and activity was found close to the creek and diverting its flow for which no necessary permission was obtained for this activity as was supposed to be submitted by the CIDCO. At the site of ONGC pipeline, the area has not been restored, in order to ensure free flow of tidal water and soil mound affecting flow of tidal water, as is clearly visible from the CD prepared. These are the observations corroborated by video, prepared and submitted by the Fisheries Department.

19. Countering averments in the Application, JNPT denied all the material averments, put forth by the Applicants. According to JNPT, notable commercial fishing opportunities are available only outside the harbor area, which is shown in the Environment Impact Assessment (EIA) report of the year 1981. There are minimal fishing opportunities available within the sea-water domain of Nhava-Sheva creek, where the villages/hamlets of the Applicants are situated and they do not carry out fishing activity within said creek or harbor area. It is the case of JNPT that the Applicants used to carry out fishing activity approximately 10 km away from their villages/hamlets, and they are residing in the proximity of creek shores, whereas, traditional fishing boats can ply at a maximum distance of about 2 kms. The case of JNPT further is that, the area of Nhava-Sheva creek, or any part of the area of 330m extension activity for 4th berth container terminal is, in fact, neither breeding ground for fishes, nor is spawning area wherefrom fish stock is available. It is further

stated that Mahul Creek (Extinguishment of Rights) Act, 1922, is not applicable to the case of the Applicants, inasmuch as Section (2), of the said Act, was amended by repealed Act of 1927, whereby, the words 'tidal rights' were removed from the ambit of Section 2 of the said Act. Thus, only traditional rights of navigation of boats may be covered under Section (2), thereof. In other words, case of JNPT, is that traditional fishermen have no right as such to claim legal right of fishing in the area within marine/coastal zones. According to JNPT, mouth of creek will remain open at least up to 125m during low tide waves even after 330m expansion. Thus, it will suffice the purpose of the Applicants to enter the sea-area, by using traditional boats within Port water through the available width of the channel of creek in question. The JNPT claims that it is not bound to take any NOC form fisheries department, Govt. Maharashtra, etc. for expansion of 4th berth of jetty. It is pointed out that expansion of 330m 4th berth is being taken after following due process with approval of MoEF, dated July 29th, 2008 which was revalidated for further five years in 2013. The JNPT canvassed as to how it has planned financial budget and also incurred certain expenditure and is required to manage future work. The plan of JNPT is that expansion work of 4th terminal of 330m, towards north at JNPT, is a 'development project' of national importance, which will provide employment opportunity to the local villagers and will be more beneficial to the Applicants and others, as

compared to insignificant, unfounded and minimal loss of Mangroves or spawning ground of fishes, is taken into consideration. On these premises, JNPT sought dismissal of the Application.

20. By filing reply affidavit of Mr. Prabhakar Mhatre, the Respondent No.9, ONGC- resisted the Application and denied the report of MCZMA, regarding non-restoration of the Mangroves around underlying pipeline. The ONGC claims to have taken due efforts to restore Mangroves on the damaged patch of about 1Ha and issued a letter to the Forest Development Corporation Ltd (FDCL), Maharashtra, to conduct the survey. Underlying pipeline of ONGC, is from TEE-99031, at Shevala south to JNPT was completed on 25th March, 2007. The case of ONGC further appears to be that there was a freak accident on one occasion regarding leakage of the pipeline which was taken care of by repairing oil pipeline and restoration of the area nearby, including Mangroves. Consequently, the ONGC also denied its liability to pay any compensation to the Applicants and denied that it has caused any environmental damage due to action/inaction on its part to maintain underlying pipeline, which would adversely affect fishery or bio-diversity in the area. Hence, ONGC sought dismissal of the Application.

21. The Respondent No.10, objected maintainability of the Application on the ground that it is barred by limitation. So also, due to the fact that the Applicants have been approaching the Govt. authorities including 'Lokayukta' etc.

Thus, they are indulging in forum-shopping which be discouraged. The chief bone of contention raised by the Respondent No.10, is that it is stakeholder to the extent of 26%, NMSEZ, and it has paid compensation to the agriculturists from whom lands were acquired for the projects of New Mumbai. It is the case of CIDCO that the plots of lands were developed and latter leased out under various lease-deeds. Further, CIDCO claims to have built holding Ponds and did concretization to take care of flooding 'Dronagiri' area during Monsoon. In substance, CIDCO, alleges that it owes no liability directly or indirectly to pay any compensation to the Applicants and do not come within domain of jurisdiction of this Tribunal.

22. Before we proceed to deal with technical objections raised by the contesting Respondent Nos.7, 8,9 and 10, it would be appropriate to make it clear that there is no much dispute about the fact that the Applicants are residents of hamlets/villages, where almost all the families are traditional fishermen. Since immemorial time, the families of the traditional fishermen residing at Nhava, Govhan, Belpada, Soneri, Jeskher, Panje, Dongri, Funde, Uran and Elephanta (Ghara-Puri) are dependent upon traditional business of fishing. They were using traditional boats in the past for such purpose. The size and nature of such traditional Boards, of course, increased keeping pace with time. There is no dispute about the fact that these hamlets/localities/villages are situated adjoining sea/creek

shores of above mentioned villages. The traditional fishermen used to navigate their Boats in the sea-water with nets or mesh to catch stock of fishes. After collection of such stock, they used to come back to shore and, thereafter, used to sell fresh stock of fishes of various species in the fish-market. This business is still going on at various places of the coastal stretches, not only in the outskirts of Mumbai, but at the places like Konkan, Goa, Kerala, so on and so forth. Needless to say, business of fishery is recognized as source of livelihood for a class of community like the Applicants. It is of common knowledge that some of the members of such community are placed under different class in the context of reservation for benefits available under various Govt. schemes or otherwise and may be employed by some of the respondents. We are not much concerned with the issue of their reservation etc. This reference is made only to show that the community of fishermen is well recognized as separate social-class, due to their nature of traditional work, source of earning of livelihood and the manner in which they are required to navigate their traditional Boats for collecting stock of fishes from deep waters of sea.

- i) **Whether instant Applicant is untenable, because the Applicants approached to the Collector, Raigad and other Authorities, including the Human Rights Commission and later on filed instant Application, which amounts to multiplicity of proceedings by way of “Forum Shopping” which can be termed as abuse of process of the National Green Tribunal?**

23. On behalf of the Respondent Nos. 8 and 9, it is vehemently argued that the Application is abuse of process of law. Learned Counsel for both the contesting Respondents pointed out that a Committee was appointed to determine questions raised by the Applicants in their representations made to State Govt. and the Committee under aegis of Collector, Raigad, rendered an Award, whereby compensation directed to be paid due to loss, as well as package for rehabilitation to the Applicants. According to learned Counsel for the contesting Respondents, the same issue cannot be again and again raised by the Applicants, when such Award is finalized by the Collector and a part thereof is *subjudice* before the Hon'ble High Court of Bombay in the Writ Petition No.1931 of 2013 filed by JNPT. It is also pointed out that the Applicant No.1 approached the Human Rights Commission for the same kind of relief. Mr. Kelvic Setalvad, learned Additional Solicitor General, and learned Advocate for the Respondent No.9, therefore, argued that the Applicants are moving from one forum to another to grab an opportunity to get something wherever it is possible and whatever they can get. According to learned ASG, Mr. Kelvic Setalvad, and learned Advocate for the Respondent No.9, the activity of 'multiple litigative process', is no short of 'Forum Shopping' and, therefore, the Application tantamount to abuse of legal process. They urge, therefore, to dismiss the Application for such a reason.

24. Now, the question is whether judicial process is really abused by the Applicants, by filing instant Application. This aspect will have to be examined, having regard to conspectus of domain within which the claims are put forth by them before Collector, Raigad and other authorities in separate proceedings. Nobody will deny that first two (2) forum are altogether different in the context of jurisdiction, power and procedure. The Committee under the Chairmanship of Collector, is, in fact, constituted by the State Govt. to consider representations of the Applicants, in order to render 'Social Justice'. The Human Rights Commission is required to deal with the rights of the persons, who are deprived of human dignity and right to live, as human beings. These rights may or may not have any nexus with the right to claim compensation/restitution and other reliefs, which are available under Section 14(1) read with Section 15 of the National Green Tribunal Act, 2010. Considering the different operative domain of jurisdiction, which Govt. Relief Committee, Human Rights Commission and the National Green Tribunal, can exercise, it is difficult to accept arguments of learned ASG, and learned Advocate for the Respondent No.9, that the Application is unsustainable, being abuse of process of Law. We do not find any misuse or abuse of process of Law in filing of such Application by the Applicants, inasmuch as, substantial environmental dispute is raised in the

Application, besides claim for compensation and destruction/damage to environment etc.

ii) **Whether the Application is barred by limitation? And as such, deserves dismissal?**

25. Another limb of argument advanced by learned ASG, Shri. Setalvad, and learned Advocate for the Respondent No.9, is that instant Application is barred by limitation for the reason that the Applicants were well aware about necessary permissions granted to the project and Environmental Clearance (EC) dated 10th May, 2013. They also knew about CZMP dated 22nd July, 2005, which includes the planning of development at JNPT. It is submitted by learned ASG Mr. Setalvad, therefore that instant Application suffers from '*suppressio veri*' and '*Suggestio falsi*'. It is pointed that the Forest Development Corporation Limited (FDCL), State of Maharashtra, informed JNPT about afforestation program. It is contended that the project is duly cleared after following procedure envisaged under the EIA Notification dated 14th September, 2006. It is also pointed out that the representatives of the Applicants were given fair opportunity of hearing during course of presentation. On basis of such submissions, it is argued that the Application is barred by limitation, inasmuch as it has been filed after six (6) months from the date of commencement of cause of action.

26. Applicant No.1- Ramdas, would submit that the dispute ‘first arose’ when the Respondent Nos. 8 to 10, denied right of traditional fishermen to receive compensation on account of loss of fishing rights, rights for settlement, rehabilitation and other relief’s, which are part and parcel of Section 14(1) read with Section 15 of the National Green Tribunal Act, 2010. He, of course, is a layman and could not properly articulate legal submissions in the context of expression ‘substantial question relating to environment’. We may refer to Section 2(m) of the NGT Act, 2010, which reads as follows:

“ **2. Definitions-** (1) *In this Act, unless the context otherwise requires,—*

- (a) xxx xxx xxx xxx
- (b) xxx xxx xxx xxx
- © xxx xxx xxx xxx
- (d) xxx xxx xxx xxx
- (e) xxx xxx xxx xxx
- (f) xxx xxx xxx xxx
- (g) xxx xxx xxx xxx
- (h) xxx xxx xxx xxx
- (i) xxx xxx xxx xxx
- (j) xxx xxx xxx xxx
- (k)xxx xxx xxx xxx
- (l)xxx xxx xxx xxx

(m) “Substantial question relating to environment” shall include an instance where, ---

(i) There is a direct violation of a specific statutory environmental obligation by a person which,--

(A) The community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or

(B) The gravity of damage to the environment or property is substantial, or

(C) xxx सत्यमेव जयते xxxxxxxx

27. Before lifting veil covered by the subject matter in this the Application, we may pin-point that Schedule-I, of the NGT Act, 2010, categorically covers the subjects, which falls within ambit of Environment (Protection) Act, 1986, and Biodiversity Act, 2002. At this juncture, we may observe that loss of Mangroves, alleged loss of species of fishes, alleged loss of spawning grounds, breeding ground of fishes and thereby diminishing stock of fish catch available in the sea-area, are subjects, which necessarily fall within ambit of the Environmental (Protection) Act, 1986 and Biodiversity Act, 2002.

28. Reverting to question of limitation, let it be noted that this is not an Appeal and, therefore, limitation as available under Section 16 of the NGT Act, 2010, is not required to be taken into consideration. The instant-Application, is mainly for relief of compensation, and restitution of environment

referred to in Clauses (a) (b) and (c) of sub-section (1) of Section 15, which ought to be read together with Section 14(1) of the NGT Act, 2010. We may reproduce, for the purpose of ready reference, Section 14 (1) and (2) of the National Green Tribunal Act, 2010.

14. Tribunal to settle the dispute:-

(1) The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule-I.

(2) The Tribunal shall hear the disputes arising from the questions referred to in sub section (1) and settle such disputes and pass order thereon.

29. In our opinion, close reading of Section 14(1) and (2), of the NGT Act, 2010, conjointly, would show that those disputes, which have been referred in sub-clause (2) as 'such disputes', which arise in social causes are substantial questions relating to environment, involved and pertain to implementation of enactments specified in Scheduled-I. So, they are covered by the limitation Clause, enumerated in sub-clause (3) of Section 14. Whatever certain point of limitation, the Tribunal may decide in this behalf, having regard to nature of subject matter of dispute. Still, however, in case of Application filed under Section 15(3) along with Section 14 and 18 of the NGT Act, 2010, limitation is of five (5) years. Needless to say, even assuming that the

Applicants were having knowledge about the EC of 2008 which is incidentally revalidated in June 2013, and could gather information about actual impacts of the proposed project in question in 2013 when actual work of reclamation and also, extension of 330 m berth started, or may be, prior to that, yet, their Application filed in NGT (WZ), on 7th September, 2013, is within period of limitation, prescribed under the NGT Act, 2010.

30. So far as the question of limitation is concerned, we will also need to examine averments of the Applicants. The averments may or may not be proved in final analysis. Still, however, it cannot be overlooked that the MCZMA, after inspection of the disputed area, observed certain non-compliances, and has thought it fit to initially issue instructions and subsequently even issued directions under section 5 of the Environment (Protection) Act, 1986. Ramdas submits that though the competent authority did granted EC for port development, however, the authorities of MoEF and MCZMA have not undertaken any enforcement of conditions of such clearance. He alleges that when he got knowledge that the impugned construction was not being carried out in accordance with the EC/CRZ clearance and such construction is likely to affect their livelihood, he immediately filed complaint to the authorities, but no action was initiated by the MCZMA. It is for such a reason that he filed the Application and claims that it is within limitation.

31. .The construction activity of Respondents, no doubt, started long back. But the real question is whether the conditions for EC/CRZ clearance granted to the construction activity were followed by the Respondent No.7,8,9,and 10. The Respondent No.9, relied upon the case of “**MunnialGirijanand v. State and others**”(Application No. 45/2014). It was a case of Slum Rehabilitation Area (SRA) project which had commenced in 2002, when it was not governed by EIA Notification, 2006. The facts of that case are altogether different from that of the present case. Secondly, it was found that the Applicants (Munnial and others) were litigating before different Forums, including the City Civil Court, Hon’ble High Court and the Apex Court in respect of identical issue, before filing of the Application in the Tribunal under Section 14 of the NGT Act, 2010. So, it was a case of going from one Court to another for the same kind of relief. In “**J. Mehta vs Union of India and Ors**” (M.A.Nos.507,509,644 and 649/2013, in Application No.88/2013).Hon’ble Principal Bench of the National Green Tribunal (PB), considered the question of limitation in following way:

“53. Thus, it is clear that the cause of action should have a direct nexus with the matters relating to environment. In the present case, the respondents can hardly be heard to contend that since they have been flouting with impunity, the law, the terms and conditions of the EC for long, and therefore, every person is expected to know such violations or unauthorized use, and as such, the application would be barred by limitation. Respondent No. 9 has not come to the Tribunal with clean hands and disclosed complete details,

which were exclusively within their knowledge and possession. In the normal course of business, Respondent No. 9 would have first entered into agreements with other persons for providing these premises, either on sale or lease, as the case may be. Then such buyers/lessees would start making constructional changes and provide infrastructure necessary for using the parking and services area for commercial purposes. Then alone, such persons would have started using the premises for such purposes. All these facts have been withheld by Respondent No. 9. Therefore, the Tribunal would be entitled to draw adverse inference against Respondent No. 9 in that behalf. In any case, Respondent No. 9 and other private respondents have converted the user of the premises contrary to the specified purpose and in violation of law and terms and conditions of the EC. Thus, even such an approach would support the case of the applicant and in any case the respondents cannot be permitted to take advantage of their own wrong or default.

54. The cause of action is not restricted to 'in personam' but is an action available to any person in terms of Section 14 of the NGT Act. It empowers any person aggrieved to raise a substantial question relating to environment including enforcement of any legal right relating thereto. Every citizen is entitled to a clean and decent environment in terms of Article 21 of the Constitution and the term 'cause of action first arose' must be understood in that sense and context. The applicant has been able to establish that he first came to know about the misuser and change of user, particularly with regard to adverse environmental impact, only in the middle of December, 2012 and immediately thereafter, he took steps retuning the authorities concerned to take action as per law but to no avail. Then 'he filed the present application within the prescribed period of six months. The respondents have not been able to rebut successfully the factual matrix stated by the applicant. As already stated, they have withheld relevant facts and information from the Tribunal.

55. A cause of action is a bundle of facts which should give, in its composite form, right to a plaintiff against the defendant to approach a court or Tribunal for a legal remedy or redressed of his grievance. Thus, the existence

of a legal remedy to the plaintiff is a sine qua non for an actionable cause of action. In view of the above reasoning, we have no hesitation in concluding that the present application is not barred by time.

56. Lastly but most importantly, now we have to deal with the question as to whether the breach of conditions of EC is likely to cause environmental and health hazards or not. We have already held that Respondent No. 9 has not only violated the specific terms and conditions of the EC dated 27th November, 2006 but has also miserably failed to submit an application for reappraisal of the project. Furthermore, the said Respondent No. 9 has committed breach of the bye laws, fire safety measures, Corporation laws, etc. All the public authorities have specifically taken the stand that at no point of time, did they accord any permission or sanction for conversion of the parking area for commercial purposes and its misuser or unauthorized construction. In fact, according to them, they have taken appropriate steps against Respondent No. 9 in accordance with law. We have already noticed that this Tribunal is not concerned with the violations and breaches committed by Respondent No. 9 with regard to other laws in force but for environmental laws in terms of Schedule I to the NGT Act and its adverse impact on environment and public health.

57. It has come on record that approximately 59 of commercial area has been increased by such unauthorized conversion and misuser. The terms and conditions of the EC have specifically provided that in the event of any change in the scope of the project, Respondent No.9 was expected to take steps for reappraisal of the project and take fresh EC, which admittedly, has not been done by Respondent No. 9 despite lapse of considerable time. These violations would consequently have a direct impact on traffic congestion, ambient air quality, contamination of underground water, sewage disposal and municipal solid waste disposal besides other adverse impact on population density in the area. With the significant change of commercial area by 59, the EC itself would be substantially affected and it would be for the authorities concerned to examine whether the EC can be continued or requires to be recalled. There is a drastic change in PSY with change in sq.ft. area as the EC was not intended for such area to which Respondent No. 9 has now

expanded its activity. Furthermore, assessment of water requirement is based upon the number of users and other services in the area and this substantial change has fundamentally been altered and would have drastic and adverse effects on all these aspects. The EIA Report submitted by Respondent No. 9 itself shows that these are the various aspects, the variation of which is bound to alter the entire basis for grant of the EC. For instance, the parking for 1772 cars was to be provided in the project in terms of EIA report. For this purpose, the basement, lower ground floor in one block and the multi-level car parking in the Block 2P had been provided. Major part of this area had been converted and used by Respondent No. 9 and other private respondents for commercial purposes. It is not even the case of Respondent No. 9 that the required number of cars can be parked in that building. The cars which could have been parked in the building now would have to be parked on the public roads/places leading to lowering the road capacity resulting in lowering the average speed of the vehicle, consequently increasing the air pollution.”

(Emphasis by Us)

32. The term ‘cause of action’ is a bundle of facts. There cannot be two opinions about legal position that once the ‘cause of action’ starts running, then it cannot be stopped. In case of violation of Law, particularly, like CRZ Notification, violation continues, when the construction activity goes on without hindrance. It appears *prima facie* that the question regarding alleged violation of CRZ Notification, is yet not been enforced by the MCZMA by seeking compliance of their own directions. Under the above circumstances, the Application cannot be held as totally barred by limitation, inasmuch as the ‘cause of action’ is continuous and still remains unabated. In our opinion,

question of *locus* as well as question of limitation ought to be decided on case to case basis.

33. What is meaning of expression 'such disputes' in relation to Section 14 (2) of the NGT Act, 2010, would depend upon facts of a particular case. One cannot be oblivious of the fact that the Legislature has purposefully used the expression 'such disputes' which imply plurality of nature of dispute, which may be raised in various kind of environmental litigations. Needless to say, it will not be possible to accept straight jacket formula for applicability of sub-section (3) of Section 14. Unless it can be clearly gathered that the dispute has origin, which could be referable to a fixed time of period due to its nature itself, counting of time will not begin from the day one of fixed starting point. Nobody will deny that once limitation period commences, then it will not be arrested in the midst thereof. Close scrutiny of sub-clause (3) of Section 14 and Section 15, will make it amply clear that period of limitation will commence from the 'date of cause of action' for 'such dispute' when it 'first arose'. If this sub-clause, is properly bisected, the legal position which emerges, may be stated in following way:

- a) Filing of Application can be allowed within six months from the date of 'commencement of cause of action' for "such dispute" and,
- b) From "first date of arising of cause" of action.

34. We cannot overlook the material fact that 'first cause of action' in respect of present dispute arose when CRZ

Notification's violation was noticed by the Applicants and they made complaint to the concerned Authority. It is important to note that though the MCZMA, is the Authority to take action in the matter on its own, yet failure to take such action by itself, would give rise to 'cause of action', because it is the breach of mandate under the Environment (Protection) Act, 1986, and the order issued thereunder by the MoEF, that will trigger cause of action. A copy of order dated 6th March, 2012, issued by the MoEF, shows that MCZMA, is the Authority is created by MoEF, under Section 3 of the Environment (Protection) Act, 1986, to exercise powers and take certain measures for protecting and improving quality of coastal environment and preventing, abating and controlling environmental pollution in the areas of the State of Maharashtra. The relevant part of Notification dated 6th March, 2012, may be reproduced for ready reference:

II. The Authority shall have the power to take the following measures for protecting and improving the quality of the coastal environment and preventing, abating and controlling environmental pollution in areas of the State of Maharashtra; namely :-

(i) Examination of proposals for changes or modifications in classification of Coastal Regulation Zone areas and in the Coastal Zone Management Plan (CZMP) received from the Maharashtra State Government and making. Specific recommendations from Coastal Regulation Zone point of view as per the provisions of Coastal Regulation Zone notification, 2011;

(ii) (a) inquiry into cases of alleged violation of the provisions of the said Act or the rules made there under or any other law which. is relatable to the objects of the said Act and, if

found necessary in a specific case, issuing directions under Section 5 of the said Act, insofar

as such directions are not inconsistent with any direction issued in that specific case by the National Coastal Zone Management Authority or by the Central Government;

(b) Review of cases involving violations of the provisions of the 'said Act and the rules made thereunder or under any other law which is relatable to the objects of the said Act, and if found necessary referring such cases, with comments for review to the National Coastal Zone Management Authority:

Provided that the cases under sub-paragraphs (ii) (a) and (ii) (b) of paragraph II only be taken up *suomotuon* the basis of complaint made by an individual or an representative body or an organization;

(iii) filing complaints under Section 19 of the said Act, in cases of non-compliance of the directions issued by it under sub-paragraphs (i) and (ii) of paragraph II of this Order; (iv) to take action under Section 10 of the said Act so as to verify the facts concerning the issues arising from sub-paragraphs (i) and (ii) of paragraph II of this Order.

35. Considered from the standpoint of above view, we are of the opinion that “such disputes” in the present Application arose when the MCZMA failed to issue directions under Section 5 of the Environment (Protection) Act, 1986, irrespective of knowledge that the construction activity was in breach of the CRZ Notification. We are of the opinion that the Applicants could have knowledge of the nature of initial EC granted in favour of the project Proponent. Obviously, the cause of action ‘first arose’ for such a ‘dispute’ when knowledge of actual field level impacts and/or violations due to project activity was gained and that Competent Authority

failed to exercise powers under Section 5 of the Environment (Protection) Act, 1986, because 'cause of action' triggered for the purpose of filing this Application and hence it is within limitation.

36. Objections raised by the contesting Respondents, are overruled. Both the issues are hence answered in the Negative.

(iii) **Whether the Applicants have can claim customary rights for navigation and right to collect catch of fishes/fishery rights from the sea-water of Nhava-Sheva and as such have a right of route to navigate their traditional boats, through the creek?**

37. The creek between Nhava-Sheva at entrance of JNPT is like a natural entrance gate. The natural entrance gate within port area is not at all the creation of any human activity and such kind of arrangement is, obviously, made by the nature after keeping the rocks covered by water during tide like entrance gate, yet this arrangement is in keeping with natural ecology and aid ingress and egress of the fishermen's boats.

38. Though the Applicants are claiming compensation on basis of such an extinguished enactment, the 'Mahul creek (Extinguishment of rights) Act, 1922, yet, there is no such legal right specifically available to them under the provision of said Act. Perusal of the provisions of the 'Mahul creek (Extinguishment of rights) Act, 1922' (Ex. 'v'), go to show that the rights of navigation in certain part, particularly,

north side part of draft bridge, was kept permanently closed by the trustees of the Port of Bombay and spanning of the said creek at the point specified in the Schedule thereof, had been extinguished. The enactment also provides grant of compensation to the victims, who had suffered loss or damage on account of such extinguishment of rights, likewise available under Section 7 of the Land Acquisition Act, 1894. It is important to take note of the fact that Mahul creek is far away from the location of creek between Nhava and Sheva, with which we are dealing for the present and which is the subject matter of instant dispute. We have not been made aware of any specific enactment, which caused extinguishment of rights of fishermen to use Nhava-Sheva creek for navigation of their traditional boats for egress and ingress within sea-water of the port area for their daily and regular collection of fisheries through network laid in traditional manner. It is nobody's case that they are using the nets, which are harmful to ecology, spawning of fishes, life of fisheries and endangers environment within sea area.

39. In absence of any such legal right under the specific enactment which gives right to the traditional fishermen for navigation of their boats by using the creek between Nhava and Sheva, to reach seawater in the port area of JNPT, it is essential to examine how such rights emerged and can become form of Law and provides any right to the Applicants. The seawater is not the property of any individual, corporation or even Maritime Board. It is a part

of environment, which is related to internal activities of aquatic life under the water, corals, tidal waves, their exchanges and resultant impacts on environment, below the surface water. For example; if the land covered by sea-area is reclaimed, then natural fall-out, would be that the ecology under seawater and growth of Mangroves, existence of corals, movement of turtles, spawning grounds fishes and other activities would be closed or at least, become partly obliterated or minimal.

40. It need not be reiterated that hamlets/villages of the Applicants are adjacent to the creeks/seawater and they used to navigate their traditional fishing boats through Nhava-Sheva creek for earning of livelihood by collecting fish catch even in the port area from water of the sea. This custom was being followed by them for years together. As stated before, at Mahul creek the entrance gate was closed down in 1922, due to certain exigencies/reasons found necessary by the then Government. The origin of such customary right available to the Applicants, cannot be traced out. The custom is explicitly clear and was never destructed.

41. The customary easement as defined in Section 18 of the Indian Evidence Act, clearly bestows right of fishing from the seawater to the Applicants, they being traditional fishermen, admittedly being the Members of such families, who are dealing in the business by virtue of tradition and

legal custom. Section 18 of the Indian Easement Act, 1882 reads as follows:

- (1) An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustration

(a) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A, having become the tenant of a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

42. It would not be out of place to reproduce illustration (a), inasmuch as for the purposive interpretation illustration is part and parcel of understanding legal provision by way of illustration in section, is duly explained in order to understand contextual meaning thereof.

43. We may look the matter from yet another standpoint of view. Had there been no right available to the Applicants, there was no reason to grant compensation to erstwhile families of fishermen, who were affected due to extinguishment of right of tidal waves under the Mahul (Extinguishment of right) Act, 1922. In fact, a careful reading of said Act, clearly goes to show that the Collector was supposed to act under Section 7 of the Land Acquisition Act, 1894, in such a matter. The Applicants have come out with a case that they shall be provided with compensation, because their right to fishery is being taken away due to acts

of the Respondent Nos.8 and 9, in particular and also to some extent by the Respondent No.10. They allege that fishing areas are like underwater farms/fields for them. In our opinion, this is not a right to property as such, notwithstanding the fact that they have right to fishery by way of customary right, which is available under the Indian Easement Act, 1882, as well as under Article 21 of the Constitution, which guarantees right to live. The Respondent Nos.7 to 10, also cannot thwart legal responsibility which emanates from Corporate Social Responsibility to promote 'sustainable development'. The positive impact of the CSR initiative with respect to local communities and environment can be observed. The environment represents the accumulation of the material resources to be shared by all actors in a country. The Corporations in their creation of economic goods exploit these precious resources. However, these rewards are accompanied with evils in the form of pollution, congestions, stripped resources and overall environmental degradation. Corporate Social Responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders. CSR is generally understood as being the way through which a company achieves a balance of economic, environmental and social imperatives.

44. The jurisdictional interpretation of ‘custom’ and the right which is crystallized from there under can be seen from the Easements Act.

Salmonda noted Jurist, described ‘Custom’ as: “Custom’ is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.” Another Jurist of outstanding reputation in the development of Jurisprudence namely; **Austin** observed that: “custom is a rule of conduct which the governed observe spontaneously and not in pursuance of law settled by a political superior.” Judicial Committee of Privy Council, observed that “A rule which is a particular family or a particular district has, from long usage, obtained the form of law.” sometimes a ‘Custom’ is observed by a large number of people in society and in course of time, the same becomes to have the force of Law. It is of common knowledge that ‘Custom’ is recognized as one of the source of Law. It may not be Law itself, however, Customary Law may take the quality of legal Rules in dual ways. It may be adopted by the group of people or subordinate legislature and can be turned into a Law in the direct mode or it may be taken as a ground of judicial decision which afterwards obtains as a precedent which is converted into the Law. There cannot be any two opinion about the manner in which a customary right can become Law, without enactment of Parliament. First, it must be immemorial in origin thereof, must be so ancient that

ordinarily it cannot be traced out as to when it had started. The customs have been followed openly, without use of force, without permission of those adversely affected by the custom being regarded as necessary. Repeated use of same kind of usage without any hindrance by the party, which could have objected to use of custom, openness of use, long period of usage, proximity of flock of people using custom and longstanding benefit they derived out of such customs, are main indications, which makes the regular use thereof as 'Customary Law'. We do not think that it is essential to deal with these aspects any more, particularly, having regard to categorical provision under Section 18 of the Easements Act, 1882, making it source by virtue of such legal provision, because of the fact that the Applicants are residing adjoining the creeks/seashore and are using seawater, which is not personally owned by them.

45. We may also, incidentally, refer to certain provisions of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976. The special enactment relates to zoning of territorial waters of India. Section 3 (2) of the aforesaid Act, may be reproduced for ready reference as follows:

3.(1) xxxxxxxxxxxxxxxx

(2) The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.

At the same time, we may take note of the legal position enunciated in Section 5(1) of the said Act.

The Exclusive Economic Zones of India, is delineated in Ss. 7(1) and 7(4) of the said Act. Perusal of the said Act, reveals that the purport of special enactment, is to create Maritime Zones of India for various purposes like economic zone, security zone etc. This special enactment also does not curtail or extinguish the traditional rights of the fishermen.

There is yet another enactment, namely; the Maharashtra Fisheries Act, 1960, which deals with the power of State Govt. to control illegal activities, use of particular type of mesh and kind of Nets and the manner of using them, for dealing with daily business of catching of fishes in the private water or rather water bodies. This enactment also is, of no much reliance to the facts of the present case.

(iv) **Whether the width of entrance area for passage of the Boats of traditional fishermen inside the sea within Port area, near additional Berth No.4, of widening project, is likely to be reduced or substantially altered/bottlenecked due to reclamation activity/project activity of JNPT?**

(v) **Whether reclamation, cutting of Mangroves and other activities undertaken by JNPT and other respondents, did or would cause substantial environmental damage/degradation, which will result into loss of ecology, resulting into loss of natural spawning of fish**

species, breeding of fishes, availability of fish catch and species thereof?

46. Both the above mentioned issues are inter-twined and core issues involved in the present Application. We have to see as to whether any activity of JNPT, caused degradation of environment due to destruction of Mangroves in the area, particularly, because of illegal reclamation, widening, deepening of channels and narrowing down width of Nhava-Sheva creek, which would disallow easy access to traditional route of the fishermen's boats. We would deal with the role of Respondent Nos. 9 and 10 at appropriate stage, in the context of alleged degradation of environment and penultimate loss caused to the Applicants. Still, however, let the issue against JNPT, be first clarified, thrashed out and addressed in right direction. In its countered pleadings and joint written submissions, JNPT placed on record that the port has about 800Ha area covered with planted trees and Mangroves, which are undisturbed, as support system for breeding of fish and other marine fauna, providing means of livelihood for local community and port's activities absolutely confirm to CRZ norms. The above part of reply affidavit filed by JNPT, through Smt. Yogeshwari Bhatt, is significant and much relevant for the reason that JNPT, partly admits the claim of the Applicants regarding their dependency on ecosystem for breeding of fishes and other marine fauna, providing means for livelihood. What JNPT, states is that its activities are in accordance with CRZ

norms. At this juncture, it may be stated that JNPT, claims categorically that the project of development of eastern shore of Mumbai harbor, is under the Major Port-Trust Act, 1963, and since beginning the port does not give permission for fishing activity within boundaries of JNPT. Both these stands of JNPT, are contradictory to each other. The reply affidavit filed by JNPT further shows that the matter regarding removal of rock patches at the entrance of Nhava creek, was studied through CWPRS, at mouth thereof. The scientific study indicates that there would be hardly any noticeable change in the flow of water conditions. The case of JNPT, is that rehabilitation measures are duly taken, as stated in the pleadings and for such purpose, huge amount is spent. The reply affidavit of JNPT, would show that the Commissioner of Fisheries, has passed an order dated 7.6.2012, which is the subject matter of challenge before the Hon'ble High Court of Bombay in the Writ Petition No.1931 of 2013.

47. Before dealing with merits on these issues, it would be proper to examine the conspectus of jurisdictional methodology available to the NGT. We may usefully quote Section 19 of the NGT Act, 2010, as follows:

19. Procedure and powers of Tribunal.—

- (1) The Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice.
- (2) Subject to the provisions of this Act, the Tribunal shall have power to regulate its own procedure.

- (3) The Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872 (1 of 1872).
- (4) The Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely; –
- (a) summoning and enforcing the attendance of any person and examining him on oath;
 - (b) requiring the discovery and production of documents;
 - (c) receiving evidence on affidavits;
 - (d) subject to the provisions of Section 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
 - (e) issuing commissions for the examination of witnesses or documents;
 - (f) reviewing its decision;
 - (g) dismissing an application for defaults or deciding it *ex parte*;
 - (h) setting aside any order of dismissal of any application for default or any order passed by it *ex parte*;
 - (i) pass an interim order (including granting an injunction or stay) after providing the parties concerned an opportunity to be heard, on any application made or appeal filed under this Act;
 - (j) pass an order requiring any person to cease and desist from committing or causing any violation of any enactment specified in Schedule-I;
 - (k) any other matter which may be prescribed.

(5) All proceedings before the Tribunal shall be deemed to be the judicial proceedings within the meaning of Sections 193, 219 and 228 for the purposes of Section 196 of the Indian Penal Code (45 of 1860) and the Tribunal shall be deemed to be a civil court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

48. A plain reading of Section 19, quoted above, reveals that there are wide powers available with this Tribunal to regulate its own procedure for determination of environmental issues. We cannot and must not overlook the fact that substantial environmental dispute or question relating to environment, under the enactments under Schedule-I, of the NGT Act, 2010, need determination by taking pragmatic view. This kind of litigation is not adversarial in nature. The *lis* is not between the parties. The jurisdiction available to NGT, is, therefore inquisitive, investigative and if so required research oriented. The purpose of having Hon'ble Expert as Member of the Bench, is to render expert's conception to the judicial decision making process. Otherwise, for mere adversarial litigation perhaps, the Legislature might not have made such arrangement to establish the National level Green Tribunal.

49. In the above backdrop, we may first peruse the site investigation report dated 31st October, 2013, (Ex-'A') prepared by three Member's Committee, in pursuance of order of this Tribunal passed on October 11th, 2013. We had passed following order:

The MCZMA, also shall ensure that mangroves are not cut and destroyed in any manner and the Authorities shall

carry out the investigation and verify the information submitted by the Applicants and a report be filed by next date. (i.e. on 13th November, 2013.)

50. The report received from three member committee of MCZMA, is explicitly against counter claim of the Respondent No.8. The report shows that there is Mangroves degradation at Gavhan –Nhava road. The reclamation was found ongoing process. Before reclamation, there were saltpan and Mangroves. The Committee made it very clear that clarification was required to be sought from JNPT on these issues. The photographs appended to the report also support reclamation on Mangroves patches, destruction of Mangroves, untreated effluent flowing into creek, obstruction caused to tidal exchange in the creek, bund without maintenance at Belpada, near parking terminal so on and so forth.

51. Instead of giving all the details ,we may reproduce the recommendations of the Committee to the extent of JNPT issues are concerned as below:

Recommendations:

JNPT issues:

- a. The tidal flow into the Nhava creek has been affected and sufficient tidal influx is not there into the mudflats and extensive mangroves in the area resulting in the degradation of the mangroves and fisheries.
- b. The proposed the proposed extension of the jetty (330m) at the inlet of the Nhava creek may be useful from the technical and operational angle to the JNPT. But it is afraid that this will further reduce the tidal influx into the Nhava creek and seriously impair the mangroves and the fisheries

- c.** Bandharas constructed by the JNPT at different locations are not in use and are further reducing the influx of the tidal waters into the mangrove areas resulting in their systematic degradation. Changes made as temporary structures such as service roads, bunds, wall etc. are to be demolished to restore the natural set up and hassle free tidal inundation flow throughout the mangrove and intertidal areas. These bunds at Belpadavillge and near proposed parking terminal which is also near to Belpada village and FundeDongri village, required to be dismantled by the JNPT and the original creek condition and tidal influx restored to ensure free flow of tidal water into mangroves vegetation.
- d.** It is found that several CRZ areas with dense mangrove vegetation adjacent to the Nhava creek had already been reclaimed by JNPT for truck parking or container storage areas and the reclamation activity is still progressing near the custom house and port user building. Parking of vehicles is observed adjacent to road(near custom port user building). This is a clear violation of CRZ Notification. Irreversible changes such as reclamation within CRZ area need to be stopped and areas restored with mangroves.
- e.** 4th container and chemical terminal development of the JNPT intends to extend the present berths to the butcher island area. It is observed that already silted area on the southern banks (now appear as mudflats) is afraid to be further aggravated resulting in the clogging of the mangrove areas behind. It is noted that Ministry of Environment and Forest, New Delhi has granted Environmental Clearance to the project on 29th July, 2008. The condition of non-destruction of the mangroves and breeding and spawning grounds provided in the approval order needs to be compiled. Further, JNPT should comply all the conditions stipulated in Environment Clearance granted to the project by MoEF.

The above report leaves no manner of doubt that JNPT, continued with reclamation activity, which is in clear violation of CRZ Notification. So also, JNPT has failed to ensure free flow of tidal water with adequate ingress for existence of Mangroves and free movement of boats of local fishermen. Observations in the said report are not controverted by any reliable material placed on record by JNPT. The report may be, therefore, termed as “*Res-ipsa Locuitor*”. The Member Secretary of MCZMA, thereafter issued communication to the Collector and Chairman of the District Coastal Zone Management Committee, and others. JNPT, did not budge inspite of such immediate report of the Committee. Subsequently, Chairman MCZMA issued directions under section 5 of Environment (protection) Act, 1986 to JNPT on 27.11.2013 for complying certain directions which are based on above committee report, which were to be complied in six months.

52. Learned ASG, would submit that the Applicants have no particular legal right to claim entry within the port area, unless and until the Captain of Ports gives them such permission. He argued that right to collect fishes is asserted only because of permissible use of the creek. His further contention is that width of the traditional boats of fishermen folks could be 2-3ft and they cannot now, be allowed to use the boats, which are of non-traditional type i.e. which are having diesel operated engines. He would submit that there is sufficient space available for passage of traditional boats

inside the creek and as such, the Applicants have no case on merits. He contended that expansion of 4th Berth is legally permissible activity, in view of the EC granted by the MoEF, notwithstanding the fact that it is within CRZ area. He invited our attention to the conditions of EC letter dated 10th May, 2013.

53. We find it rather difficult to countenance the contentions raised by learned ASG Mr. Kelvic Setalvad. First, the Committee of Fisheries Department has recognized right of the traditional fishermen, living in and around the hamlets/villages to fishery in the sea/creek water in the proximity of such localities. The Committee has also recognized their rights to have free, unhindered and appropriate passage to enroute their traditional boats through Nhava-Sheva creek, in order to enjoy traditional right to fishery. As stated before, the Commissioner of Fisheries has passed an order, whereby, the families of fishermen are directed to be compensated and rehabilitated. The order is under challenge by JNPT, in the Writ Petition filed before the Hon'ble High Court of Bombay, to the extent of liability, which is which is imposed on JNPT. The recognition of rights by the Committee, as well as immemorial fishing activities of the Applicants give them not only customary rights to use the seawater for continuation of fishing rights, but also to continue the right to life and liberty under the Constitution, which is most ticklish problem, as there are both natural and human interventions

on ecosystem of the water bodies, including tidal waters of the sea. The economy of fishermen folk, has nexus with their right to enter the seawater, collect fishes by using traditional boats, using net/mersh, as per the norms of State Govt. and to do business for daily earnings. They cannot be deprived of bread and butter for no much fault on their part.

54. All said and done, perusal of the record shows that since very inception of the present matter, stand of JNPT, is obstinate, complete denial and even though there are various references, yet, non-halting of reclamation work and destruction of Mangroves by JNPT, continues reclamation of the land. Thus, JNPT without having regard to degradation of environment within the area, unabatedly attempted to go ahead with the project, is indicative of disregard to mandate of “Public Trust Doctrine”. JNPT, no doubt, is entitled to seek development and the project is likely to cater the needs of cargo users, may give employment to several persons and would add some money in the account of exchequer. The project, however, ought to be carried out in keeping with principle of ‘sustainable development’. The concept of ‘sustainable development’ has co-relation with eradication of poverty, which is offshoot of the project and project activity must be balanced against conservation of environment. The ‘Sustainable Development’ is development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.

In **Vellore Citizens Welfare Forum** case, it was stated that there is today no conflict between 'development' and 'safeguarding ecology'. It is a viable concept which has been developed after two decades from Stockholm to Rio; it is a principle which seeks to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystem.

In **Narmada BachaoAndolan vs. Union of India**, it was pointed out that when the effect of a project is known, then the principle of sustainable development would come into play which will ensure that necessary mitigative steps shall be taken to preserve the ecology balance. Sustainable development means what type or extent of development can take place without affecting the environment, may be with certain mitigation measures.

55. As a result of foregoing discussion, we have no hesitation in holding that JNPT, caused destruction of Mangroves and degraded the environment in the area of Port by reclamation of land as well as contemplated effect on tidal exchanges and obstruction in natural water navigation route available to the traditional fishermen.

(vi) Whether ONGC, (Respondent No.9), has cleared off Mangroves cover around the underline pipeline, as directed by the concerned Authorities and restored ecology?

(vii) Whether CIDCO through its land development activities have affected coastal system, in violation of CRZ Notification?

56. On various occasions during course of the proceedings, we directed site visits to find out whether the project work was going on without following EC conditions and directions of the NGT. Not only that but video shooting was also conducted at the site. All areas covered in the CD, including project site at JNPT, Gavhan Bandar, Belpada Bandar, storage tank farm area, 4th marine terminal site, pipe outlet structure at Dronagirinode, NMSEZ, 70 gates. CIDCO, ONGC, Bel side, Puran Bandar, Hanuman Koliwada, Uran, MC turning site and others were covered, as directed by NGT. We need not give elaborate account of the facts revealed during video shooting conducted in presence of the Assistant Commissioner of Fisheries, Raigad on 14th October, 2014. We may, however, state that JNPT was found constructing a gate bund along Nhava creek, connecting approach bridge and container yard. The western portion of bund was already complete. At container yard, adjoining Nhava creek, Mangroves have been seen cut at many places. The CD clearly shows cut Mangroves laying at the bank, Mangroves tree trunks were visible at the site. So, clear violation of the conditions stipulated in approval the project by the MoEF, had been noticed, even as on 14th October, 2014. ONGC, also claims to have restored pipeline in order to ensure free tidal water exchanges. Soil mound affecting flow of tidal water were clearly visible in the photographic CD. The contesting Respondents controverted the claim and also relied upon different videography of CD prepared at the

site. Still, however, in our opinion, site visit by the Govt. authorities viz. the Assistant Commissioner of Fisheries, Raigad, would give more weightage to the documents placed on record. Therefore, we assign credibility to the said report.

This is not only the reason why we are inclined to rely upon the documents and CD brought before us by the Applicants.

57. There is additional affidavit filed by Mr. Ajay Fulmali, Scientist-I, of Environment Department, dated 2nd April, 2014, that corroborates various non-compliances and conditions of the EC. The site visit by MCZMA Members at the sites of JNPT and CIDCO area on 22nd March, 2014, (Ex.'A'), goes to show that piling work of Mooring, Dolphin for anchoring/tying for ships at liquid terms was observed. JNPT officials considered it as a part of project activity. It was also noticed that Mangroves replantation programme was not undertaken alongside of the creek. The construction of pipe outlet structure was observed at the site. This fact negates the claim of ONGC. CIDCO officials informed that the work of construction of pipe outlet was being carried out along with gate installation, in order to control flood of Dronagiri node. In and around, destruction of thick Mangrove vegetation is dominated by *Avicennia Marina* locally known as Tivar.

58. True it is that the Courts/Tribunals will not normally enter into thicket of Govt. policy. Still, however, in a situation like present one, the financial facet of the dispute

relates to 'social cause' of which 'environmental cause' is the main component. Social cause involves as to how in future the Applicants may sustain financial loss and their culture as fishermen, would be obliterated due to degradation of environmental destruction by the acts of the contesting Respondents. Secondly, in our opinion, though JNPT, alleges that the Applicants have been given certain job opportunities for rehabilitation programme, yet inadequacy, is to large extent and gap is to be filled up without impunity. In this context, the concept of 'settlement' needs to be appreciated in right prospective. The rehabilitation programme of traditional fishermen, does not include relocation of their hamlets/localities in the nearby areas, which could be of identical use for earning livelihood. Nor it is the case of contesting Respondents that some Marine bio-diversity is contiguous in the area of the seawater, likewise JNPT and other areas. The Marine organism contribute too many critical processes that have direct and indirect effects on the health of the oceans and humans. What is obvious is that there are specific species and functional groups that play critical roles in important ecosystem processes, and the loss of these species may have significant influences on the whole ecosystem. Primary and secondary productions are important mechanisms by which marine communities contribute to global processes. It has been estimated that half the primary production on earth is attributable to marine species. Without primary producers in surface

waters, the oceans would quickly run out of food, but without planktonic and benthic organisms to facilitate nutrient cycling, the primary producers would quickly become nutrient limited.

59. JNPT, could not pin-point how many of the permanent service opportunities were made available to the traditional fishermen, what kind of R & R was implemented to their benefit and how far employments were given to them real fruits of the project.

60. PROTECTION OF HUMAN RIGHTS

Under international law, states have a clear duty to protect people within their jurisdiction from having their human rights breached by non-state actors, including companies. Apart from being bound by international customary law, India has ratified, and is therefore, a state party to, several international treaties that guarantee human rights. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Indigenous and Tribal Populations Convention (Convention No.107) of the International Labour Organization (ILO). India has also supported the UN Declaration on the Rights of Indigenous Peoples (2007).

When a government fails to protect people's human rights against harm by non-state actors such as companies, this amounts to a violation of international law. However, government failure to protect rights does not absolve non-state actors from responsibility for their actions and their impact on human rights.

61. Now, we would go little back to the affidavit of Mr. Ajay Fulmali, scientist-I, of Environment Department and the Member Secretary, MCZMA, which is duly corroborated by the minutes of site visit of MCZM, passed on 12th November, 2013. The Expert member's team, visited eleven (11) sites on 16th November, 2013. The team of Experts found that claim of ONGC regarding removal of Mangroves and clearance of damaged pipeline is unfounded. The observations may be quoted as follows:

“Damaged Mangroves patch is about 1Ha area. It is understood that it is due to leakage and spillage of oil. The damaged pipeline has been repaired. ONGC was instructed and they committed for restoration of affected Mangroves and free flow of tidal water into Mangroves area will be ensured.”

ONGC had left the work as it is, without any restoration of area. It was affecting free flow of water. The affidavit of Scientist-I, Mr. Ajay Fulmali, coupled with above report, makes it difficult to place implicit reliance on the lop sided version of ONGC.

62. The Respondent No.7, (CIDCO), no doubt, prepared plan for development of New Mumbai, and therefore acquired various parcel of lands. The owners of such acquired lands were paid due compensation. The fact-finding Committee noted that soil/debris from the channel at the mouth and in the downstream portion of the creeklet had not been removed, so as to ensure free flow of tidal

water through creeklet for dependent Mangrove vegetation. CIDCO was asked to ensure that debris be not dumped near Mangroves. A heap of soil was observed in the proximity of the Mangroves patches around site of Chhanje village by MCZMA team, which could probably cause destruction thereof. Thus, the activities of CIDCO also may have potential damage to Mangroves, as well as may cause destruction thereof, although some of the patches are still not fully destructed.

63. In case of activities of CIDCO, we deem it proper to apply the 'Precautionary Principle' so as to protect Mangroves forest in the area. As stated before, as is explained in the instant case, the '**Precautionary Principle**' is totally ignored by the MCZMA and the MoEF. In case of in "**Vellor Citizens' Welfare Forum Vs. Union of India, (1996) (5) SCC 647**"(paragraphs 10 to 20) the 'Precautionary Principle' is elaborated. So also, in in "**JagnathVs. Union of India, (1997) (2) SCC 87**" at paragraph 49 and 51, as well as in in "**Karnataka Industrial Areas Development Board Vs. C.Kenchappa&Ors, (2006) SCC 371**" at paragraphs 66,77 and 94, the Apex Court laid down following principles:

- *Environmental measures to be taken by theGovt. and statutory bodies must anticipate, prevent and attack which causes environmental degradation.*
- *Where there are threats of serious or irreversible damage, lack of scientific certainty cannot not be*

used as a reason for postponing measures to prevent such degradation.

- *The onus is on the developer to show that his actions are environmentally benign.*

64. Section 20 of the NGT Act, 2010, makes it clear that the Tribunal shall consider the 'Precautionary Principle'. There cannot be two opinion about proposition that Section 20 of the National Green Tribunal Act, 2010 mandates the Tribunal, while passing any order or decision, to apply the principle of sustainable development, the precautionary principle and the polluters pay principle. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment.

65. In the context of projects, which require development sustained with certain loss of environment, the issues related to regulatory and environmental aspects, must also be examined on the touchstone of risks and benefits. The goal should be to continuously evolve environmental improvement through redesigning the processes while development is undertaken. The project for extension of 4th Birth involves activity of reclamation of land. The entry point of NhavaSheva creek, according to learned ASG, Shri. Setalvad, will provide enough width for the boats of fishermen to enter the seawater and therefore, the Application is unfounded. According to the fishermen, the

main question relates to route for returning from the creek. They apprehend that the traditional boats will be capsized through return journey, because of impediments on account of rocks in the seawater which will be on the surface after tide would recede. The reports of inspection team, go to show that such apprehension of the Applicants, is quite plausible. In any case, the Applicants have made out good case, so as to apply the 'Precautionary Principle' laid down under Section 20 of the NGT Act, 2010, which would protect right of free egress and ingress of their boats in the seawater tidal exchanges of the water and spawning grounds of sea.

66. Needless to say, cost-benefit analysis of the project ought to have been made by the contesting Respondent No.8, prior to seeking EC. The cost-benefit analysis includes costs of resettlement of the Applicants. The economic advantage of the Applicant's, daily income they derive on an average and their rehabilitation programme.

67. The corporate responsibility to respect human rights, and the role of impact assessment.

There is an emerging consensus on corporate responsibility for human rights that companies- as a minimum-must respect all human rights. This is the position articulated by Professor John Ruggie, the UN Special Representative of the Secretary-General (UN SRSG) on the issue of human rights and transnational corporations and other business enterprises, in his 2011 report to the Human Rights Council. According to the UN SRSG:

“ In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts,

business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”

Assessment of human rights impact is increasingly seen as vital for businesses, particularly in sectors that are highly physically invasive, such as the extractive industries. According to the UN SRSG, “While these assessments can be linked with other process like risk assessments or environmental and social impacts assessments, they should include explicit references to internationally recognized human rights.”

In the EIAs reviewed for this report, two issues related to the human rights impacts of Vedanta’s mine and refinery operations emerge: first, the FIAs identify a number of issues and environmental impacts that clearly pose a risk to human rights. However, the FIAs rarely consider or assess the repercussions of the environmental impacts in human terms. This is a common shortcoming of FIAs. Second, there are potential negative human rights impacts that the FIAs do not touch upon at all. Companies are not required, under Indian Law, to consider human rights impacts or to carry out any other impact assessment process. As a consequence, some issues are effectively invisible in the impact assessment process. They do, however, become very visible once the projects are implemented.

68. In the final analysis, we have come to the conclusion that JNPT degraded environment to much extent by destruction of Mangroves after and during commencement of the project activity, preparation of work at the site even prior to grant of EC and conducted the EIA report without proper

R & R programme, as well as risks and benefits auditing due to implementation of the project. loss of ecology, loss of livelihood to the Applicants, loss of spawning grounds, loss of species of fishes in the area and de-settlement of the Applicants, are significant issues, which require due payment of compensation to them, though it is difficult to relocate them with some kind of facilities, environment and culture. The Respondent No.9, (ONGC), also did not remove outer cover of the pipeline, in order to restore ecology and environment in the area. It appears that tidal exchanges of sea water are obstructed due to acts of the Respondent Nos.7,8 and 9. In addition to such a loss, mainly JNPT, admittedly, has undertaken the work of narrowing Nhava-Sheva creek, which will cause difficulty in enroutening passage of traditional boats of the Applicants. Under these circumstances, it is manifest that their main source of living is being takes away. We are inclined to hold, therefore, that they are entitled to recover compensation as stated below.

69. The Respondent No.10, has, however, no directly, caused any serious damage to source of livelihood of the Applicants. The lands required for development of new township called 'Navi-Mumbai' was the project assigned to it by Govt. Notification No.RPB/1171-181.24-ii/w, dated 28th March, 1971. Acquisition of private lands for development of Navi-Mumbai has been done, in accordance with the Land Acquisition Act, 1894. The Respondent No.10, has paid compensation to the owners of those lands. There was no

legal liability to pay any compensation to the present Applicants, because they are not the owners of any land as such. Needless to say, their claim against the Respondent No.10 is unsustainable and will have to be dismissed.

70. The apportionment of compensation amount payable to the Applicants from the Respondent Nos. 8 and 9, and 10 (CIDCO, JNPT & ONGC) in our opinion, would be 10:70:20% having regard to their contribution to loss of Mangroves, loss of spawning grounds, loss of livelihood etc. as contemplated under Section 14(1) read with Section 15 (a) of the NGT Act, 2010. In the result, the Application is allowed in the following way.

71. It is an admitted fact that the Nhava-Sheva creek is used by the traditional fishermen to navigate their boats from creek to the open sea and return. It is an admitted fact that with the development of 4th terminal, the available width of creek would be further reduced. During the course of argument, we specifically enquired about any defined navigation route/channel for such local fishermen boats, in the context of such development, and whether such route/channel has been appraised and approved by the competent authorities? It was informed that the Captain of the Ports has a mandate to regulate the movement of the Boats in the port area. Further, the MMB is the designated authority outside the port area in the creek area. While appreciating the concerns raised by the JNPT regarding safety and security while allowing such movement of

ships/boats, it is necessary to develop a system whereby such movement of the boats belonging to traditional fishermen or otherwise shall be regulated by the competent authorities with necessary safety and security measures including anti-collision devices, GPS, separate registration etc. Such system will ameliorate such conflict of the local fishermen visa-a-visa commercial port activities leading to a sustainable development. We, therefore direct JNPT to approach the competent authority, and if necessary provide required support to implement such system.

72. While parting with the judgment, we are also concerned with the in-house environmental due diligence practices adopted by the major P.S.U.s. Like JNPT and ONGC. It is now a common knowledge that environmental performance is an integral part of any corporate performance. And therefore, any non-compliance on the environmental front which may lead to legal or penal action, can have significant impact on the corporate image, credentials and market value. It is pertinent to note that MoEF has recognized such corporate environmental responsibility principle in its communication dated 19th May 2011. This communication speaks about necessity of environmental policy for the Corporate standard operating processes and procedure to bring into focus any infringement/deviation/violation of the environmental norms, setting of an appropriate hierarchical system to deal with environmental issues and reporting of compliance/non-

compliance to the Board of Directors. In the present era of sustainable development, there cannot be any dis-agreement on the need and necessity of putting such a system in place in large corporate like JNPT, ONGC and CIDCO, which will be truly reflective of the precautionary principle embedded in corporate planning, project execution and operation stages. We could not see any such environmental responsibility and reporting system in the Respondent's affidavit which otherwise could have identified and addressed some or many of the issues raised in the Application. We are, therefore, of the opinion that such an integral system independently reporting to the top management is required to safeguard the environmental and social aspects of a project and Corporate. We expect the Respondents to take suitable steps in this regard.

73. We would also like to record some observations regarding the enforcement of EC/CRZ clearances by the regulatory authorities. JNPT has obtained EC in 2008, which was revalidated for a period of further 5 years in 2013, by MoEF. It is observed that while revalidating the EC, no consideration of environmental compliance has been done by MoEF either by site inspection or any field visit. Though, JNPT has permission for reclamation of 24 Ha of land, EC does not specify the location/s of such reclamation, nor the JNPT authorities have submitted such map to MCZMA or MoEF who have the mandate of ensuring the compliance of EC/CRZ conditions. The role of both

regulatory authorities i.e. MoEF and MCZMA is far away from the expectations and mandate cast upon them by the Legislations. In spite of being such a large scale projects with many identified environmental concerns, and even on receipt of complaints, both these agencies have not taken proactive steps for enforcing compliance. MCZMA visited the area only after specific directions of the Tribunal. The MCZMA's actions are further not adequate and are limited to issuance of instructions/directions, which are essentially to facilitate the filing of affidavits. We are unable to find subsequent actions following the issuance of such instructions/directions, i.e. whether such instructions/directions have been complied in time bound manner and whether, any further action is taken in case of non-compliance. This is relevant as MCZMA had given time of six months to the Respondents to comply their directions. The port development is an important infrastructure activity, required for overall development of the country. However, the development has to be sustainable. It is submitted that the entire port area, is controlled by Port authorities, however, they were expected to define the navigational channel for traditional fishermen, while developing 4th terminal. MoEF has even not filed affidavit in this matter raising such important issues. No compliance or visit reports are filed on record by MoEF, which could have assisted the Tribunal in effective adjudication of the matter.

74. Consequently, we think it proper to impose cost of Rs. 1lakh each on MoEF and MCZMA which shall be paid to Collector Raigad, within 8 (eight) weeks who shall undertake environmental awareness and education activities in next two (2) years from these funds.

75. The issues of reasonable compensation, restitution, rehabilitation and restoration of environment to the extent it is practicable, are the facets with which now which we shall have to deal with. The Communication of Government dated 30-10-2012, reveals that amount of Rs.1,24,48,98,000/- is legal and proper compensation. However, this report is not supported by any particular methodology adopted by the Authority. The communication goes to show that it is based upon conjunctures.

76. It is difficult to determine income derived by each fisherman with mathematical precision and the fishermen's family-wise income. Yet hypothetical exercise should have some rational with normal period for which their family would suffer loss of earnings due to activities of the Respondent Nos.7, 8 and 9. We hold that ordinarily such period will be at least that of three (3) years. The family may comprise four (4) members, including two (2) male and two (2) women. All the four may be earning about Rs.800/- per day even if pro rata income is considered @ Rs.200/- per day. This is normal income earned by any person of lower strata. Therefore, the yearly loss of income per family may be Rs.2,92,000/-. Considering the mere subsistence of

1/3rd of this amount, the gross loss per family per year turns out to be Rs.1,94,666/- only. We may realistically assume that each of such family will need period of about three (3) years to switch over to some other vocation to earn livelihood. For example; some of them may be required to learn driving of transport vehicles, get due experience and jobs in such business. Some may go to sundry petty businesses so on and so forth. The gap of three (3) years is pragmatic having regard to sudden change over in their life's daily source of earning. Therefore, total loss of three (3) years for 1630 families, is Rs.95,19,20,000/-. That is why above period will be rather justifiable. The above is proper and reasonable compensation. In our view, each of the family is entitled to recover accordingly from the Respondent Nos.7, 8 and 9 i.e. CIDCO:JNPT:ONGC in ratio 10:70:20 as stated above.

77. In the result, we allow the Application in the following manner.

- i)** The Applicants do recover Rs.95,19,20,000/- (Rs. Ninty Five Crores Nineteen Lakhs Twenty Thousand only), which be distributed equally to 1630 (one thousand six hundred thirty) affected and identified fishermen's families as per the Collector's Report, named therein, to the extent of Rs.5,84,000/- (Rs. Five Lakhs Eighty Four Thousand) per family within three (3) months by the Respondent Nos.7, 8 and 9 (i.e. CIDCO, JNPT and ONGC) respectively, as per their shares mentioned above.

- ii)** In case, such amount is not paid within above period, then it will carry interest @ 12 % p.a. till it is realized by the concerned fishermen's families.
- iii)** The Respondent Nos.7, 8 and 9, shall pay Rs.50Lakhs (Rs. Fifty lakhs) and restoration cost for environmental damage, as per above share which work, the Collector, Raigad, shall carry out under his supervision within eight (8) months hereafter for activities of mangrove plantation, ensuring free passage of tidal currents etc. in consultation of MCZMA.
- iv)** The Respondent Nos.7, 8 and 9, shall pay costs of Rs.5Lakhs (Rs. Five lakhs) as litigation costs to the Applicants and bear their own costs.
- v)** The Respondent Nos.7, 8 and 9, shall deposit the amount shown in above para (i) and (iii) in the office of Collector, Raigad within stipulated period, otherwise the Collector shall realize the said amount, as if it is Land Revenue dues from them. A compliance Report in this behalf be submitted by the Collector, within four (4) months to this Tribunal.
- vi)** MCZMA shall submit the compliance of directions issued by them to the Respondents in two (2) months.

....., **JM**
(Justice V. R. Kingaonkar)

....., **EM**
(Dr.Ajay A. Deshpande)

Date: February 27th,2015.

Note:Three (3) photographs annexed herewith be treated as part and parcel of the present Judgment, inasmuch as they clarify topography of the creek and nearby places, including result by activity, which will narrow down the passage due to creek activity.

Khk

Map of site

	<p>Degradation of mangroves is initiated mostly because of lack of inundation. Drying of trees and growth of <i>Acanthus ilicifolius</i> are the indicators of this process.</p>		<p>Original mangrove areas are transformed in to saline blanks occupied by grasses.</p>
			



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