IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on	Orders pronounced on
08.01.2020	18.08.2020

Dated : 18.08.2020

Coram

The Hon'ble Mr. Justice **T.S.SIVAGNANAM**
and
The Hon'ble Mrs.Justice **V.BHAVANI SUBBAROYAN**

Writ Petition Nos.5756, 5764, 5771, 5772, 5773, 5774, 5776, 5792, 5793, 5801 and 21547 of 2019 and W.M.P.Nos.6575, 6590, 6596, 6598, 6602, 6628, 6630, 6703, 6634 of 2019 and W.M.P.SR No.102459 of 2019

W.P.No.5756 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,
SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-vs-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,

Secretariat,
Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk,
Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,

Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.Fatima

10.S.Raja

11.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008.

12.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008. .. Respondents

[RR9 to 12 are impleaded vide order dated 12.06.2019
made in W.M.P.Nos.9850, 9451, 8288 & 8848 of 2019
in W.P.No.5756 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records in respect of the Impugned

Order passed by respondent no.2 vide Proceeding No.T1/TNPCB/F.0212TTN/RL/W&A/2018 dated 12.04.2018 as arbitrary and illegal and quash the same.

W.P.No.5764 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,
SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-vs-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008.

10.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008. .. Respondents

[RR9 & 10 are impleaded vide order dated 12.06.2019 made in WMP Nos.9842 & 9371 of 2019 in W.P.No.5764 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records in respect of the Impugned Order passed by respondent no.2 vide Proceeding No.T7/TNPCB/F.30921/2012/TTN/A-1 dated 29.03.2013 and quash the same as arbitrary and illegal.

W.P.No.5771 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,
SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-vs-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008.

10.S.Raju,
State Co-ordinator, Makkal Athikaram (People Power),
No.16, Mullai Nagar Commercial Complex,
Ashok Nagar 2nd Avenue, Chennai-600 083.

11.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008. .. Respondents

[RR9 to 11 are impleaded vide order dated 12.06.2019 made in
W.M.P.Nos.9846, 9827 & 9372 of 2019 in W.P.No.5771 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus, directing the Respondent No.2 to grant forthwith the Hazardous Waste Authorization to the petitioner in keeping with the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016.

W.P.No.5772 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,
SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-VS-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy, Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.S.Raju,
State Co-ordinator, Makkal Athikaram (People Power),
No.16, Mullai Nagar Commercial Complex,
Ashok Nagar 2nd Avenue, Chennai-600 083.

10.G.Hariraghavan

11.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008.

12.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008. .. Respondents

[RR9 to 12 are impleaded vide order dated 12.06.2019
made in W.M.P.Nos.9832, 9835, 9848 and 9373 of 2019
in W.P.No.5772 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records in respect of the Impugned Order passed by the Respondent No.2 vide Proc.

No.T1/TNPCB/F.0212TTN/RL/28/W&A/2018 dated 09.04.2018 under Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 (the 'Water Act') and Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 (the 'Air Act') and quash the same and consequently, direct the Respondent No.2 to forthwith issue the Consents to Operate to the petitioner for its copper smelter plant for a period of 5 years, under the Air Act and Water Act.

W.P.No.5773 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,
SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-vs-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008.

10.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008. .. Respondents

[RR9 & 10 are impleaded vide order dated 12.06.2019 made in
W.M.P.Nos.8296 & 9374 of 2019 in W.P.No.5773 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus directing the respondents to furnish copies to the petitioner of all Record of Proceedings maintained by the Government of Tamil Nadu and the Tamil Nadu Pollution Control Board together with the Inspection and Scrutiny Reports pertaining to the petitioner's plant and

operations, including, without limitation, the copy of the Report of Inspection along with annexures of the Joint Chief Environment Engineer, Monitoring, Tirunelveli dated 27.02.2018 for renewal of consents, the Scrutiny Report prepared by TNPCB officials after the inspection of the petitioner's Unit in February 2018, the Inspection Report dated 28.02.2018, for renewal of the Hazardous Waste Authorization by the Joint Chief Environmental Engineer, Monitoring, Tirunelveli and to furnish the same to the petitioner forthwith and the record of proceedings (administrative file(s) by whichever name called), in respect of the issuance of the order dated 23.05.2018 passed by the TNPCB, the Respondent No.2 herein and the issuance of the Government of Tamil Nadu Order in G.O.(Ms) No.72 dated 28.05.2018 issued by the State of Tamil Nadu, Department of Environment and Forest, the Respondent No.1 herein.

W.P.No.5774 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,

SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-vs-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008.

10.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008. .. Respondents

[RR9 & 10 are impleaded vide order dated 12.06.2019 made in
W.M.P.Nos.8297 & 9375 of 2019 in W.P.No.5774 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records in respect of the Impugned Order passed by respondent no.2 vide Proceeding No.T7/TNPCB/F.30921/2012/TTN/A-2 dated 29.03.2013 and quash the same as arbitrary and illegal.

W.P.No.5776 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,
SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-VS-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008.

10.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008. .. Respondents

[RR9 & 10 are impleaded vide order dated 12.06.2019 made in
W.M.P.Nos.9376 & 8298 of 2019 in W.P.No.5776 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records in respect of the Impugned Order passed by Respondent No.2 vide Proceeding No.TS1/TNPCB/F.0212/TTN/EB/2018 dated 23.05.2018 and quash the same as arbitrary and illegal and consequently direct the immediate restoration of power supply to the petitioner's plant.

W.P.No.5792 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,
SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-vs-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008.

10.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008.

11.G.Hariraghavan

12.S.Raju,
State Co-ordinator, Makka Athikaram (People Power),
No.16, Mullai Nagar Commercial Complex,
Ashok Nagar 2nd Avenue, Chennai-600 083. .. Respondents

[RR9 to 12 are impleaded vide order dated 12.06.2019
made in W.M.P.Nos.9856, 9377, 9836 & 9834 of 2019
in W.P.No.5792 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records of the impugned order passed by the Department of Environment and Forest, the Respondent No.1 herein, vide Government Order G.O.(Ms) No.72 dated 28.05.2018 and the consequential orders being Order No.H2/9992/14 dated 28.05.2018 passed by Respondent No.5, Order No.DB/1420/2018 dated 28.05.2018 with respect to Boiler Nos. T-6129, T-6144, T-6662, T-6663, T-6664, T-6665, T-7290, T-7797, T-8121, T-8122 passed by Respondent No.6, Order No.C/1056/2018 dated 30.05.2018 passed by Respondent No.7, Order No.C/1057/2018 dated

30.05.2018 passed by Respondent No.7, Order K.Dis.No.23562/C1/2017 dated 01.06.2018 passed by Respondent No.8 and quash the same.

W.P.No.5793 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,
SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-vs-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008.

10.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008. .. Respondents

[RR9 & 10 are impleaded vide order dated 12.06.2019 made in W.M.P.Nos.8299 & 9378 of 2019 in W.P.No.5793 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records in respect of the Impugned Order passed by Respondent No.2 vide Proceeding No.TS1/TNPCB/F.0212/TTN/RL/W&A/2018 dated 28.05.2018 and quash the same as arbitrary and illegal and consequently direct the Respondent No.2 to facilitate the immediate opening including by immediate de-sealing of the petitioner's plant with restoration of supply of electricity.

W.P.No.5801 of 2019 :-

Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager-Legal,

SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002. .. Petitioner

-vs-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Tamil Nadu Electricity Board,
Rep., by its Superintendent Engineer,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.Town Welfare Officer,
Thoothukudi Corporation,
Thoothukudi.

6.Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

7.Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

9.Vaiko,
General Secretary,
Marumalarchi Dravida Munnetra Kazhagam Party,
12, Rukmani Lakshmipathy Salai, Egmore,
Chennai-600 008.

10.K.S.Arjunan,
S/o.T.Seetharaman,
District Secretary, Communist Party of India (Marxist),
16, Masilamanipuram 3rd Street,
Thoothukudi-625 008. .. Respondents

[RR9 & 10 are impleaded vide order dated 12.06.2019
made in W.M.P.Nos.9379 & 9858 of 2019 in W.P.No.5801 of 2019]

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records in respect of the Impugned Order passed by Respondent No.2 vide Proceeding No.TS1/TNPCB/F.0212/TTN/RL/W&A/2018 dated 23.05.2018 and quash the same as arbitrary and illegal and consequently direct the immediate opening of the petitioner's plant together with restoration of electricity supply by the Respondent No.4.

W.P.No.21547 of 2019

Fatima,
D/o.M.G.Rodriguez .. Petitioner

-VS-

1.State of Tamil Nadu,
Rep., by the Principal Secretary,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.Tamil Nadu Pollution Control Board,
Rep., by its Chairman,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District,
Tamil Nadu.

4.Vedanta Limited,
Unit: Sterlite Copper,
Rep., by its General Manager,
SIPCOT Industrial Complex,
Madurai Bypass Road,
Thoothukudi, Tamil Nadu-628 002.

Prayer:- Petition under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus directing respondents 1 to 3 to forthwith demolish the 4th respondent's industry, restore the site to its previous state by remediating the environment, including the soil and water.

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For Petitioners :-

In W.P.Nos.5764 & 5774 of 2019 :-

Mr.ARL.Sundaresan, Senior Counsel

In W.P.Nos.5792 & 5793 of 2019 :-

Mr.G.Masilamani, Senior Counsel

In W.P.No.5756 of 2019 :-

Mr.P.S.Raman, Senior Counsel

In W.P.Nos.5772, 5801, 5776, 5773 and 5771 of 2019 :-

Mr.C.A.Sundaram, Senior Counsel
assisted by
Ms.Rohini Mussa

For Respondents :-

For RR1, 3, 5 to 8 in all Writ Petitions :-

Mr.Vijay Narayan, Advocate General
Assisted by
Mr.V.Jayaprakash Narayanan,
Government Pleader &
Mr.K.V.Viswanathan, Senior Counsel

For R2 in all Writ Petitions :-

Mr.C.S.Vaidyanathan, Senior Counsel
Assisted by Mr.Siddhart Kohli
for Mr.Abdul Saleem,
Mr.M.Yogesh Kanna &
Mr.Balaji Srinivasan,
Additional Advocate General

For Respondent in W.P.No.21547 of 2019, For RR9 & 10 in W.P.No.5756 of 2019:-

Mr.A.Yogeshwaran
for Ms.Poonguzhali

For R9 in W.P.No.5756 of 2019 :-

Ms.R.Vaigai, Senior Counsel
assisted by Ms.B.Poonguzhali

For R9 in W.P.No.5772 of 2019, for R10 in W.P.No.5771 of 2019 & for R12 in W.P.No.5792 of 2019 :-

Mr.T.Mohan
for Mr.A.Suresh Sakthi Murugan

For R10 in W.P.No.5772 of 2019 and for R11 in W.P.No.5792 of 2019 :-

Mr.Balan Haridas
for Mr.Jimraj Milton

For R12 in W.P.No.5756 of 2019, For R10 in W.P.No.5764 of 2019, for R11 in W.P.No.5771 of 2019, for R12 in W.P.No.5772 of 2019, for R10 in W.P.Nos.5773, 5774, 5792 & 5793 of 2019 and for R9 in W.P.Nos.5776 & 5801 of 2019 :-

Mr.Vaiko (Party-in-person)

For R9 in W.P.Nos.5773, 5774, 5764, 5771, 5764, 5792, 5793 of 2019, for R10 in W.P.Nos.5776, 5801 of 2019 band for R11 in W.P.Nos.5756 & 5772 of 2019 :-

Mr.N.G.R.Prasad
for Mr.L.Subbumuthuramalingam

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COMMON ORDER

T.S.Sivagnanam, J.

The petitioner, in all these Writ Petitions, except W.P.No.21547 of 2019, is M/s.Vedanta Limited – Unit Sterlite Copper Thoothukudi, formerly known as 'Sterlite Industries (India) Ltd/ Sesa Goa Ltd/ Sesa Sterlite Limited'.

2.The petitioner is a company incorporated under the Companies Act having its registered office at Mumbai. The nature of activities done by the petitioner, are exporting, extracting and processing minerals such as copper, iron ore, aluminium, oil and gas and commercial power and claims to be one of the world's largest diversified natural resources companies.

3.The ten Writ Petitions, filed by the petitioner, could be segregated into four categories. The first being, the lead cases; the second set of cases challenging consequential orders; the third set of cases in which independent reliefs have been sought for; and the fourth set of cases challenging the orders passed by the Tamil Nadu Pollution Control Board (TNPCB) in the year 2013. In the course of discussion in these Writ Petitions, primarily, we will refer to the lead cases, which are W.P.Nos.5772 of 2019 and 5792 of 2019.

4.The reliefs sought for in the Writ Petitions are to quash the order passed by the TNPCB, dated 09.04.2018, rejecting the application for renewal of consent to operate under Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 (for brevity the 'Water Act') and Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 (for brevity the 'Air Act') and for a consequential direction to renew the consent to operate the petitioner's plant and to quash the Government Order in G.O.Ms.No.72, Environment and

Forest EC-3 Department, dated 28.05.2018, in and by which, the Government endorsed the closure direction of the TNPCB and also directed TNPCB to close the petitioner's unit and close the plant permanently.

5.The Writ Petitions, which fall in the second category are W.P.No.5756 of 2019, challenging the order of the TNPCB, dated 12.04.2018, directing the petitioner not to resume production; W.P.No.5801 of 2018, challenging the order of closure, dated 23.05.2018, passed by the TNPCB and for a consequential direction to reopen the unit and restore electricity supply; W.P.No.5776 of 2019, challenging the order dated 23.05.2018, disconnecting the power supply to the petitioner's unit; and Writ Petition in W.P.No.5793 of 2019, challenging the order of TNPCB, dated 28.05.2018, sealing the petitioner's unit, consequent upon G.O.Ms.No.72, dated 28.05.2018 and for a direction to de-seal the unit and restore the electricity.

6.In the third category of cases, W.P.No.5773 of 2019, has been filed to issue a direction to the authorities to furnish copies of the proceedings with regard to inspection and scrutiny reports etc., and W.P.No.5771 of 2019, has been filed to direct the TNPCB to forthwith grant Hazardous Waste Authorisation under the provisions of the Hazardous and other Wastes (Management and Transboundary Movement) Amendment Rules 2019, as amended (for brevity 'Hazardous Rules').

7.The Writ Petitions in the fourth category in W.P.Nos.5764 & 5774 of 2019, are challenging the two orders even dated 29.03.2013, passed by the TNPCB in exercise of powers under Section 31 of the Air Act, directing closure of the petitioner's unit and disconnection of power supply. W.P.No.21547 of 2019, has been filed by one Ms.Fatima, which we shall deal with separately in the later part of the order.

8.As the present matter has had a chequered history and there has been litigation since 1997, i.e., soon after the petitioner commenced production, a prelude is essential.

9.The plant set up by the petitioner in Thoothukudi is engaged in the manufacture of copper cathode, copper rods, sulphuric acid, phosphoric acid and other by-products in the process of smelting copper concentrate. The copper rod plant and the captive power plant are situated within the copper smelter complex of the petitioner's unit.

10.During 1997, the Government of Tamil Nadu approved the project of the petitioner to set up a copper smelting plant and during 1994, the State Industries Promotion Corporation of Tamil Nadu (SIPCOT) allotted an extent of 102.50.0 hectares of land in an industrial complex developed by it at Thoothukudi. The manufacture of copper is classified as 'red category

industry' signifying that the process is highly polluting and the effluents are hazardous. Therefore, prior environmental clearance of the Central Government was mandatory. On 16.01.1995, the Ministry of Environment, Forest and Climate Change (MoEF & CC) granted environmental clearances for the project. Thereafter, the Government of Tamil Nadu, the Department of Forest granted environmental clearance on 17.05.1995. In terms of the provisions of the Air Act and Water Act, the petitioner was required to obtain consent to establish the plant. This was granted by the TNPCB on 22.05.1995, to manufacture 234 tonnes of blister copper per day and 638 tonnes of sulphuric acid per day. The order of consent contained various conditions. By order dated 14.10.1996, under Section 21 of the Air Act and Section 25 of the Water Act, the petitioner was granted consent to operate the plant with a capacity of 391 tonnes of blister copper per day and 1060 tonnes of sulphuric acid per day till 31.03.1997. This order also contained conditions. Soon after the grant of the consent orders, Writ Petitions were filed before this Court

during November 1996, essentially challenging the grant of environmental clearance and other related matters. On 01.01.1997, the petitioner commenced production. During April 1997, W.P.No.5769 of 1997, was filed challenging the grant of environmental clearance, dated 06.01.1995 and the clearance granted by the State Government, dated 17.05.1995. Within about seven months, after commencement of production, the petitioner was visited with an order of closure dated 06.07.1997, on account of an incident regarding gas leakage. The State Government, presumably taking note of the concern expressed by the local public, constituted a Committee to investigate into the incident. It is the petitioner's case that upon reports being submitted by the Expert Committee, the TNPCB by order dated 13.08.1997, ordered reopening of the plant and permitted the petitioner to commence and continue production. Subsequently, during June 1998, the State Government appointed another team of experts to examine the working of the petitioner's unit.

11.In the Writ Petition, which was filed challenging the environmental clearance namely, W.P.No.5769 of 1997 and other matters, which were tagged along with the same, direction was issued to the National Environmental Engineering Research Institute (for brevity 'NEERI') to submit a report. On 17.11.1998, NEERI submitted a report to the Court, which was adverse to the petitioner. On 23.11.1998, the Division Bench, which heard the matters, ordered for closure of the petitioner's plant. Subsequently, the Division Bench by order dated 23.12.1998, lifted the order of closure and permitted the plant to operate on experimental basis for about two months from 26.12.1998 to 28.02.1999. On 09.02.1999, NEERI opined that the petitioner can be allowed to operate and the Division Bench taking note of such report, permitted the petitioner to operate the plant, by order dated 23.02.1999. Presumably during the period when the plant was to operate on experimental basis, the full production capacity could not have been achieved or was not permitted, but eventually the TNPCB while issuing the consent

order dated 20.05.1999, permitted the petitioner to operate full capacity, i.e., 391 tonnes of blister copper per day and 1060 tonnes of sulphuric acid per day. Roughly about the said time, the petitioner made an application for expansion of its production capacity from 391 tonnes of copper per day to 900 tonnes per day (TPD). Public hearing is stated to have been conducted on 10.01.2003, on the application of the petitioner for expansion. Thereafter, on 01.07.2004, the State Government issued No Objection Certificate for the expansion and accordingly, addressed the MoEF. The Expert Committee appointed by the MoEF had visited the petitioner's factory on 12.08.2004 and 13.08.2004.

12.While the matters stood thus, in a Public Interest Litigation, the Hon'ble Supreme Court appointed a Monitoring Committee for all 'red category industries' in the country including the petitioner and directed inspection to be conducted, vide order dated 21.09.2004. On 22.09.2004, the MoEF granted environmental clearance for expanded capacity of 900 TPD. In

terms of the directions issued by the Hon'ble Supreme Court on 21.09.2004, the TNPCB constituted a Committee on 29.10.2004, for monitoring all red category industries in the State and a report was submitted on 16.11.2004, ie., after expansion. The TNPCB, on its part, appointed NEERI for conducting an environmental audit of the petitioner, who, in turn, submitted their report on 16.03.2005, with pointed observations and directions. By order dated 19.04.2005, the TNPCB granted consent to operate for the increased capacity, i.e., from 391 TPD to 900 TPD with conditions and such consent to be valid till 31.03.2006. During September 2005, the petitioner made an application for further increase in the production capacity from 900 TPD to 1200 TPD through a process called 'bottlenecking'.

13.According to the petitioner, this process essentially focuses on increased production with the available infrastructure by adopting technical and scientific processes. The TNPCB granted consent for the expansion and

permitted the petitioner to operate with the increased capacity up to 1200 TPD, by order dated 15.11.2006, valid till 31.03.2007. The MoEF had issued interim operational guidelines with regard to red category industries on 21.11.2006, the environmental clearance of the petitioner unit for increased capacity from 900 TPD to 1200 TPD was granted. The petitioner sought for further increase in their production capacity from 1200 TPD to 2400 TPD, which was favourably considered by the MoEF and on 01.01.2009, environmental clearance was granted, but no public hearing was conducted. According to the petitioner, the same is not required to be conducted. On 19.01.2009, the TNPCB renewed the consent to operate both under the Air Act and Water Act subject to condition, the consent to be valid till 31.03.2009. Subsequently, on 14.08.2009, the consent was renewed till 31.03.2009, subject to conditions, more particularly, with directions to dispose of the waste gypsum stored by the petitioner.

14.The Writ Petition in W.P.No.5769 of 1997, which was filed challenging the grant of environmental clearance dated 16.01.1995, was allowed and by order dated 28.09.2010, the petitioner's unit was directed to be closed. The petitioner filed appeal to the Hon'ble Supreme Court in C.A.Nos.2776 - 2783 of 2013, and an order of interim stay was granted on 01.10.2010. The Hon'ble Supreme Court issued directions to NEERI to conduct an environmental study *vis-a-vis* the petitioner's unit along with the Central Pollution Control Board (CPCB), TNPCB, the public interest litigants, NGOs and political parties, who were parties before the Hon'ble Supreme Court. NEERI submitted its report dated 20.05.2011, which contained various observations and directions. The TNPCB, pursuant to the directions issued by the Hon'ble Supreme Court on 18.07.2011, filed their response/ report on the report submitted by NEERI on 02.08.2011. The District Collector, Thoothukudi District also filed his status report dated 22.08.2011, on the ground situation in Thoothukudi. In the said report, the Collector has stated

that the President of the Meelavittan Panchayat had stated that on account of the petitioner-industry, agricultural activities have been affected, several cattle were found dead after drinking the contaminated water from the Odai. The President of Therkkuveerapandiyapuram Village Panchayat stated about the discharge of gaseous emission during the early morning hours and also that the ground water is polluted. The Joint Director of Agriculture had stated that the agricultural operations in the area has dropped to 10%, as most of the agricultural lands have been converted into industries or divided into housing plots. The District Collector refers to the report of the Assistant Director of Geology, who reports general change in the Total Dissolved Solids (TDS), Sulphates-Chlorides; and the Deputy Director of Health Services mentions about respiratory diseases in the said area. In conclusion, the District Collector in his observations stated that there is a distinct smell which emanated in and around the factory premises, attributing the same to the production activity of the petitioner. He would further state that agricultural

lands were diverted and the operation of the petitioner caused some kind of air and water pollution and waste water discharged could have flowed and found its way into the channel.

15.The Hon'ble Supreme Court directed TNPCB to examine the report of NEERI, dated 20.05.2011, pursuant to which they filed their report on 02.09.2011. The Hon'ble Supreme Court directed TNPCB to issue statutory directions, who, in turn, by order dated 24.10.2011, issued 30 directions which were directed to be complied with by the petitioner as per the orders of the Hon'ble Supreme Court, dated 11.11.2011. On 02.03.2012, the petitioner was granted renewal of consent to operate till 30.06.2012, and necessary directions were issued to CPCB and TNPCB. On 14.09.2012, a joint report was filed by the Boards stating that 29 directions out of the 30 directions have been complied with. On 05.10.2012, the TNPCB renewed the consent to operate till 31.03.2013. On 23.03.2013, a complaint was received

by TNPCB from the public, complaining of eye irritation, suffocation, more particularly in the areas in New Colony, Keezha Shanmugapuram and other areas. This resulted in issuance of show cause notice dated 24.03.2013, for non-compliance of consent conditions and public complaint. The petitioner was called upon to show cause as to why action should not be initiated based on such violation and public complaint. The petitioner had submitted their reply and additional reply on 27.03.2013 and 28.03.2013, respectively. TNPCB by order dated 29.03.2013, directed closure of the plant under Section 31A of the Air Act and power supply was ordered to be disconnected. On 30.03.2013, the feed to the plant is stated to have been stopped and power was disconnected.

16.On 01.04.2013, the petitioner filed appeal before the National Green Tribunal (NGT) in Appeal Nos.22 & 23 of 2013. On 02.04.2013, the Hon'ble Supreme Court delivered judgment in the appeals filed by the

petitioner against the order of closure directed by the Division Bench in W.P.Nos.5769 of 1997, etc., dated 28.09.2010 and reported in ***(2013) 4 SCC 575***. We shall dwell into the finer aspects of the judgment in the later part of this order.

17.In the appeals filed before the NGT, Expert Committee was appointed on 09.04.2013, to cause an inspection. On 19.04.2013, the TNPCB suspended the closure order from 09.00 am on 04.05.2013 to carry out inspection. Subsequently, these appeals were transferred to the Principal Bench of the NGT from South Regional Bench. A report was submitted by the Committee on 28.04.2013. On transfer to the Principal Bench, a Committee was constituted on 31.05.2013. The petitioner's application for renewal of consent dated 31.03.2013, was returned on 28.05.2013. Since, the unit was allowed to commence production by the NGT, TNPCB challenged the said order before the Hon'ble Supreme Court in C.A.Nos.4763-4764 of

2013. The Hon'ble Supreme Court on 10.06.2013, directed to file the report of the Committee constituted by NGT. On 13.06.2013, the CPCB and TNPCB proposed inspection of the plant on 14.06.2013 to comply with the directions issued by the NGT, the closure direction was suspended for the period from 14.06.2013 to 10.07.2013. The Committee had conducted the inspection on 16.06.2013, and subsequently, the TNPCB extended the suspension of closure direction till 15.07.2013, specifically mentioning about their appeal filed before the Hon'ble Supreme Court.

18.As noted earlier, the NGT by order dated 31.05.2013, had constituted an Expert Committee, which submitted its report on 10.07.2013. On 15.07.2013, NGT ordered the petitioner's unit be allowed to continue operations till final orders are passed. It is mentioned that the report dated 10.07.2013, was signed by the Member Secretary, TNPCB and District Environmental Engineer, TNPCB without prejudice to the rights and

contentions in the appeal pending before the Hon'ble Supreme Court. On 22.01.2014, the NGT disposed of O.A.No.176 of 2013. The petitioner would state that their applications for renewal of consent to operate was kept pending and despite several reminders, no orders were passed. It is to be noted that the NGT by an interim order dated 08.08.2013, had directed TNPCB to consider the application filed by the petitioner for renewal of consent to operate. On 07.03.2016, the CPCB issued notification regarding harmonisation of classification of industries under 'red', 'orange' etc., categories. It is only on 13.04.2016, the TNPCB renewed the consent to operate till 31.03.2017.

19.While so, on 28.04.2016, W.P.No.13810 of 2009, which was filed challenging the environmental clearance for expansion dated 01.01.2009, was dismissed. Consequent upon the directions issued by CPCB, orders were passed revising the period of consent to operate for red category industries from one year to five years. TNPCB issued orders on 26.09.2016 and

04.07.2017, prescribing time lines for consideration of applications for consent to operate and for authorisation under the Hazardous Waste Management Rules, 2016 (hereinafter referred to as "the HWM Rules"). On 14.11.2016, TNPCB granted consent to establish Copper Smelter Plant – II with validity for seven years i.e., till 2023. The petitioner would state that between December 2016 and October 2017, they had invested about Rs.600 crores for expansion i.e., for Copper Plant No.II. The petitioner filed applications dated 31.01.2017, 14.03.2017 &and 23.03.2017, for renewal of consent to operate under the Air Act and Water Act. While the applications were pending, TNPCB conducted inspection of the unit on 10.03.2017 and 11.03.2017. This lead to issuance of show cause dated 14.03.2017, pointing out eleven violations under the Water Act and six violations under the Air Act. The petitioner submitted separate replies dated 23.03.2017, along with annexures. On 06.09.2017, the Joint Chief Environmental Engineer, TNPCB, Madurai and District Environmental Engineer, TNPCB, Thoothukudi conducted

inspection of the plant. On the very next day i.e., 07.09.2017, the consent to operate under the Water Act and Air Act were renewed till 31.03.2018, with special and general conditions. Earlier, the Joint Chief Environmental Engineer, TNPCB, Madurai conducted inspection of the unit on 25.07.2017 and 05.08.2017 and recommended for issuing certain directions. This recommendation was accepted by TNPCB and further directions were issued to the petitioner on 11.09.2017. On 10.11.17, objections were raised from different quarters objecting expansion of the petitioner's industry. The petitioner on 31.01.2018, applied for renewal of consent to operate under both Acts for a period of five years, from 01.04.2018 to 31.03.2023 and along with the applications, they enclosed details of compliance effected by them with regard to the conditions which were imposed by TNPCB by order dated 07.09.2017, while renewing the consent to operate under both Acts till 31.03.2018. On 05.02.2018, protest by the public escalated more particularly, at Kumara Reddy Palayam village. On 22.02.2018, an inspection was

conducted by the TNPCB, and a report, dated 27.02.2018, was submitted. The petitioner would state that copy of the said report was not furnished to them and they had obtained the same under the Right to Information Act. The petitioner would state that there is a discrepancy in the copy of the report, as one of the copies of the report does not show the name of the representative of the company whereas, the other does. The petitioner would state that the said inspection report dated 27.02.2018, shows that the petitioner was fully compliant of all directions. On 22.08.2018, the Joint Chief Environmental Engineer, TNPCB, Tirunelveli recommended renewal of the hazardous waste authorisation.

20.As mentioned earlier, protests were held at various places and it appears that the Police authorities refused permission for conducting protests, which led to the filing of Writ Petition before the Madurai Bench of this Court in W.P.(MD).No.5276 of 2018, in which an order was passed on 15.03.2018

by the Division Bench granting permission subject to conditions. On 24.03.2018, the protest spread to Chidambaram Nagar. The petitioner in the mean time appears to have sought for police protection and also addressed the TNPCB on 26.03.2018, stating that the plant has been shutdown for repairs and maintenance. The petitioner moved the Madurai Bench of this Court in W.P.(MD)No.7313 of 2018, requesting for grant of police protection, which Writ Petition was disposed of by order dated 04.04.2018, by directing the petitioner to submit a fresh representation to the Superintendent of Police, Thoothukudi for police protection which was directed to be considered in accordance with law. While so, on 09.04.2018, TNPCB rejected the applications for renewal of consent dated 31.01.2018 and 27.02.2018. This order is impugned in W.P.No.5772 of 2019. The petitioner on 12.04.2018, filed an appeal against the said order before the Appellate Authority constituted under the provisions of the Air and Water Acts. Consequential order dated 12.04.2018, was passed by the TNPCB directing the petitioner not

to resume production without obtaining prior approval/renewal of consent from the Board. This order is impugned in W.P.No.5756 of 2019. The appeal filed before the Appellate Authority was heard, TNPCB had filed their response and the matter was adjourned from time to time. The petitioner moved the Madurai Bench of this Court in W.P.(MD).No.11190 of 2018, to declare the area to the radius up to 1km around the petitioner's plant, residential premises of its employees and its warehouse as 'protest free zone'. The said Writ Petition was disposed of by order dated 18.05.2018, directing the authorities to consider the petitioner's representation, dated 09.04.2018, and reminder dated 16.04.2018 on its own merits with due consideration of the observations made in the order wherein, the Court observed that the proposed protest is likely to trigger a law and order situation and in such scenario, invoking Section 144 Cr.P.C. would be highly recommended in public interest. On the ill-fated day, 22.05.2018, police resorted to firing leading to the death of several persons. On 23.05.2018, TNPCB ordered for closure of

the petitioner's plant and disconnection of power supply. This order is impugned in W.P.No.5801 of 2019.

21.The petitioner submitted representation to TNPCB for restoration of power supply for maintenance of the plant. On 28.05.2018, the Government by G.O.Ms.No.72, endorsed the order of closure passed by the TNPCB, dated 23.05.2018, and directed sealing of the petitioner's unit and permanent closure thereof. This Government Order is impugned in W.P.No.5792 of 2019.

22.In compliance with the directions issued by the Government, the TNPCB issued consequential order, dated 28.05.2018, sealing the petitioner's plant. This order is impugned in W.P.No.5793 of 2019. Subsequently, the Municipal Corporation passed an order dated 28.05.2018, rejecting the petitioner's renewal application for renewal of horse power licence; the boilers'

licence was revoked by the Director of Boilers by order dated 28.05.2018; factory licence was revoked as suspended by the Joint Director, Industrial Safety by order dated 30.05.2018; the registration certificate under the Contract Labour Regulation Act was revoked on 30.05.2018 and the fire licence was cancelled by the Director, Tamil Nadu Fire and Rescue Services by order dated 01.06.2018.

23.The petitioner filed Miscellaneous Petitions to grant licenses, approvals and permits which stood cancelled/withdrawn to facilitate the maintenance activities of the plant pending disposal of W.P.No.5792 of 2019. On 29.05.2018, SIPCOT cancelled the land allotted to the petitioner for the expansion project, copper smelter plant-II. In the light of the Government Order directing sealing and permanent closure of the petitioner's plant, the Appellant Authority by order dated 06.06.2018, felt it not appropriate to hear the appeals filed by the petitioner against the order passed by the TNPCB rejecting the applications for renewal of consent to operate.

24.The petitioner moved the Madurai Bench of this Court in W.P.(MD)No.13144 of 2018 seeking for restoration of power supply and for manpower access for maintenance activities. On 21.06.2018, the Government of Tamil Nadu constituted a high level committee comprising of six members to identify and assess the materials stored in the premises of the petitioner and offer its recommendations and the committee visited the plant on 22.06.2018. While so, the petitioner filed an appeal before the NGT challenging the orders passed by the TNPCB, including the orders dated 09.04.2018, 12.04.2018, 23.05.2018 and the Government Order dated 28.05.2018. The District Collector, Thoothukudi, passed an order dated 30.06.2018, directing the petitioner to move all materials as found in the plant at the time of inspection by the high level committee within the time stipulated. The Writ Petition filed by the petitioner in W.P.(MD)No.13144 of 2018, was closed by order dated 09.07.2018. The NGT by order dated 09.08.2018, directed CPCB to conduct an inspection of the petitioner's plant on the current status of the materials in

the plant and make recommendations of their storage/disposal. This order was challenged by the TNPCB before the Hon'ble Supreme Court in Civil Appeal No.8250 of 2018, in which it was clarified that the NGT, may continue to hear the matter on merits and finally decide the matters both on maintainability as well as on merits. On 20.08.2018, the NGT passed an order and made certain observations and issued directions permitting the representative of the petitioner to have access to the administration section as have already been ordered. This order was put to challenge by the State as well as TNPCB before the Hon'ble Supreme Court, which was disposed of on 10.09.2018. While so, the Committee constituted by the NGT had visited the slag site at Pudukottai as well as the petitioner's plant and also conducted a public hearing in the premises of the Government Polytechnic, Thoothukudi. The petitioner had challenged the order passed by SIPCOT by a writ petition before the Madurai Bench in W.P.(MD).No.20788 of 2018 and an order of interim stay was granted on 30.10.2018. Thereafter, the petitioner had been addressing the

authorities reiterating their request for access to the plant to carry out maintenance and repair works. Ultimately, the NGT by order dated 15.12.2018, allowed the appeal filed by the petitioner and set aside the orders of rejection, closure and sealing passed by the respondents and directed immediate issuance of consent to operate and hazardous waste management authorisation. The Appellate Authority by order dated 18.12.2018, closed the appeals in the light of the final order of the NGT dated 15.12.2018. The TNPCB filed appeal before the Hon'ble Supreme Court challenging the order of the NGT dated 15.12.2018, the State had also filed appeal against the said order. The petitioner filed an application in I.A.No.1188 of 2019 in C.A.No.23 of 2019, seeking implementation of the directions issued by the NGT, vide order dated 15.12.2018. The Hon'ble Supreme Court by order dated 18.02.2019, allowed the appeals filed by the State and TNPCB, setting aside the orders of the NGT, dated 31.05.2018, 08.08.2013 and 15.12.2018. The Hon'ble Supreme Court granted leave to the petitioner to file Writ

Petitions before this Court by restoring the position as of 2013 and May 2018, thereby, reviving the orders, which are impugned in these Writ Petitions. The Hon'ble Supreme Court allowed the appeals on the ground that the NGT lacks jurisdiction to deal with the matter. This is how, these Writ Petitions are before us.

25.Mr.C.A.Sundaram, learned Senior Counsel appearing for the petitioner prefaced his submission by contending that the first ground raised by the petitioner challenging the impugned orders is on the ground of violation of principles of natural justice, as no notice was issued to the petitioner alleging pollution, no explanation was called for, but series of orders were passed including cancellation of various licenses granted to the petitioner. Though such a ground has been canvassed, the petitioner requested the Court to hear the case on merits, since if the petitioner succeeds in establishing that there has been serious violation of principles of natural justice, the

consequence that would normally follow, is an order of remand to the authorities to reconsider the matter again, which course would work prejudice to the petitioner and therefore, while not giving up the said ground of challenge, the Court was requested to decide the matter on merits.

26.It is further submitted that for issuing an order of closure, there should be a clear finding of pollution, which is *sine qua non* and, the impugned orders of closure does not allege any pollution and the same have been passed for extraneous reasons and the order of permanent closure will clearly show, it is *mala fide*. It is submitted that even assuming there is a case of pollution, if the same is remediable, closure should not be resorted to. It was submitted that the petitioner is the largest manufacturer of copper in India and if the petitioner is to be shutdown, it will have a serious impact on the economy, as India would have to import copper at high cost. Further it is submitted that in the SIPCOT Industrial Complex at Thoothukudi, there are 63

industries, which are 'red category industries' including the petitioner and without conducting a source apportionment study, the petitioner cannot be stated to be the "sole contributor'. In fact, a direction was issued by the NGT to the TNPCB to conduct a source study, which was not complied with. Further, it is submitted that the plant is 'zero' discharge plant and there is no effluent released by the petitioner into the sea.

27.In 1998, NEERI had submitted a report making certain adverse observations against the petitioner, which were objected to by the petitioner and in fact, the State and Central Government also objected to the report and ultimately, the order of closure was revoked by the Division Bench and the petitioner incurred a cost of about Rs.500 crores and implemented all recommendations made by the NEERI and this being a reason for TNPCB to permit the petitioner to operate full capacity by order dated 20.05.1999. It is further submitted that so far as the hazardous waste management authorisation

is concerned, there are 101 industries, which require such authorisation, but none of them have been issued such authorisation, but no action has been taken to close down any such industry. It is further submitted that the state of affairs up to the year 2013, will clearly show that the petitioner is not a pollutant and now to say that the petitioner is a chronic polluter is unsustainable especially when, there has been no complaint of pollution from 2013 till 2016 and in April 2016, environmental clearance was granted for Copper Plant-II and earlier expansion of Phase-I was permitted and increase in production capacity by the process of de-bottlenecking was also permitted. Further, during November 2016, consent to establish Plant-II was granted by the TNPCB. While so, for the first time, in the show cause notice dated 14.03.2017, there is an allegation. Further, it is submitted that the petitioner obtained the copy of the inspection report, dated 27.02.2018, under the RTI Act, which recommends renewal of consent for five years. However, the petitioner's unit was closed down based on this report. It is further submitted

that along with the inspection report, there is a scrutiny report, which has recommended renewal of consent for five years, which has not been produced by the respondents. For the first time in April 2018, there is an allegation of groundwater pollution, when the fact remains that the ground water analysis report, dated 30.04.2018, shows it is within the permissible parameters. Further, the allegation of groundwater pollution was not one of the grounds for passing the impugned order dated 09.04.2018 and for the first time in the pleadings filed before the NGT, TNPCB raised such a ground.

28.The learned Senior Counsel submitted that the order of closure passed by the Chairman, TNPCB is without jurisdiction. The source of power traceable by the Chairman of TNPCB is based on a resolution passed by the Board on 24.02.1994, empowering the Chairman to pass orders under Sections 33A/31A of the Water and Air Acts.

29.To exercise power under these provisions, factum of pollution is a must and such power can be used where there is urgency and in a given situation, where emergent action is required in the matter, when act of pollution is continuous and when following normal course of action will delay the matters and to ensure prompt action considering the emergent situation. Thus, only under such circumstances, the Chairman of TNPCB can invoke such a power and not otherwise. It is submitted that the above mentioned factors warranting exercise of power are absent in the instant case and such power could not have been exercised by the Chairman, TNPCB. Further, it is submitted that the order of refusal to renew the consent is not final, as on compliance of the conditions, consent can be granted. Further, the learned Senior Counsel raised serious objections to the alleged inspection on 18.05.2018 and 19.05.2018 and disputed the taxi receipts produced by the TNPCB, as proof of officials having travelled for conducting inspection. Therefore, it is submitted that the very foundation of the order of closure

should go. Further, commenting upon the impugned Government Order, it is submitted that the Government wanted to prove a political point and what motivated the Government to pass the order, is not to safeguard against pollution, but for extraneous consideration and the order is a colourable exercise of power. It is submitted that the main allegation that one of the reasons for closure as stated in the order dated 09.04.2018, is that the copper slag has not been removed. Even as per the stand taken by the MoEF and TNPCB, copper slag is non-hazardous and the designated use of copper slag as land fill has been authorised by the CPCB, sale of copper slag to private party has been permitted by the TNPCB and the petitioner has entered into agreements with private parties for sale of slag and the TNPCB is aware of the same. The copper slag, which has been stored in the patta land, belongs to a private party, who had purchased the slag and the TNPCB instead of initiating action against the land owner, cannot proceed against the petitioner. It is submitted that though the petitioner is not the owner of the said land, on their

part, they had taken action and had erected a physical barrier between the river and the patta land, where copper slag has been stored.

30.The learned Senior Counsel elaborated upon the inert nature of copper slag, how it is non-hazardous, etc. Further, the petitioner has not violated any one of the 11 conditions imposed in the renewal of consent order dated 07.09.2017. Further, it is submitted that there are 67 industries, which are in the SIPCOT Industrial Complex, Thoothukudi including three thermal plants apart from four other thermal plants in Thoothukudi District and the order of closure passed against the petitioner is violative of Articles 14 and 19(1)(g) of the Constitution of India. It is further submitted that the TNPCB drew samples on 30.04.2018, and the report shows everything was within the permissible limit and this report was suppressed. It is further submitted that until 30.04.2018, with three years of continuous monitoring, shows there is 'zero' pollution. This is fortified by the fact that after one year of closure, it is

stated that the TDS level is high, this will clearly show that the petitioner is not the cause. Further, it is reiterated that non-removal of slag by a private party cannot be a reason for closure. Furthermore, when consent was renewed on 07.09.2017, two conditions were imposed which are new conditions and therefore, these cannot be a reason to order closure. Further, it is submitted that the authorities were aware of the fact that the slag was stored by the patta landowner and not by the petitioner and that is why no notice was issued to the petitioner. Further, for the first time in the pleadings, it is stated that copper slag is a pollutant and there was no such allegation in any of the orders passed by the TNPCB.

31.The learned Senior Counsel appearing for the petitioner referred to various documents to emphasis his arguments that copper slag is non-hazardous, the CPCB clearly states that slag is a non-hazardous and the present stand of the TNPCB is contrary to records. Further, by referring to the

HWM Rules, it is submitted that slag has been excluded from the category of hazardous waste and a contrary stand cannot be taken by the respondents in their counter affidavit.

32.Referring to the report of the National Institute of Oceanography, it is submitted that copper slag is used as a reclamation material. Earlier, TNPCB had taken a clear stand that the slag is non-hazardous and it is non-leachable and would not affect groundwater and this was based upon the stand taken by the CPCB. Further, by referring to various test reports of TNPCB, it is submitted that the parameters have been found to be within permissible limits. Further, it is submitted that the application for hazardous waste management authorisation was pending and there are several such industries in the State, whose applications are pending and the petitioner had been continuously submitting representations for renewal of the authorisation. Further, in terms of Rule 6(1)(a)(b) of the HWM Rules, authorisation under

the Rules is not a pre-condition for obtaining consent to establish or to operate. It is submitted that when the impugned order dated 09.04.2018, was passed, the application for renewal of authorisation was pending. Therefore, the same could not have been a reason for rejection of the renewal of consent to operate. It is submitted that the TNPCB had recommended for renewal of HW authorisation with 16 conditions, therefore, the reason stated in paragraph 3 of the impugned order dated 09.04.2018, is wrong. Further, it is submitted that while granting renewal of consent dated 07.09.2017, there was no specific condition that the test will be conducted in the Board's laboratory, as in the past i.e., from 2002, the test reports were submitted by the petitioner as conducted by M/s.Vimta Labs and if the petitioner had been informed that test has to be conducted through a particular laboratory, they were willing to do so. Further, even assuming that the test had to be conducted in the Board's laboratory or an accredited laboratory, it is only a remediable breach and cannot be a reason for closure.

33.With regard to construction of the gypsum pond, for the first time a direction was issued on 22.02.2018, to construct the gypsum pond in accordance with the CPCB guidelines which the petitioner would comply, but however the same cannot be done in five weeks, as its a 40 acre pond. Furthermore, even as per the guidelines issued in October 2014, the petitioner had time to comply till September 2019 and the same cannot be a ground for closure. Furthermore, at no earlier point of time, there was any allegation about gypsum except in the year 2003, when it was pointed out that there is excess stock which was later promptly disposed of by the petitioner.

34.With regard to the allegation of presence of heavy metals, arsenic, it is submitted that the arsenic level is below the deductible limit, the petitioner has done sampling in all 10 sites and all are within the regulatory limit of 5mg/l. Further, TNPCB in 2013, filed a counter affidavit before the Hon'ble Supreme Court stating that the petitioner is fully compliant and cannot

now take a contrary stand. The learned Senior Counsel referred to the various monthly reports, which were filed and submitted that the approach of the TNPCB should be fair and unbiased and their decision is open to judicial review to examine as to whether there has been a decision taken for collateral purposes.

35.It is reiterated that international practices of slag disposal clearly show that the copper slag is non-hazardous and hence, cannot be a pollutant and much less a reason for closure of the petitioner's plant. Similarly, gypsum is manufactured throughout the country and it is a non-hazardous material and the TNPCB takes a stand that it is the hazardous only in the case of the petitioner. If the stand taken by the TNPCB is to be accepted, then all fertiliser industries must be closed. Further, as per the guidelines issued by the CPCB, storage of gypsum is regulated and unless there is a violation of such regulation, the petitioner cannot be penalised. Furthermore, there is no allegation that the petitioner violated the storage regulation.

36.Further, the learned Senior Counsel made elaborate reference to the design which has been adopted for the storage pond and that being the reason, CPCB granted time till September 2019 for construction of the pond as per the new design. It is submitted that though there was no requirement for such a storage pond, which was imposed only in the year 2014, the petitioner had constructed a state of art storage pond as early as 1999 and the present guidelines is a change of specifications which the petitioner would achieve. Further, the learned Senior Counsel submitted as to the effect of non-maintenance of gypsum pond on account of disconnection of power supply and the consequences which will result, if there is a overflow due to rains and there is a likelihood of polluting the groundwater. Further, the learned counsel referred to the affidavit filed before the Committee constituted by the NGT and the observations made therein.

37.Mr.C.S.Vaidyanathan, learned Senior Counsel appearing for TNPCB submitted that the petitioner cannot refer to any of those documents

which were placed before the NGT, as all proceedings are *non est,* in the light of the order passed by the Hon'ble Supreme Court.

38.In response, Mr.C.A.Sundaram, learned Senior Counsel submitted that he is not putting forth an argument that the order of NGT or the observations of the Committee are binding, but the affidavits filed before the Committee/NGT can be relied on. Further, with regard to the usage of phosphogypsum, the learned counsel referred to the tender notifications issued by the various State Governments and governmental agencies for supply of gypsum for agricultural purposes or for the purpose of reducing alkalinity in the soil etc., which will clearly show that the material is non-hazardous. In October 2014, guidelines were issued for management, handling and disposal of phosphogypsum by the CPCB and only if there is a violation of the guidelines, action could have been initiated and there is no allegation against the petitioner as to which of the guidelines/regulation, the petitioner had

violated. Further, it is submitted that in the impugned order of closure, dated 09.04.2018, five observations were made to state that they were the basis of the order of closure, however, now the TNPCB has raised various other grounds in different form and that too, for the first time in the counter affidavit filed in the Writ Petitions.

39.It is submitted that the petitioner will be able to demonstrate that none of the grounds are sustainable, as the petitioner is fully compliant with all parameters. In this regard, the learned Senior Counsel had referred to the various documents filed in their typed set of papers. Further, it is submitted that as per the pollution norms, each industry is informed about the marker pollutants which would be generated in the manufacturing process and so far as the petitioner is concerned, the marker pollutants are arsenic, zinc and fluoride and only if there is an increase of these marker pollutants, an inference can be drawn against the petitioner and not otherwise. Further, it is

submitted that chlorides, sulphate and calcium are not marker pollutants of the petitioner and it is the TNPCB, who has to state as to who is responsible for increase of these parameters in the ground water, as there was no allegation earlier against the petitioner.

40.Continuing his arguments, the learned Senior Counsel submitted that in environmental matters, normally, the Courts will go one step ahead than what has been stated in the orders impugned before it. The questions, that will be normally posed, are has this industry caused pollution?; is this industry in a continuous sense causing pollution?; and is the alleged pollution being caused cannot be remedied?. It is submitted that unless all the above three tests are satisfied, the Court will not close the industry and this is so held in the judgment pertaining to the petitioner in ***Sterlite Industries (India) Ltd. vs. Union of India [(2013) 4 SCC 575]***. In other words, it is submitted that closure should not be resorted to, if there is a chance to remedy. It is

submitted that so far as the petitioner's case is concerned, none of the three tests have been satisfied, thus, the question would be, is the action of the respondents justified, which was taken based on the public reaction.

41.Further, by commenting upon the stand taken by the TNPCB in their counter affidavit, it is submitted that in several places the expression "may" cause pollution, has been mentioned and the same cannot be a basis for closure order, as proof or factum of pollution is *sine qua non*. Further, it is submitted that there is no material to point out that the petitioner was the reason for fall in standards of the groundwater and to say that the petitioner is the cause, is untenable when there are 67 other industries and that too, without conducting any source apportionment, such allegation could not have been made. Further, it is submitted that the Hon'ble Supreme Court in its judgment dated 02.04.2013, records that the 30 directions have been complied with by the petitioner and this finding of fact cannot be revisited. In this regard,

reference was made to the various directions, more particularly direction numbers 16(a) to (e).

42.Further, it is submitted that raw material is not tested for pollution and it is a by-product which has to be tested, this is so because by-product, what is eliminated in the manufacturing process, is to be disposed of after removing the toxic elements. Further, it is submitted that the details given in the tabulated statement in page 37 of the counter affidavit of the TNPCB are factually wrong and the information available after 20.12.2017 has not been disclosed in the counter affidavit. Further, the baseline figures, i.e., the parameter which existed prior to 1996, i.e., before the petitioner commenced operation or before the SIPCOT Industrial Complex came into existence, have not been mentioned. Further, by referring to certain figures in the details furnished in the counter affidavit, it is submitted that inference that has to be drawn is that the petitioner is not the cause for the pollution. Further,

it is reiterated that after the order passed by the Hon'ble Supreme Court dated 02.04.2013, all matters have been done and dusted and cannot be reopened.

43.Further, by referring to various documents, it is submitted that slag is non-hazardous and non-leachable, even as per the report of CPCB and, the stand taken by the TNPCB before this Court is untenable. Further, it is submitted that if the salinity level is high, it will reflect higher TDS levels. In this regard, the learned Senior Counsel referred to the groundwater year book for Tamil Nadu & Pondicherry to show that TDS level in Thoothukudi was always high attributing to the sea water and the salt pans etc. There was elaborate reference to the various documents, facts and figures to demonstrate that the TDS levels in Thoothukudi are high and within SIPCOT area, it is the lowest. It is submitted that report of the Central Water Organisation was challenged by the State by filing a Writ Petition before this Court, which was dismissed. Thus, it is the argument of the learned Senior Counsel that this

report destroys the case of the respondents and therefore, they wanted the report to be scrapped and failed in their attempt. Thus, it is submitted that there is no material to infer pollution and no scientific study has been done by the TNPCB and the reasons given for closure, are wholly unsustainable. Further, by filing a Writ Petition challenging the report of the Central Government will not only show there is malice in fact, but malice in law as well.

44.Further, with regard to the effect of the discharge made by the Thermal Power Plants, reference was made to the report filed by the respondents to show that heavy metals were present in the water which were discharged into sea by the Thermal Power Plants, yet no action has been taken against the thermal power plants by the respondents. It is further submitted that based on all these reports, the Hon'ble Supreme Court considered the matter and allowed reopening of the petitioner's industry and there cannot be

an order of closure by relying upon the very same report. Further, it is submitted that the report submitted by NEERI in the year 2007 was accepted by the Hon'ble Supreme Court in 2013 and the same cannot be revisited at this juncture. Further, reiterating as regards the type of gypsum pond provided by the petitioner, it is submitted that the petitioner has higher standards in their system and this system could not be operated, as the power supply was disconnected after issuance of the order of closure. Further, as per the report submitted by NEERI in the year 2011, the Secured Land Fill (SLF) is as per the CPCB guidelines and this report was accepted by the Hon'ble Supreme Court and the respondent did not report of any problem till 2018 and therefore, the order of closure should not have been passed.

45.The learned Senior Counsel referred to the parameters regarding nickel sludge residue and that nickel sludge is sold to authorised parties, the conclusion of the report more particularly, with regard to fluoride concentration etc. Thus, it is submitted that there must be a clear evidence

pointing towards pollution and it cannot be presumed. Further, if according to the respondents, copper slag is toxic and hazardous, then the other copper manufacturers like Hindustan Copper, Hindalco, etc., should not be permitted to operate, more so when they are not zero discharge units like the petitioner. Further, it is reiterated that the inspection report dated 27.02.2018, was not furnished to the petitioner and in the report, higher values from the years have been taken note of and it is not clear as to what value was adopted for the month of February 2018 and the petitioner had no notice of such inspection.

46.Mr.G.Masilamani, learned Senior Counsel appearing for the petitioner in W.P.No.5792 of 2019 questioned the validity of the impugned Government Order ordering permanent closure and sealing of the plant. It is submitted that the Government while ordering for sealing of the Unit and permanent closure of the plant, endorsed the order of closure passed by the TNPCB, whereas the TNPCB did not order for permanent closure and the

order was only non-renewal of consent to operate. Therefore, it is submitted that the State Government has to trace their power to a specific provision under the Act, as the Government Order refers to only Section 18(1)(b) of the Water Act.

47.Referring to the averments made in the affidavit filed in the writ petition, more particularly, paragraph 68, it is submitted that the order of closure of the Unit dated 23.05.2018, was passed by the Chairman of TNPCB in his individual capacity basing such action on the delegation of powers under Section 33A of the Water Act and Section 31A of the Air Act by the TNPCB to its Chairman, vide resolution dated 11.03.1994. Further, the order passed by the State Government is also in the individual capacity as Principal Secretary to Government. Therefore, it is submitted that the Principal Secretary to Government, vide his order dated 28.05.2018 endorsed his own order dated 23.05.2018 passed in his capacity as Chairman of TNPCB.

Therefore, it is clear that the State Government has not independently considered the matter before passing such drastic order of closure. Thereafter, the Chairman, TNPCB in his individual capacity passed consequential order dated 28.05.2018 relying upon G.O.Ms.No.72 dated 28.05.2018. Further, it is submitted that merely by stating that the order is passed in public interest cannot be countenanced and the Government Order is in complete violation of the petitioner's fundamental right to do business as protected under Article 19(1)(g) of the Constitution of India. Further, it is submitted that if the Government states that it has taken a policy decision, then the procedure under the Rules is required to be followed in respect of policy decision and nothing is on record to show that the impugned order of closure is a policy decision of the Government.

48.Referring to the averments set out in the counter affidavit filed by the first respondent, it is submitted that if the first respondent states it is a

policy decision of the Government, then it should be shown that such decision was scientifically arrived. It is submitted that the petitioner industry is a permitted industry and the field of activity is not *res extra commercium,* though it is classified as a red category industry. Therefore, such permitted industry cannot be closed for reasons set out by the first respondent in their counter affidavit. It is further submitted that if the Government endorses the order of the TNPCB refusing to renew the consent to operate, it cannot order for permanent closure, because the petitioner can comply with the conditions and would be able to obtain renewal of consent to operate. Therefore, it is submitted that in a democracy, mobocracy has no room. Elaborating on this submission, the learned Senior Counsel referred to the counter affidavit filed by the first respondent and submitted that the stand taken by TNPCB is, if compliance is effected, the petitioner would be able to secure renewal of consent to operate. It is submitted that the only power invoked for passing the impugned Government Order is Section 18(1)(b) of the Water Act, which

gives power to the State Government to issue directions to the Board and it shall be bound by such directions. It is submitted that crucial words in the said provision are "such" and "such directions", which would necessarily mean 'Functions of the Board', as enumerated in Section 17(1) of the Water Act. It is submitted that the 'Functions of the Board' are exhaustive and not illustrative. So, therefore, such directions contained in Section 18(1)(b) of the Water Act cannot be interpreted to mean any directions. In sub-clauses (a) to (o) of Section 17(1) of the Water, the 'Functions of the Board' have been exhaustively set out and none of the clause gives power for permanent closure of an industry. It is further submitted that order of permanent closure is an independent cause and the same has been ordered without issuing a show cause notice to the petitioner.

49.The learned Senior Counsel submitted that he is not arguing that the impugned order is vitiated for not following the Wednsebury principles of

reasonableness, because the order is challenged on the ground of lack of jurisdiction and as well as on merits. Further, the counter affidavit filed by the first respondent does not show that any material was placed before the Government for ordering permanent closure. It is submitted that on a reading of the counter affidavit filed by the first respondent, more particularly, paragraph 18, it is seen that the Government surrendered to the pressure, because the only reason assigned is that the people started agitation. If according to the respondents, the Unit has to be permanently closed as there is a reference to Article 48(A) of the Constitution of India, there should be unabated pollution and there is no material produced by the TNPCB to establish that there was unabated pollution.

50.Referring to the documents filed, it is submitted that the emission from the Sulphur Dioxide plant of the petitioner is 1%, that of the power plant is 4%, whereas from the Government power plant, it is 50%. That apart, there

are several red category industries in the SIPCOT Industrial Complex and the petitioner cannot be isolated. Further, it is submitted that due regard should be given to the impact of the closure of the plant on the employees and considering all the factors, the order of permanent closure is wholly arbitrary and unreasonable, apart from being vitiated on the ground of lack of jurisdiction.

51.Mr.A.R.L.Sundaresan, learned Senior Counsel appearing in W.P.No.5764 of 2013, which challenges the order of closure dated 29.03.2013 and in W.P.No.5774 of 2019, which challenges the order of disconnection of electricity supply dated 29.03.2013 reiterating the factual matrix which ultimately culminated in the order of closure, submitted that the District Environmental Engineer, Thoothukudi, by letter dated 23.03.2013, addressed to the District Collector, Thoothukudi though states that the ambient air quality value shot up suddenly from 20ug/m^3 to 62ug/m^3 even though within

the limit of 80ug/m^3 and the value was immediately reduced to 10ug/m^3 around 6.35 a.m. The District Collector has also issued a press release on 24.03.2013 informing the general public that they need not fear of any gas leak. On the very same day, an inspection was conducted at about 16.30 hrs., and perusal of the inspection report would show that the allegations in the show cause notice are wrong. Further, the figures with regard to the ambient air quality values will be reflected in the Care Air Centre (CAC). Further, by referring to the proceedings of the District Collector dated 25.03.2013, it is seen that the petitioner is not the only industry in the area and precisely for such reason, the District Collector while constituting a Committee for conducting safety audit inspection, decided to do the same for all industries in the area. The petitioner while responding to the show cause notice in their reply dated 27.03.2013, apart from other things, submitted that during Sulphuric Acid Plant (SAP) heat up process on 23.03.2013, sulphuric acid plant bed was maintained at required temperature using furnace oil and the gas was routed through Tail Gas

Scrubber (TGS) and during the alleged gas leak complaint, the values of the SAP, SO_2 online analyser as reported by CAC were found to be within the prescribed norms of 479PPM, as the software captures the actual emission values even though the software was in maintenance mode inadvertently during the period.

52.The learned Senior Counsel referred to an information furnished under the Right to Information Act dated 28.03.2013, from the Government Medical College Hospital, Thoothukudi, to show that there was no in-patient admitted in the hospital on 23.03.2013 affected by any alleged leakage of gas. Referring to the report of the Deputy Chief Scientific Officer, Mobile Environmental Laboratory, TNPCB, Thoothukudi, addressed to the District Environmental Engineer dated 02.04.2013, it is submitted that maximum of sulphur dioxide emission was 22.0ug/m as against the permissible upper limit of 80ug/m3. Therefore, it is submitted that the impugned order has been

passed on assumptions. The learned Senior Counsel drew the attention of this Court to a report dated 28.04.2013 submitted by the Expert Committee appointed by the NGT.

53.Mr.C.S.Vaidyanathan, learned Senior Counsel appearing for TNPCB objected to placing reliance on the said report, as the order passed by the NGT has been set aside by the Hon'ble Supreme Court. This report is pressed into service to show that the Sulphur dioxide Analysers for stack gas are in working condition; emission from all the stacks were within the permissible limit prescribed by the TNPCB when the plant was in normal operation and in addition, the ambient SO_2 concentration in all the sixteen monitoring stations were within the prescribed limit when the plant was in normal operations. It is submitted that in the said report, it has been pointed out that M/s.V.V.Minerals and Pigments Limited, situated very near by the petitioner, causes emission, which could have impact on the monitoring of the

results at manual monitoring station installed at location-All India Radio. Further, the Committee noted that to control air pollution, the Unit has installed wet scrubbers, etc., installed TGS for SAPs in March 2006, which has helped reduction of emission level lower than 1kg/tonne of sulphuric acid produced and has listed out various measures taken by the petitioner to control emission from the plant specifically noting that all stacks are provided with trips and inter logs to trip process in case of deviations. Further, the report states that the total emissions from all the stacks were 0.1% which is equivalent to 0.98MT. Hence, the total sulphur fixed in the process and the stacks is 99.93% which is equivalent to 1108.92 MT.

54.The learned Senior Counsel further elaborated upon the mass balance of copper smelter by referring to the said report. It is further submitted that the report clearly states that the emission from all stacks meet the prescribed standards for SO_2 of 1250mg/nm^3, i.e. 477PPM. The learned

Senior Counsel referred to the emission statistics of polluting industries functioning in and around Thoothukudi as reported by the Expert Committee and submitted that the emission load of SO_2 from Thoothukudi Thermal Power Station is 51.3 Tonnes Per Day (TPD), which will go to show the inferences arrived at by the Expert Committee that there are other industries which contribute the major portion towards polluting the atmosphere. The learned counsel also referred to the recommendations made by the Committee which the petitioner was always ready and willing to comply. It is therefore submitted that from 2013 till the impugned order of closure, there was no complaint of air pollution and such drastic order of closure followed by an order of permanent closure ought not to have been passed. Further, by referring to various provisions of the Air Act, it is submitted that the intention of the legislature is only to regulate, which has been lost sight of by the respondents. The learned counsel by referring to the trend graphs for the parameters of SO_2 and NO_2 during the period 2014-2019 which have been

filed by the respondents, had argued that the emission levels were far below the standards fixed, which will go to show that the petitioner has not violated the parameters.

55.Mr.P.S.Raman, learned Senior Counsel instructed by Ms.Rohini Moosa, learned counsel appearing in W.P.Nos.5756, 5771 and 5773 of 2019 submitted that the question would be as to whether the public opinion will prevail or the pollution control laws would prevail. It is submitted that there was absolutely no material available for ordering permanent closure. Apart from these two main points, it is submitted that he would address the Court with regard to the compliance regarding stack height requirement, compliance regarding green belt requirement, whether there was any misrepresentation with regard to the extent of land, when the petitioner obtained environmental clearance during 2007 and subsequently, for enhancement of production capacity by the process of de-bottlenecking, was there any pollution on

account of movement of copper ore from the Port to the petitioner's factory. It is further submitted that the care and maintenance of the plant after the order of closure is with the State and the entire responsibility is that of the State. It is submitted that finally, it is the duty of the petitioner to dispel the myths about Sterlite and demonstrate as to how the myths are *ex facie* false. It is submitted that the first and foremost requirement for a Red Category Industry is to obtain no objection from the State Government, which was granted to the petitioner on 01.08.1994. Thereafter, environmental impact assessment study was done by TCS and a report was submitted to the Central Government.

56.The MoEF by order dated 16.01.1995, granted environmental clearance for production of 391 TPD. It is submitted that the period during which the petitioner had operated the Unit without renewal of consent to operate was dealt with by the Hon'ble Supreme Court and a fine of Rs.100 Crores was imposed on the petitioner and the very same reason cannot be used

to close down the petitioner. It is submitted that it is not the general public, who want closure, but only a small section of people, that too, they were objecting the expansion of the Unit.

57.To demonstrate as to how the impugned action was on account of public opinion, the learned counsel submitted that an organization, based in UK, called "Foil Vedanta", made incorrect statements on 18.02.2018 and 24.02.2018 and immediately thereafter on 27.02.2018, the TNPCB conducts inspection and submits a report running to about 200 pages recommending renewal of consent to operate. However, ignoring the said report by a single page order dated 09.04.2018, the application for renewal of consent to operate was rejected citing five reasons. The petitioner was not furnished with the inspection report dated 27.02.2018. It is submitted that there must be record to show that between 27.02.2018 and 09.04.2018, there was unabated pollution and the application for renewal of consent to operate should be rejected and

without any application of mind, the respondent had passed the order. The petitioner filed an appeal before the Appellate Authority under the Air Act on 12.04.2018 and in the counter affidavit filed by the TNPCB, only the five grounds mentioned in the order dated 09.04.2018 were dealt with and no other points were canvassed. When the appeal was pending, on 22.05.2018, the protesters entered the residential colony of the employees of the petitioner and caused extensive damage to the vehicles parked therein, which is estimated to be around Rs.17 Crores. Thereafter, on the ill-fated day, firing was resorted to in which, 13 people died and as a knee-jerk reaction, an order of closure was passed by the Government.

58.The learned Senior Counsel referred to the representation stated to have been signed by 1,60,000 people supporting Sterlite and seeking for revoking the order of closure. Since the entire matter is fully covered by the legislation, rule of law will have to prevail and public opinion cannot be the

basis for ordering closure. Further, it is submitted that order of closure can be resorted to, only if the TNPCB or the State Government comes to the conclusion that the situation is irremediable. Further, it is submitted that the fine amount, which was paid by the petitioner, i.e., Rs.100 Crores has not been spent for any remedial measures and the amount stated to have been spent are for other works such as installing bore wells, cleaning open wells, etc.

59.Referring to the decision in the case of ***P.Sivakumar vs. Secretary, Ministry of Home, Government of Karnataka & Ors. [Manu/SC/1281/2016(SC)]***, it is submitted that people cannot become law unto themselves. In support of the argument that the State succumbed to the public out cry, reliance was placed on the decision of the Kerala High Court in ***M/s.Harrisons Malayalam Limited vs. State of Kerala & Ors. [Manu/KE/0911/2018]***. On the second aspect as to whether, there was material available for ordering permanent closure, it is submitted that the

petitioner had placed the utilization plan proposing SAP and import of phosphates to enable production of phosphoric acid for fertilizer industry. Further, there are a copper rod plant, a 32 megawatt captive power plant, diesel based captive power plant for maintenance and to meet the emergency power shutdown and, a 160 megawatt thermal power plant with 100% fly ash utilization programme as per TNPCB norms with full-fledged RO system and on account of the impugned order, all the above independent entities were also closed down.

60.Referring to the reports, it is submitted that there was no complaint against the petitioner and the report clearly shows that there is nothing adverse against the petitioner in the year 2016, 2017 and 2018 and hence, there is no material to term the petitioner as a 'chronic polluter' for ordering, sealing and permanently closing. It is submitted that the word 'closure' is not synonymous with sealing and to explain this concept, further

reliance was placed on the decision in the case of ***Gopinath Private Limited vs. Department of Environment, Government of N.C.T. of Delhi & Ors. [MANU/DE/0190/1998]***.

61.It is further submitted that ever since 2013, there has been no allegation of air pollution caused by the petitioner and there is nothing to indicate that the poor quality of the ambient air is due to the petitioner. It is submitted that after the order of closure, samples stated to have been drawn from undisclosed locations and report of analysis of such samples cannot be the basis for ordering permanent closure. Though it may be true that in the report submitted by NEERI during 2005 there were certain observations against the petitioner in respect of certain parameters, after the decision of the Hon'ble Supreme Court in ***2013 (4) SCC 575 [Sterlite Industries (India) Limited vs. UoI & Ors.]***, the NEERI report of 2005 cannot be put against the petitioner. It is submitted that the allegation with regard to stack height is that

it should be 84m, but only 60.38m have been provided, the production capacity has not been increased since 2007 and as per the consent conditions, the required stack height is only 60.38m and the petitioner has provided two separate stacks for the two SAPs and therefore, the petitioner is compliant of that condition. With regard to the green belt, it is submitted that 25% of the total area is to be maintained as a green belt.

62.Before the Hon'ble Supreme Court, the Member Secretary, TNPCB filed an affidavit dated 06.10.2012, confirming that out of 30 directions issued by the TNPCB, 29 directions have been complied. This will go to show that the petitioner had complied with the green belt requirement. That apart, in the order of renewal of consent to operate, there is no reference to non-compliance of the green belt requirement. The learned Senior Counsel also referred to the inspection report submitted by the TNPCB before the Hon'ble Supreme Court. As per the directions issued in the order dated

27.08.2012, which states that green belt of around 26 hectares of land has been developed to the width of 25 meters and among other things, recommending for proper watering of the area for increasing the growth rate, stated that the direction regarding greed belt has been complied with. Therefore, it is submitted that on this score also, the application for renewal of consent could not have been rejected. Regarding the allegation of misrepresentation of the land area and with regard to the classification of the land, it is submitted that for increase of production by adopting the process of de-bottlenecking, no additional land is required.

63.The petitioner in their reply dated 19.01.2007, addressed to MoEF have clearly set out all facts and there is no misrepresentation. The environmental clearance for de-bottlenecking was granted on 09.08.2007, which will also show that there was no misrepresentation and subsequently, the MoEF also passed orders on 25.06.2012. With regard to the classification

of land, it is submitted that the factory is situated in an industrial complex where apart from the petitioner, there are other red category industries and such an objection raised by the private respondents at this distance of time, is to be rejected as a frivolous objection. The land was allotted by SIPCOT and after following due procedure, the plant was established and has been functioning since 01.01.1997 and therefore, such contention needs to be rejected. Further, it is submitted that the frivolous allegations have been made against the petitioner by the impleaded parties with regard to the health condition of the local public.

64.Referring to the study conducted by the Public Health Department, it is submitted that there is not a single incident of arsenic poisoning in the area. It is further submitted that the power under Section 31A of the Air Act can be invoked for emergent situations and the only emergence that is shown by the petitioner is the shooting incident in which, 13 people

died. It is submitted that on 26.03.2018, the plant was shutdown for maintenance and the entire plant will be dismantled and would be put back after repairs and maintenance. The TNPCB alleged that on 23.05.2018, the petitioner attempted to start production which is impossible, because the entire plant was dismantled. On 25.05.2018, i.e., immediately after closure order by TNPCB, the petitioner addressed the Chairman, TNPCB pointing out that the plant requires serious maintenance, leaks were noticed and if maintenance is not done, the plant and machinery worth about Rs.2,250 Crores will be let to rot. It is submitted that when such was the request made by the petitioner, the shocking response as could be seen from the counter affidavit filed by the State Government is that the petitioner should dismantle and leave. Thus, the learned Senior Counsel submitted that the order rejecting renewal of consent to operate and the order of permanent closure passed by the Government, are wholly illegal and arbitrary.

65.Mr.C.S.Vaidyanathan, learned Senior Counsel appearing for the TNPCB submitted that the first misconception that the petitioner has had is that they have fundamental right to carry on their activity and their only duty is to rectify the mistakes pointed out. It is submitted that everyone has a right to get clean air and clean water, and everyone has a duty to ensure that the water is clean and the air is clean, and it is on this fundamental principle that a right is given to establish an industry and carry on its activities and this is more so in an inherently polluting industries, such as the petitioner. It is submitted that the Government is not an adversary, but it is exposing the cause of all; the TNPCB is the watchdog, which is vested with this sacred duty. It is submitted that it is incorrect to state that the protest led to the closure, but closure was ordered as pollution continued, despite remedial steps stated to have been taken by the petitioner.

66.It is submitted that the Hon'ble Supreme Court in the earlier round of litigation, found that the petitioner was polluting, yet gave an opportunity, but the petitioner continued to pollute and now, they seek a premium to continue pollution. The petitioner's attempt was to make a show of compliance, when the fact remains that there was no fair and complete compliance and pollution is continuing, and giving further opportunity would be putting a premium.

67.Referring to the preamble of the Water Act and the statement of objects and reasons, it was pointed out that the Government came to the conclusion that the existing local provisions are neither adequate, nor satisfactory and therefore, there is an urgent need for introducing a comprehensive legislation, which would establish unitary agencies in the Centre and States to prevent abatement and control of pollution of rivers and streams, for maintaining or restoring wholesomeness of such watercourses and

for controlling the existing and new discharges of domestic and industrial wastes.

68.The statement of objects and reasons in the Amendment Act 44 of 1978 proposed to amend the Act to provide for appointment of the Chairman of the State Board; it felt that there should be an integrated approach for tackling the water and air pollution problem and proposed that the existing Boards for Prevention and Control of Water Pollution should be authorised to perform functions relating to prevention, control and abatement of air pollution.

69.The learned Senior Counsel referred to the statement of objects and reasons of Amendment Act 53 of 1988 and pointed out that the amendments propose to make it obligatory on the part of a person to obtain the consent of a relevant Board for establishing or taking any steps to establish an

industry, operation or process, which is likely to cause pollution of water, and also to empower the Boards to limit their consents for suitable periods so as to enable them to monitor observance of the prescribed conditions. Further, it proposed to empower the Boards to give directions to any person, officer or authority including the power to direct closure or regulation of offending industry, operation or process or stoppage of regulation of supply of services, such as water and electricity.

70.The learned Senior Counsel has drawn the attention of this Court to the various definitions under the Water Act and in particular, Section 2(d), which defines "occupier"; Section 2(e), which defines "pollution"; Section 2(g), which defines "sewage effluent"; Section 2(j), which is an inclusive definition of "stream"; and Section 2(k), which is an inclusive definition of "trade effluent".

71.Referring to Sections 17(1)(f) & (l) of the Water Act, it is submitted that sub-Clause (l) uses the expression “any order”, which would mean 'order of consent to establish, order of consent to operate' and therefore, the Board has sufficient powers to vary or revoke an order of consent to establish, or an order of consent to operate.

72.The learned Senior Counsel has referred to Section 18(1)(b), Section 24(1)(a), Section 24(1)(b) and Section 25 of the Water Act to substantiate his case that the Government is empowered to issue directions, which shall be binding upon the TNPCB. Elaborating his submissions, with reference to Section 25 of the Water Act, it is submitted that there is no fundamental right to establish such a polluting industry, because it is a right to establish the industry with the consent of the Board. This is clear from sub-Section (4) of Section 25, because conditions as to the nature of composition, temperature, volume, etc., of the discharge are mentioned. Further, Section 27

of the Water Act empowers the Board to refuse or withdraw consent to establish or operate.

73.Section 33-A of the Water Act was inserted by Act 53 of 1988 and it commences with a *non obstante* clause and it gives supervening power to the Central Government. Thus, all the above provisions cast a duty on the petitioner to strictly comply with the provisions of the Water Act.

74.Referring to the statement of objects and reasons of the Air Act, it was pointed out that an integrated approach was required for tackling environmental problems relating to pollution and therefore, proposed that the Central Board, constituted under the Water Act, will also perform the functions of the Central Board for the Air Act. The statement of objects and reasons of Amendment Act 47 of 1981 speaks of "eliciting public cooperation" and any person should be able to complain to the Courts

regarding violations of the provisions of the Air Act after giving sixty days notice to the Board. Thus, it is submitted that the public have a role to play in the matter relating to pollution.

75.The learned Senior Counsel referred to the various provisions of the Air Act, viz., Section 2(a), which defines "air pollutant"; Section 2(b), which defines "air pollution"; Section 2(h), which defines "chimney"; and Section 2(j), which defines "emission". Sections 17(e) & (f) to highlight the "Functions of the Boards"; Section 18 was referred to with regard to power to issue directions; and in particular Section 21 to emphasis the point that no person shall without the previous consent of the Board, establish or operate any industry/ plant in an air pollution controlled area. Therefore, there is a prohibition from establishing such an industry/ plant and by grant of consent, this prohibition is lifted. Reference was also made to Section 31A, which deals with "power to give directions" and Section 52, which deals with

"overriding the effect of the Air Act" notwithstanding inconsistent therewith contained in any enactment other than the Air Act.

76.Referring to the statement of objects and reasons of the National Green Tribunal Act, 2010 (for brevity "the NGT Act"), it is submitted that it was noted that the right to help the environment has been construed as a part of the right to life under Article 21 of the Constitution in the judicial pronouncement in India; the National Environment Tribunal Act, 1995, was enacted to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environmental Tribunal for effective and expeditious disposal of cases arising from such accident, with a view to give any compensation for damages to persons, property and the environment noting that the Tribunal had very limited mandate, was not established. Therefore, it was decided to establish the NGT. Thus, it is submitted that the right to healthy environment,

cast a duty on every person that he or they do not impair the healthy environment.

77.It is further submitted that Courts while exercising power under Article 226 of the Constitution, has also propounded the theory of Polluter Pays Principle; Precautionary Principle; and Principles of Sustainable Development and the above three principles have been incorporated in Section 20 of the NGT Act and the same will equally apply to proceedings under Article 226 of the Constitution. Thus, it is submitted that the burden is on the petitioner to show that they do not cause any pollution.

78.Referring to the statement of objects and reasons of the Environment (Protection) Act, 1986, it is submitted that an urgent need was felt for the enactment of a general legislation on environmental protection which, *inter alia*, should enable co-ordination of activities of the various

regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents, threatening environment and deterrent punishment to those, who endanger human environment, safety and health.

79. The learned counsel referred to Section 2(a), which defines "environment"; Section 2(b), which defines "environmental pollutant"; Section 2(c), which defines "environmental pollution"; Section 2(d), which defines "handling"; and Section 2(e), which defines "hazardous substance". It was submitted that the petitioner had contended that copper slag and gypsum are not hazardous, as it has been removed from the list of processes generating hazardous wastes in Schedule-I under the HWM Rules and this submission is incorrect.

80.After referring to the various provisions of the HWM Rules, and Schedule-I thereto, it is submitted that the wastes mentioned in serial nos.7.1 to 7.5 are all hazardous wastes to be kept in the SLF. Further, it is submitted that no finality can be attached to Schedule-I to the Rules and inclusion or exclusion is not final. It is submitted that though in the note below Schedule-I, it has been stated that phosphogypsum is excluded from the category of hazardous wastes, the TNPCB will be able to establish that it is a hazardous waste, if it falls within the ambit of Section 3(17) of the Act.

81.Referring to Part-C in Schedule-III of the HWM Rules, which furnishes the list of hazardous characteristics, in particular, Code Nos.H12 and H13, it is submitted that if the leachate from copper slag or leachate from gypsum possess any of the characteristics in Code Nos.H1 to H11 or H12 and H13, it will be hazardous. Further, Part-B of Schedule-III gives the list of other wastes and one of the other wastes as per Basel No.1100 is slag from

copper processing containing arsenic, lead or cadmium is other waste. Thus, it is submitted that the petitioner's responsibility does not cease upon sale of these wastes. This is precisely the reason as to why the expression "may" has been used in the counter affidavit in several places, while referring to that the petitioner's operation "may" cause pollution and therefore, the criticism made by the petitioner with regard to the phraseology adopted in the counter affidavit is unwarranted.

82.In support of his contention, the learned counsel referred to the following decisions :-

(i) M.C.Mehta vs. UoI [(1987) 4 SCC 463];

(ii) Vellore Citizens Welfare Forum vs. UoI [(1996) 5 SCC 647];

(iii) M.C.Mehta vs. Kamal Nath & Ors. [(1997) 1 SCC 388];

(iv) A.P.Pollution Control Board vs. Prof.M.V.Nayudu [(1999) 2 SCC 718];

(v) M.C.Mehta vs. UoI [(2004) 12 SCC 118];

(vi) Intellectuals Forum, Tirupathi vs. State of A.P. & Ors. [(2006) 3 SCC 549];

(vii) Tirupur Dyeing Factory Owners Association vs. Noyyal River Ayacutdars Protection Association & Ors. [(2009) 9 SCC 737];

(viii) Rural Litigation and Entitlement Kendra vs. State of U.P. [1989 Supp (1) SCC 504];

(ix) Chairman, All India Railway Recruitment Board & Anr. vs. K.Shyam Kumar & Ors. [(2010) 6 SCC 614]; and

(x) PRP Exports & Ors. vs. Chief Secretary, Government of Tamil Nadu & Ors. (2014) 13 SCC 692.

Thus, it is submitted that in the present case, the TNPCB and the Government applied the Precautionary Principle, which involves anticipation of environmental harm and the onus of proof in environmental matters is on the

party, who wants to alter the existing circumstances and such party should bear onus, as the presumption should be in favour of environment.

83.The learned Senior Counsel elaborately referred to the rapid Environmental Impact Assessment (EIA) report, the environment impact study, the toxic gas effect, etc. Reference was also made to the orders granting consent to establish, general conditions and other specific conditions, to buttress his submission that the Government and TNPCB did not permit storage of huge quantity of slag and gypsum and, the direction was to clear the same from time to time.

84.Referring to the NEERI reports, it is submitted that the parameters clearly exceed the desirable standards of the soil samples, 100 times than the desired parameters. The observations of the inspecting team were also referred to wherein, there is a reference to a possibility of acid rain.

The learned Senior Counsel also referred to the Articles written by eminent persons to explain the toxic effect of the waste generated. Reference was made to the NEERI Report dated 09.02.2019, and in particular, the characteristics of solid waste, the tracer study, quality of water (not potable), etc. It is submitted that based upon the directions issued by the Division Bench dated 30.04.1999, consent to operate was granted on 20.05.1999, which was valid till 30.09.1999 and, till 2005, no order of consent to operate was granted and in the interregnum, the unit was operating based on Court orders.

85.Reference was also made to the environmental audit reports to support the contentions that from 1999 to 2005, the matter concerning pollution had not improved. Further, the petitioner failed to comply with the direction to remove the huge quantities of gypsum lying in stock without being cleared and there is a primary responsibility on the petitioner to remove the same including the copper slag and it cannot state that the TNPCB did not

direct them to do so. Further, the water in certain wells was unfit for drinking; cadmium, chromium and copper were in excess than the prescribed standards; the TDS and sulphates were in excess in the trade effluent; and the soil had high content of heavy metals. It is submitted that condition was imposed to dispose of phosphogypsum by December, 2008, but the petitioner did not comply with the same thereby, violating such condition.

86.Further, it is submitted that the Government of India recognised that slag can be hazardous or non-hazardous and only non-hazardous slag can be used for road construction and it is required to be done as per the CPCB guidelines. The order of consent granted, which was valid till 31.03.2009, and the conditions imposed are additional conditions over and above the original conditions, which were imposed. Pursuant to the directions issued by the Hon'ble Supreme Court, by order dated 25.02.2011, NEERI was appointed to submit a report, which they had submitted in May, 2011 and at that juncture,

TNPCB did not renew the consent to operate. The samples, which were drawn from various locations, showed high level of TDS, even in trade effluent. Referring to the order passed by the Hon'ble Supreme Court dated 10.10.2011, the learned Senior Counsel submitted that the Hon'ble Court directed the TNPCB to issue appropriate directions.

87.The learned Senior Counsel referred to the report submitted pursuant to the directions issued by the Hon'ble Supreme Court. It is submitted that the directions issued by the TNPCB are continuing directions and the compliance reported can, at best, be up to that date and there is an obligation on the part of the petitioner to continue to comply with all conditions. It is further submitted that the test laid down by the Hon'ble Supreme Court is regarding the power of judicial review, when the High Court exercises power and orders closure and not when TNPCB exercises power and if the petitioner is a defaulter, that is good enough for the TNPCB to exercise

its power. Thus, the decision of the Hon'ble Supreme Court arose out of an order passed by the High Court ordering closure and not deciding the correctness of an order passed by a regulating agency, the TNPCB.

88.It was well open to the TNPCB to refer to all antecedent facts and exercise of powers and the TNPCB has not taken decision solely based on past events, also the events which took place after the order of the Hon'ble Supreme Court and there is a clear observation in the judgment of the Hon'ble Supreme Court that the TNPCB can exercise its power. Further, the Hon'ble Supreme Court has recorded that the NEERI report of 2005 clearly states that there was pollution. Since NEERI had filed the report before the Hon'ble Supreme Court stating that 29 out of the 30 directions had been complied with, the Unit was permitted to operate. In the said judgment, there is a positive affirmation that there was pollution and in spite of imposition of fine of Rs.100 crores on the petitioner, it has not had any deterrent effect on them.

Further, the Hon'ble Supreme Court in the said decision has recognised the right of the public to protest and therefore, to state that the Government ordered closure based on public protest and to term the action as “malice” in law is erroneous. Thus, the Hon'ble Supreme Court did not give a clean chit to the petitioner, but left it to the Board to issue appropriate directions.

89.Elaborate reference was made to the levels of TDS, chlorides, sulphate, nitrates, etc. The learned Senior Counsel referred to the various documents, observations during inspection, observations regarding the gypsum pond, action to be taken by the Unit, recommendations etc., and submitted that nowhere it clearly exonerates the petitioner and the recommendation is that the petitioner's case may be considered and it does not has any words to state that the petitioner should be granted renewal of consent. Further, with regard to the copper slag, which has been stored in the private patta land, the responsibility was to be fixed on the petitioner, the petitioner cannot disown its

responsibility upon sale of the slag as per the terms and conditions imposed on it. Thus, it is submitted that action has been taken with due application of mind and the decision is proper and *bona fide*.

90.Further, the learned Senior Counsel had referred to the comparative chart of the various reports prepared by NEERI during 1994, 1998, 1999, 2005 and 2011 and submitted that they clearly show that the petitioner's operation has had an impact on the environment and after they stopped, the environmental conditions have visibly improved, this leads to an inevitable conclusion that the petitioner has caused water pollution. The learned Senior Counsel referred to the sample reports and also the places where the samples were drawn from and the leachate liquid was analysed and therefore, to state that it is non-leachable is an unscientific statement. The petitioner, earlier, had taken a stand that gypsum is leachable, but now would contend that it is non-leachable. Elaborate reference was made to the Ambient

Air Quality (AAQ) monitoring, ground water monitoring and soil sample monitoring to substantiate that the petitioner is a highly polluting industry.

91.With regard to the construction of gypsum pond, though five years time was given as per the CPCB guidelines on 17.10.2015, the period comes to an end in September, 2019. So far as the application for renewal of the hazardous waste management authorisation or renewal of consent is concerned, on every occasion when the application was defective, the same was returned for valid reason and not mechanically and alleging *mala fide* against TNPCB is not tenable.

92.In the impugned order dated 09.04.2018, one among the several reasons for rejecting the application for renewal of consent is that during the inspection on 22.02.2018, it was found that the petitioner had to construct gypsum pond as per CPCB guidelines and the same remained non-compliant

till 31.03.2018. Firstly, the submission of the petitioner is that even before guidelines were framed, the petitioner had a state of art facility. Further, there was reference to certain orders passed by the TNPCB granting extension of time to certain other industries. The argument put forth by the petitioner stating that their existing facility was already a state of art facility can hardly come to the aid and assistance of the petitioner while seeking to challenge the impugned order on the said ground. The petitioner does not enjoy any exemption from the new design, which the CPCB has stipulated. The petitioner did not apply for grant of additional time to comply with the requirement. During 2014, the condition was imposed and five years times was granted. Until 31.03.2018, the petitioner did nothing about it. Therefore, to state that the same cannot be a reason for rejection of renewal, is untenable.

93.The 2nd respondent has stated that the petitioner generates around 3,200 tons of phosphogypsum per day and has a gypsum pond area of about 16

Ha, within excess of 4 lakhs tons of gypsum stored therein. The characteristics of the product is stated to be a grey coloured damp fine grain powder which is a by-product of the phosphoric acid plant of the petitioner's unit. The concentration of metals in this phosphogypsum depends upon the composition of the phosphate rock. Main concerns with respect to phosphogypsum includes high fluoride concentration, which may leach and contaminate groundwater; heavy metals, which may enter into the food chain; and high acid content, which may cause fish mortality and affect pH levels of the ground water. After referring to the characteristics of the phosphogypsum generated by the petitioner, TNPCB states that there is significant chance of pollution to the ground water, if the phosphogypsum is not properly managed. The guidelines issued by CPCB state that all the existing phosphoric acid plants presently following the practice of stacking the phosphogypsum may continue the same operation for a period of five years from the enforcement of the guidelines and during this period, all such phosphoric acid plants should

periodically monitor the surface and ground water resources around the phosphogypsum stack(s) as per the monitoring protocol suggested by the guidelines through a laboratory recognised under the EP Act. For assessment of contamination if any, such assessment report be submitted once in a year to the CPCB through the respective State Board with remarks, if any. In case, adverse environmental impacts are observed, then such phosphoric acid plant is required to submit remediation plan which may also include existing phosphogypsum utilization plant seeking approval of CPCB. The guidelines issued by the CPCB granted time till September, 2019 and for construction of the pond as per the new design. The petitioner had not initiated any steps to comply with the guidelines. The petitioner had also not complied with the disposal mandate for gypsum to avoid accumulation consequently, to avoid ground water pollution. Reports state that huge quantity of phosphogypsum lies within the factory premises unattended.

94.With regard to the air pollution aspect, it was submitted that several persons, including doctors, had given statements that there was a huge spike and causing severe throat irritation, eye irritation to people in the locality. In this regard, the learned Senior Counsel referred to the statements of certain Doctors, the Deputy Director of Health Services, etc. Further, the learned Senior Counsel submitted that certain values in the reports pertain to the span gas general interpolation and this interpolation was done to match the explanation given by the petitioner stating that they used 4000 PPM cylinders with diluter. Thus, the right approach would be to take an overall look of what had happened in these 20 years; there are ample materials to show that the air, water and the quality of soil had deteriorated. Therefore, TNPCB would be well justified in erring on the side of caution. The action taken by TNPCB is in good faith, the conditions imposed on the petitioner are clear, it cast a definite obligation on them and adverse inference can be drawn against the petitioner. Reliance was placed on the decision of the Hon'ble Supreme Court

in ***U.P. Pollution Control Board vs. Modi Distillery & Ors. [(1987) 3 SCC 684]; Reliance Life Insurance Company Limited & Anr. vs. Rekhaben Nareshbhai Rathod [(2019) 6 SCC 175];*** and ***Federation of Obstetrics and Gynaecological Societies of India vs. UoI & Ors. [(2019) 6 SCC 283].***

95.Mr.K.V.Viswanathan, learned Senior Counsel appearing for the Government of Tamil Nadu submitted that a conjoint reading of Sections 2(e), 17(1)(l), 18(1)(b), 25, 27, 33(a), 41 & 44 of the Water Act clearly vest in the State Government, the power to pass orders for permanent closure and similar powers can be exercised under the Air Act, which is clear from a conjoint reading of Sections 2(a), 17(1), 18(1)(b), 21, 21(4) and proviso to Sections 31A, 37, 39 & 40 of the Air Act. It is submitted that the only option left for the Government is to order for permanent closure and that he will sustain the order passed by the Government by addressing arguments on the various issues, which have been put forth by the petitioners.

96.Summing up the contentions advanced by the petitioner, it is stated that they are (i) source of power for the Government to pass an order of permanent closure; (ii) whether, the exercise of such power was justified?; (iii) whether the decision to order permanent closure was vitiated on account of malice in law?; (iv) the distinction between closing and sealing; (v) that the petitioner has been singled out and the action is arbitrary; (vi) no pollution has been caused by the petitioner; (vii) in the light of the 2013 judgement of the Hon'ble Supreme Court, nothing prior to the said judgement can be looked into or taken note of by the respondents for passing the order of closure; and (viii) whether, the delegation of power to the Chairman was proper and the effect of such delegation.

97.It is submitted that the Water and the Air Acts were enacted to provide for prevention, abatement and control of pollution and it is not necessary to wait till pollution has occurred. One of the modes of prevention

and control of pollution is by imposing conditions in the consent orders, which are meant for substantial compliance, consent orders are time bound and have a specific expiry date. Thus, violation of any of the conditions imposed in the consent order, would be violation of the provisions of the Act and thus, illegal. Thus, it is contended that the petitioner's argument amounts to challenging the consent condition, which is impermissible.

98.Emphasising on the principles relating to environmental protection, it is submitted that it was argued by the petitioners that there is scientific uncertainty as to the role of the petitioner in causing pollution and in the absence of source apportionment study, no liability can be fastened on them, on the contrary, there is enough evidence that the petitioner has caused pollution. It is submitted that the authorities functioning under the statute are bound by the doctrine of public trust and can act on mere apprehension of pollution. Protection of environment would take precedents over economic

interest. The parameters for judicial review differ from matter to matter and in matters of environment, it stand on a different pedestal to adopt a low threshold on the Government. Thus, mere potential of pollution by slag is enough, once slag has not been safely managed and has been dumped across the district. Reliance was placed on the decision in the case of ***Vellore Citizens Welfare Forum*** (supra); ***M.C.Mehta [(2004) 12 SCC 118]*** (supra); ***Kamal Nath*** (supra)***; Prof.M.V.Nayudu*** (supra)***; Intellectuals Forum*** (supra); ***M.C.Mehta [(1987) 4 SCC 463]*** (supra); ***M.C.Mehta & Anr. vs. UoI [(1987) 1 SCC 395]*** and ***Sayyed Ratanbhai Sayeed vs. Shirdi Nagar [(2016) 4 SCC 631]***.

99.It is further submitted that public interest would stand at a higher pedestal than individual commercial interest and the good of the public at large is the ultimate good, i.e., *"salus", "populi", "suprema", "lex"*. Thus, it is submitted that the role of the State is to act in the greater welfare of the

collective and public welfare, which is to be treated to be a zenith of law. In support of such contention, reliance was placed on the decision in the case of ***G.Sundarrajan vs. UoI [(2013) 6 SCC 620]***. It was submitted that one of the arguments of the petitioner is that the 2013 judgement of the Hon'ble Supreme Court would operate as a *res judicata.* In this regard, it is submitted that the 2013 judgment arose out of an order passed by this Court directing closure, whereas the present case is, where there is refusal of consent ordered by the TNPCB and permanent closure ordered by the Government followed by orders by TNPCB. Therefore, the two situations are qualitatively different.

100.It is submitted that the 2013 judgment of the Hon'ble Supreme Court that for a Court to order closure, threshold is very high. In a case of a closure order by the authorities, the said threshold cannot apply and what will come into play is the principle set out in the judgment referred above. Furthermore, in paragraph 51 of the 2013 judgment, it has been clearly stated

that the judgment will not stand in the way of the authorities issuing directions including 'closure'. Therefore, the argument of the petitioner is a complete misreading of the 2013 judgment. Further, the 2013 judgment does not give a clean-chit to the petitioner and it is not that the petitioner is a non-polluting industry. So far as the 30 conditions are concerned, it is a continuing obligation on the petitioner and on violation of any one of the same, the Board is empowered to close down the industry.

101.The learned counsel referred to paragraphs 42, 44, 45, 50 and 51 of the 2013 judgment to support his contention that the order of 'closure' was well within the jurisdiction and not hit by *res judicata.* Referring to a few of the 30 directions, it is submitted that they are continuous in nature and not an one time compliance. It was pointed out that it is an admitted fact that slag was dumped along Uppar odai, beyond the stipulated 10 hectares of land and beyond the restricted stacking height of 12m. Furthermore, there is no *res*

judicata in environmental matters and in this regard, placed reliance on the decision in the case of ***Rural Litigation and Entitlement Kendra*** (supra) and also paragraphs 39, 39.1 & 39.2 of the 2013 Sterlite judgment. Thus, while reiterating that power vests with the Board/ State for ordering closure as referred above, State has considered the TDS levels in Thoothukudi are higher than what is safe and needs to be mitigated and as a preventive measure, the State can resort to closure. It is further contended that in this decision-making process, it is not necessary that the petitioner alone is the sole cause of high TDS level and mere causatory or contributory impact is enough for such an order to be passed.

102.In the case of ***Gopinath Pvt. Ltd.*** (supra) referred to by the petitioner, the only issue was whether sealing of the industry was valid, distinct from closure. The Delhi High Court held that if the direction of closure was not acted upon, then the Delhi Pollution Control Committee would take recourse under Section 37 of the Act, which is a penalty provision.

However, in the petitioner's case, the TNPCB vide order dated 09.04.2018, refused renewal of consent to operate and vide order dated 12.04.2018, directed the unit not to resume operation without obtaining prior consent. The other order, which was passed subsequently dated 28.05.2018, was due to violation of conditions in orders dated 09.04.2018 and 12.04.2018 and it is only, vide order dated 28.05.2018, sealing of the petitioner's unit was directed. Therefore, this is a factual distinction from that of ***Gopinath Pvt., Ltd*** (supra). Furthermore, in ***Gopinath Pvt., Ltd.*** (supra) the subject matter of impugned order was only a small part of its business, unlike the petitioner. Thus, it is contended that the power to order sealing falls within the purview of the incidental and ancillary powers as preventive measures against a repeat commission of an offence. In this regard, reliance was placed on the decision in the case of ***Khargram Panchayat Samiti & Anr. vs. State of West Bengal & Ors. [(1987) 3 SCC 82]*** and ***Indian Council for Enviro-Legal Action & Ors. vs. UoI & Ors. [(1996) 3 SCC 212].***

103.Countering the submissions of the learned Senior Counsel for the petitioner that the petitioner has been singled out, it is argued that the State has the power to strike against the largest, most polluting, most contumacious, most callous industry, specially where the industry has a history of pollution. In this regard, it is submitted that single person legislation has been held to be permissible under law and in this regard, reliance was placed on the decision in the case of ***S.P.Mittal & Ors. vs. UoI & Ors. [(1983) 1 SCC 51]; State of H.P & Anr. vs. Kailash Chand Mahajan & Ors. [1992 Supp (2) SCC 351]***. Referring to the sequence of events from 1995 to 2013 and thereafter, till 2018, it is submitted that there were enough materials available with the respondents much before the closure or sealing of the plant and it is not a knee-jerk reaction, consequent upon the firing incident; there is no *malice in law* as cogent material exists to sustain the order of permanent closure. It is submitted that there is specific reference to Article 48A of the Constitution in the impugned Government Order. The State, acting as *parens patriae,* has a

duty to the people to ensure protection of environment and to act, where there is reasonable apprehension, suspicious or proof of adverse effect on environment. In furtherance of that role, the State has a responsibility to take all such policy decisions as may be necessary to mitigate or alleviate high pollution in an area.

104.It was argued that while ordering closure, the State Government took a policy decision and this Court exercising power of judicial review, will not review the merits of the decision, but the decision-making process only and referred to the decisions in the case of ***Sarvepalli Ramaiah (Dead) & Ors. vs. District Collector, Chittoor [(2019) 4 SCC 500],*** **(para 42)**; ***Tata Cellular vs. UoI [(1994) 6 SCC 651]; Balco Employees' Union vs. UoI & Ors. [(2002) 2 SCC 333]*** and ***M.P.Oil Extraction & Anr. vs. State of M.P. & Ors. [(1997) 7 SCC 592]***. It is further submitted that the order refusing to renew the consent to operate, dated 09.04.2018, sets out five grounds and all five

grounds are squarely made out and assuming that even if some grounds are justifiable by the authorities, the order is to be upheld, as the grounds are inextricably linked and they cannot be separated from the valid grounds stated in the notice.

105.To explain the doctrine of severability, reliance was placed on the decision of the Constitutional Bench in the case of ***Shewpujanrai Indrasanrai Ltd vs. Collector Of Customs & Others [1959 SCR 821 (Constitution Bench)]***. It is submitted that the petitioner is not a citizen of India and they cannot claim any right under Article 19(1)(g) of the Constitution. To support such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***State Trading Corporation of India Ltd. vs. Commercial Tax Officers & Ors. [AIR 1963 SC 1811]*** and ***Romesh Thappar vs. State Of Madras [AIR 1950 Madras 124]***.

106.Reliance was placed on the decision in the case of ***Raj Kumar Shivhare vs. Assistant Director, Directorate of Enforcement & Anr. [(2010) 4 SCC 772],*** to explain the meaning of the word "any", which means "all" and with that in mind, if Section 17(1)(l) of the Water Act is read, then the Board has power to make any order, vary any order or revoke any order and closure would fall within the expression "any order" as contained in the provision. It is submitted that the petitioner is a chronic polluter, who is callous and does not deserve any discretionary relief from this Court. In the order granting consent to establish both under the Water and Air Acts, multitude of conditions were imposed, which would reveal that the petitioner's industry being established had great potential of causing pollution and without proper environmental oversight by the petitioner and by the TNPCB, there would be harm to the environment. The salient conditions included not to undertake any work in natural watercourse. This condition was violated when the petitioner dumped copper slag at Uppar Odai. The petitioner was to collect water

samples from the nearby watercourses and get the same analysed by the Board to develop robust baseline data. This could not be done through EIA, as it was a rapid EIA and hence, this condition was imposed. The petitioner feigned compliance of the requirement to dispose of the slag and indiscriminately dumped the same across the district. The condition was imposed for disposal of gypsum to avoid accumulation and consequent ground water pollution. The petitioner violated this condition, as over four lakh metric tones slag was accumulated at the premises at the time when the consent was refused. There was a specific condition for disposal of hazardous and non-hazardous wastes and avoid accumulation on the premises. The petitioner violated this condition by operating without authorisation, not furnishing details of authorised recyclers and allowed great accumulation of wastes within the premises. The petitioner did not comply with the condition regarding the green belt requirement and literally, there is no green belt available even till date.

107.It is submitted that the argument of the petitioner amounts to challenging the consent condition, which is not permissible. The submissions on non-hazardous/hazardous nature are immaterial and amount to challenging the consent conditions of the consent to operate dated 07.09.2017, which directed creation of a barrier between the slag and the river and further, directed removal of heaped and dumped copper slag along Uppar Odai. The learned counsel referred to the various other consent conditions and also pointed out the 11 sites in and around Thoothukudi, where copper slag was dumped without any waste management and after dumping the same, the petitioner claimed to have disposed of the slag from its own premises and one of the 11 sites was a patta land in Uppar river belt wherein, 3,52,000 metric tones was heaped.

108.It is further submitted that on 11.09.2017, TNPCB issued further directions to the unit to remove the heaped and dumped slag and to

construct the barrier. The petitioner replied on 28.10.2017, stating that slag was sold to the land owner, who was getting the land surveyed and on survey, would construct a barrier. It is pointed out that survey was done between October and December 2017 by the District Administration and there was no delay. Independently, the Sub-Divisional Magistrate, Thoothukudi, issued a notice to the landowner for removal of slag from the river bank, as the same restricted the flow of the river and caused floods in the past. The landowner sent a reply to the Sub-Divisional Magistrate stating that the land was not being measured, but the documents show that the land was measured and demarcated. Thus, it is contended that the petitioner was acting in collusion with the landowners to delay/defeat the removal of slag from the river belt, as despite survey of the land being done within a week on the request of the landowner, the slag was not removed and the landowner submitted fresh request for survey and the petitioner pleaded helplessness to carry out its operations, these facts are deemed to have been admitted by the petitioner.

The CPCB certification states that slag is a stable non-hazardous solid waste and can be used in cement industry etc., cannot be an universal rule, as it depends upon the type of slag and whether one exposed to natural causes, would it release into environment its polluting components.

109.Further by referring to the reports submitted by the agency M/s.SGS in October 2018, it is submitted that levels of heavy metals and TDS in the groundwater and around the slag dumped were at elevated levels. The damage caused by the petitioner by indiscriminate dumping across the district and in the river belt, is largely irreversible and protection of environment should have precedence over economic interest, the petitioner does not have any right under Article 19(1)(g) of the Constitution. The State and the TNPCB, as held in ***Prof.M.V.Nayudu's*** case can even err on the side of caution and prevent activities that may cause serious and irreversible harm. There is no other unit of such magnitude as that of the petitioner. The learned

Senior Counsel put forth the principle of inter-generational equity, need to protect the environment for the future and submitted that loss of few tones of copper does not matter and environmental concerns are supreme and though late, should be zealously protected.

110.Mr.Vijay Narayan, learned Advocate General appearing for the State submitted that the challenge to the order dated 09.04.2018, impugned in W.P.No.5772 of 2019 requires to be decided, as if this Court is an appellate forum and the challenge to the Government Order, directing permanent closure, is to be decided on the principles of judicial review applied to petitions under Article 226 of the Constitution of India. It is submitted that in the performance of the functions under the Act, every State Board shall be bound by the directions of the State Government and the petitioner seeks to limit this power to the functions enumerated in Section 17 of the Act, which is incorrect. The functions of the Board cannot be restricted to Section 17, but

has to be gathered from the various provisions of the Act including the preamble.

111.Referring to Sections 17(b) and 17(l)(i), it is submitted that these provisions are wide enough to give power to the State Government to issue directions. Similarly, the other functions of the Board in terms of Section 24(1)(a)(b) of the Act, would also be relevant. Thus, it is submitted that the obligation of every person is to cease and desist from polluting and there is a corresponding obligation on TNPCB to prevent such pollution and this is also one of the functions of the Board. It is further submitted that the obligation of person to obtain consent is in terms of the provisions of the Act and this is a continuing process and the obligation on the Board is to prevent a person operating without a valid consent.

112.The learned Advocate General referred to Sections 26, 27, 27(ii), 30, 32, 33 and 33A to substantiate his case that the Government is

empowered to issue directions under Section 18, which power was exercised while passing the impugned Government Order. It is further submitted that power to regulate includes power to prohibit. There is a specific power conferred under the Act to prohibit, direct closure and when both are read together, it shows that there is power to completely shutdown. It is submitted that the petitioner industry has been faced with two orders of closure by Court, three orders of closure by the TNPCB within a short span of time. Therefore, considering all these factors, the State noted the plight of the public *vis-a-vis* the commercial interest of the petitioner and passed the impugned Government Order of permanent closure.

113.The learned counsel referred to the preamble of both the Water and the Air Acts and the Water Act that was adopted by the Tamil Nadu Legislature and in this regard, referred to Article 252 and Article 253 of the Constitution of India. It is further submitted that by virtue of treaty signed by

India, the Parliament had enacted the Air Act and the Environment Protection Act and, that our Constitution emphasis need to protect environment. The learned counsel also referred to Article 243ZD relating to 'committee for district planning'; Article 243ZD(3)(a)(i) relating to 'environmental conservation'; Article 243W, regarding 'power of an authority and responsibilities of municipalities', etc; and Article 243W(a)(i)(ii) and (b) and submitted that the Constitution has given wide powers to local bodies to preserve the environment. It is the State, which has to protect the environment and the Centre can only draw down the standards. This is precisely the reason, in the impugned Government Order, there is a reference to Article 48A of the Constitution of India.

114.Referring to the decision in the case of ***Vellore Citizens Welfare Forum*** (supra), it is submitted that the Hon'ble Supreme Court explained the theory of "sustainable development, must anticipate, prevent and

attack causes of environmental degradation". There is no proven scientific classified effect and probably, we will know of it after fifty years. Thus, the onus is on the petitioner to show that their action is environmentally benign.

115.The learned counsel referred to the decision in the case of ***Prof.M.V.Nayudu*** (supra) wherein, the uncertain nature of scientific opinion has been mentioned, whom the burden of proof is cast in environmental matter etc. Thus, no one can predict the long term effect and the State has invoked 'Precautionary Principle' to completely prohibit the petitioner industry. With regard to the argument of the petitioner that in terms of Section 5 of the Environment Protection Act, it is only the Central Government which can give directions for closure, it is submitted that Section 5 is identical to Section 33A and the Central Government has delegated its power under Section 5 to the Government of Tamil Nadu by notification dated 10.02.1998, in exercise of power under Section 23 of the Environment Protection Act.

116.It is further submitted that in the impugned Government Order, the order of closure of TNPCB, the expert body, has been endorsed. A finding of fact has been recorded by the expert body and in the absence of any serious challenge to the decision making process, Article 226 of the Constitution cannot be resorted to, to upset the factual finding by an expert body. Referring to paragraph 71 of the affidavit filed in W.P.No.5756 of 2019, it is submitted that there is an averment that the State has power under Section 5 of the Environment Act to close. By notification dated 10.04.2001, in S.O.No.327(E), this power has been delegated to the Chairman, TNPCB. In support of such contention, reliance was placed on the decision in ***UoI & Ors. vs. Hindustan Development Corporation [(1990) 3 SCC 223].***

117.By way of alternate submission, with regard to the power to order closure/prohibit, traceable to Section 33A of the Act, it is submitted that as laid down by the Hon'ble Supreme Court in the case of ***State Of Tamil***

Nadu vs Hind Stone Etc, [(1981) 2 SCC 205], power to regulate includes power to prohibit. On the same aspect, reliance was placed on the decision in ***K.Ramanathan vs. State of Tamil Nadu & Anr. [(1985) 2 SCC 116],*** as the petitioner is a chronic defaulter, the power to prohibit had to be exercised. With regard to the Board Proceedings in B.P.No.9, dated 11.03.1994, the petitioner contended that such power can be exercised by the Chairman only in cases of urgency. It is submitted that the Board Proceedings give the background for delegation and a reading of the same will show that it is absolute delegation and therefore, the Chairman can exercise his powers in all circumstances and such proceedings has been in vogue ever since 11.03.1994. In this regard, reference was also made to Article 162 and Article 166 of the Constitution of India to further explain the power of the State exercisable under Section 18, the process to be followed, the extent of executive power and the method as to how power is exercisable, that is, in the name of the Governor.

118.It is further submitted that the decision to permanently close was a collective decision, the files were circulated to the Environmental Secretary, the Law Secretary, the Hon'ble Minister for Environment, the Hon'ble Minister for Law and the Hon'ble Chief Minister. All the five top ranking officials have signed the files and there is no allegation that the Rules under Article 166(3) have not been followed. Therefore, the argument of the learned Senior Counsel for the petitioner that the Chairman of the Board is wearing "two hats" is incorrect. It is submitted that the learned Senior Counsel for the petitioner argued that the impugned Government Order was a *mala fide* action and it was a knee-jerk reaction. *Mala fides* are of two kinds, viz., malice in law and malice in fact. The petitioner is guilty of continued pollution, they cannot attribute any *mala fides* to the Government, as *mala fides* and guilt are antithesis; if the petitioner is guilty, the Government's motive becomes irrelevant. Referring to the decision in ***Bharat Iron Works***

vs. Bhagubhai Balubhai Patel & Ors. [(1976) 1 SCC 518], it is submitted that victimisation is antithesis to proved misconduct. In other words, proved misconduct is antitheses of victimisation. Reliance was also placed on the decision in ***Bharat Forge Company Ltd. vs. Uttam Manohar Nakate [(2005) 2 SCC 489]*** and ***Dhampur Sugar (Kashipur) Ltd. vs. State of Uttaranchal & Ors. [(2007) 8 SCC 418].***

119.It is further argued that there was no knee-jerk reaction, but it was a prompt action by the State. In case like that of the petitioner, prompt action is required, as people are living under constant threat of air and water being contaminated. Therefore, the Government exercising the doctrine of public trust and applying the 'Precautionary Principle', ordered closure. Referring to the facts recorded by the Hon'ble Supreme Court in the 2013 judgment, it is submitted that the petitioner could not establish their unit in three of the States, viz., Gujarat, Goa and Maharashtra and having established

here (Tamil Nadu) and being guilty of continued pollution and a chronic defaulter, they need to close down and the impugned orders may be sustained.

120.Mr.Vaiko, appearing in person, who was impleaded as one of the respondents in the writ petitions, prefaced his submissions by stating that he does not propose to support the stand taken by the Government or that of the TNPCB, but would individually substantiate that the petitioner has to be closed down and they should be directed to vacate Thoothukudi District and damage caused to the environment should be remedied at their cost. It is submitted that this is so because by change of the party in power, policies will change, but he has been relentlessly fighting for the past twenty years to close down the petitioner.

121.It is submitted that during 1992, the Maharashtra Industrial Development Corporation allotted 200 Hectares of land in the Coastal

Ratnagiri for the petitioner to setup the Copper Smelting Plant. The plant proposed at a cost of Rs.700 Crores was to produce 60,000 tonnes of copper every year. The people of Ratnagiri protested, because the economy of the locality largely depended on agricultural, horticulture and fishery. The famous alphonso mangoes were grown in the coastal strip and other high yielding economic crops such as cashew nuts and coconut were grown in the area. The public started agitations and after year long agitation, the State Government thought fit to appoint a Committee to investigate the potential environmental hazardous of the proposed Copper Smelter Unit. While the researchers were collecting data, the petitioner started to erect building to house its workers. The results of the research activity reached the public and protests were taken seriously. The local Panchayat denied permission to carry on construction. However, the State intervened and permitted construction to go on. On 13th December, 1993, about 20,000 people entered the property and demolished the building. The protesters made it clear that they were not anti-industry, but

were against polluting industries and ultimately, the project was halted. The petitioner did not approach the High Court or the Supreme Court challenging the decision taken in Maharashtra, but chose to come to Tamil Nadu and the Government in 1994, granted clearance within a period of fourteen days.

122.It is submitted that in January, 1997, he had filed a writ petition and narrated about the facts leading to the filing of the said writ petition. It is submitted that the TNPCB did not do anything about the stack height. The other specifications were not enforced and the TNPCB acted as a stooge to the petitioner.

123.The petitioner though was fully aware of the toxic heavy metal, recovery and operation, they have not taken any single step to recover such heavy toxic metals like nickel, lead, cadmium, bismuth, chromium, etc. Referring to a tabulated statement filed along with the written submission, it

was submitted that the petitioner has committed major violation of the conditions stipulated in the consent order granted under the Air Act. The total sulphur, which was generated, was worked out using a formula. With regard to the sludge phosphogypsum, it is submitted that it consists considerable radioactive substance and has been dumped inside the industry in a haphazard manner. Thus, the health of all the people in the locality has been grossly affected.

124.Referring to his written submission, Mr.Vaiko referred to the report of M/s.Vimta Labs and also referred to the averment set out in the common affidavit. It is submitted that he personally had discussion with experts and obtained details. It is submitted that the effluent treatment plant was inadequate and found to be in choked condition. Thus, he would submit that the TNPCB colluded with the petitioner. It is further submitted that the facts would clearly show that NEERI has lost its credibility. Thus, the

emphasis of Mr.Vaiko is on the inadequacies, which have been pointed out, the non-compliance of consent conditions, non-functional equipments resulting in clogging, the stack height requirement having not been complied with and therefore, the petitioner is required to be permanently closed and ordered to shift.

125.Ms.R.Vaigai, learned Senior Counsel assisted by Ms.B.Poongkhulali, learned counsel for the 9th respondent, the impleaded party, submitted that before the petitioner came to Thoothukudi, they tried establishing the industry in Gujarat, Goa and Maharashtra, but faced opposition in each of the States and could not establish their Copper Smelter Plant. The petitioner is a red category large scale industry and according to TNPCB, it is categorized as one of the seventeen industries identified by MoEF as heavily polluting industry. There has been opposition to the establishment of the petitioner ever since the inception of the plant, but owing

to insufficient public hearings, the public did not get an opportunity to express their sentiments against the petitioner. It is submitted that Courts have always looked at balancing economic interest with environmental interest and held that protection of environment will always take precedent over economic interest. In this regard, reliance was placed on the decision in the case of ***P.V.Krishnamoorthy vs. Government of India*** *in* ***W.P.No.16630 of 2018 etc., batch*** dated ***08.04.2019***.

126.It is further submitted that a restriction of freedom under Article 19(1)(a) has to pass a more stringent test than a restriction on the right under Article 19(1)(g) of the Constitution of India. Environmental Laws and Orders, thereunder, are in furtherance of the Directive Principles of State Policy (DPSP). Any action taken in public interest is a reasonable restriction on the right under Article 19(1)(g) of the Constitution and an individual's right is secondary to public interest. Therefore, it is submitted that the decision relied

on by the petitioner in the case of ***Sony Pictures Releasing of India vs. State of Tamil Nadu & Ors. [(2006) 3 MLJ 289]*** and ***S.Rangarajan Etc vs. P.Jagjivan Ram [1989 SCC (2) 574]*** are not relevant.

127.To support such contention, the learned Senior Counsel referred to the decision of the Hon'ble Supreme Court in ***Dharam Dutt & Ors. vs. UoI [(2004) 1 SCC 712]*** and ***Karnataka Live Band Restaurants Association vs. State of Karnataka [(2018) 4 SCC 372].*** It is submitted that the conduct of the petitioner, as a polluting industry, should be taken into consideration. The petitioner has been found guilty of violating the various laws and conditions of consent orders, both in India and abroad.

128.In ***Goa Foundation vs. Sesa Sterlite [(2018) 4 SCC 218],*** the Hon'ble Supreme Court found that the company along with others, carried on mining operations without obtaining valid licence and bypassed regular

licensing procedures, which were aided by the State's negligence. It is further submitted that Vedanta Limited violated the Forests Right Act in Orissa and during the year 2013, the Hon'ble Supreme Court asked the Village Grama Sabhas in Niyamgiri to decide whether they wanted the mining activity in the District and the villagers overwhelmingly decided against Vedanta's operations in that region. In this regard, reliance was placed on ***Orissa Mining Corporation Ltd. vs. MoEF and others [(2013) 6 SCC 476].***

129.It is further submitted that the petitioner is a large red category hazardous industry and can be located only in an area classified as 'special industrial and hazardous use zone'. However, they are located in an area partly classified as 'general industrial use zone and agricultural use zone' under the Master Plan of Thoothukudi and located in close proximity to residential areas and densely populated urban areas.

130.Mr.C.A.Sundaram, learned Senior Counsel appearing for the petitioner submitted that the impleaded parties cannot expand the scope and, the pleadings now sought to be introduced by the impleading party should not be accepted especially, when the pleadings are based on a writ petition, which is now pending before the Madurai Bench of this Court in W.P.(MD) No.16005 of 2018.

131.In response to the said objection, Ms.Vaigai, learned Senior Counsel submitted that this is the first proceedings in which, the public are being heard as a party and therefore, the impleaded respondent could not have placed the materials anywhere earlier than in this proceedings. In any event, voices of the people have to be heard.

132.Continuing her submissions on the zoning aspect, it is submitted that the Government of Tamil Nadu in G.O.Ms.No.1730, dated 24.07.1974,

clearly distinguished the various zones and highly polluting industries such as the petitioner, which can be located only in an area specifically designated as 'special industrial and hazardous use zone'. Referring to the Master Plan and land use schedule of Meelavittan village of the year 1995, it is submitted that Meelavittan village does not have any survey number/land classified as 'special industrial and hazardous use zone' and the lands are classified as 'general industrial use zone'. That apart, the petitioner is located on lands classified as 'general industrial and agricultural use zone', as could be seen from the land use map filed by this respondent.

133.It is further submitted that the petitioner while submitting their application for renewal of consent, vide application dated 31.01.2018, claimed that the land use classification is institutional use zone, which is incorrect. As per the reply received under the Right to Information Act, dated 19.09.2018, about 'special industrial and hazardous use zones' in Thoothukudi, only two

areas namely, Swaminatham and Palayakayal are shown as 'special industrial and hazardous use zone' and this document also finds place in the paper book filed by the petitioner. Thus, it is submitted that the petitioner, which is located in Meelavittan village could not have been permitted to be located, as it is not in a 'special industrial and hazardous use zone' in Thoothukudi District.

134.It is further submitted that in terms of the provisions of the Town and Country Planning Act, 1971, more particularly, Sections 17, 24, 26(2), 28 and 32, any town plan, before being finalized, has to be published in the newspapers and opportunity should be afforded to persons, who are likely to be affected likewise, any change in the Master Plan should also follow the same process. Thus, there cannot be any deviation from the Master Plan without following the procedures enumerated under the said Act. It is submitted that this issue has not been addressed by the petitioner in their

pleadings both in the main writ petitions as well as in their preliminary rejoinder to the counter affidavit of the 9th respondent. However, in the documents filed by the petitioner, certain correspondence from SIPCOT to Directorate of Town and Country Planning (DTCP) have been enclosed. These documents indicate that SIPCOT applied to DTCP for approval of the industrial layout, which was granted with full knowledge that major chemical industries will be located within zone A & B. The SIPCOT, which has developed the industrial complex, is not the planning authority and the layout prepared by SIPCOT cannot be approved in violation of the Master Plan. The petitioner has filed a copy of G.O.Ms.No.256, dated 05.12.2012, which is in respect of effecting changes in the Master Plan with respect to car parking facility in upper floors and none of them relate to G.O.Ms.No.1730, which imposes a clear ban on locating such industries in other than areas specifically designated as 'special industrial and hazardous use zone'.

135.The other documents, which the petitioner has filed in the paper book, do not relate to Thoothukudi District. The petitioner contended that all the red category industries are located in the industrial complex, which averment would go to establish that the petitioner has admitted about the illegal location of their industry and attempts to claim equality in an illegality which is impermissible under law. In support of the contention, the following decisions were referred to:-

(i) RK Mittal vs. State of UP [(2012) 2 SCC 232];

(ii) M.C.Mehta vs. UoI [(2004) 6 SCC 588];

(iii) Lal Bahadur vs. State of UP [(2018) 15 SCC 407];

(iv) GV Granites vs. VA Arunachalam [2015 SCC OnLine Madras 7608];

(v) Mclure vs. Davidson, 258 Ga. 706, 373 S.E. 2D 617;

(vi) Hamer vs. Belgium, Application No.21861 of 2003, dated ***27.11.2007;***

(vii) Bitou Local Municipality and Timber Two Processors CC & Ors. Case No. 9221 of 2007, dated ***11.06.2008*** (High Court of South Africa)***;***

(viii) M.C.Mehta vs. UoI [(1996) 4 SCC 351];

(ix) Bangalore Medical Trust vs. BS Mudappa [(1991) 4 SCC 54]; and

(x) Virendra Gaur vs. State of Haryana [(1995) 2 SCC 577].

136.It is further submitted that the petitioner has played fraud on the Government of India with regard to the extent of land held by them. It is submitted that the petitioner obtained clearance while expanding their project from 900 TPD to 1200 TPD stating that they are in possession of 172.17 Ha while they continued to operate till the date out of an extent of 102.3 Ha. The petitioner has shown the same parcel of land towards the clearances obtained for both Copper Smelter Plant I and Plant II. It is submitted that the TNPCB

while granting No Objection Certificate for setting up a Copper Smelter Plant by order dated 01.08.1994, among other things, imposed a condition that the petitioner shall have adequate space for development of green belt for a minimum width of 250m or width contemplated under Environmental Management Plan, whichever is greater around the battery limit of the industry. When NEERI inspected the plant and submitted their report on 17.11.1998, stated that TNPCB must exercise extreme care in permitting the establishment of any new water intensive industry and/or expansion programme.

137.In the report dated 22.09.2004, submitted by the Monitoring Committee constituted by the Hon'ble Supreme Court, it was specifically mentioned that there is a mountain of Arsenic bearing slag as also of phosphogypsum; there are some issues still to be resolved in terms of the hazardous industry of the Arsenic bearing ETP wastes, which were earlier

contained in inadequately designed hazardous waste land fills. Further, it was pointed out that when the existing waste management practices of the unit are not in compliance with the environmental standards and the solid hazardous wastes generated also require to be properly managed, particularly in terms of available space and infrastructure, it would be inadvisable to consider expansion of the unit at that stage. When environmental clearance was granted by MoEF dated 22.09.2004, for expansion from 391 TPD to 900 TPD, the total area of the project was mentioned as 95.51 Ha of which, 30.65 Ha was earmarked for proposed expansion. An application was made in the year 2005 by the petitioner for consent to establish the expanded capacity from 900 TPD to 1200 TPD.

138.In the application with regard to the land details, it was mentioned that land would be required for de-bottlenecking (84.50 Ha) thereby, bringing the total land required after de-bottlenecking to 172.17 Ha.

Based on such representation, consent to establish the expanded capacity was granted on 02.11.2006. While submitting their application on 02.01.2007 to MoEF seeking *post facto* environmental clearance for the expansion from 900 to 1200 TPD, it is stated that 172.17 Ha was existing land under three LTPA scenario in December 2005, additional 6.8 Ha has been procured through SIPCOT and hence, the existing area in common is 102.31 Ha, 69.86 Ha is in the acquisition process and payment already made to SIPCOT. This additional land was stated to be utilized for future greenery development, solid waste storage and for other future purposes. Based on this representation, environmental clearance was granted to the petitioner. Thereafter, on 16.01.2007, MoEF addressed the petitioner seeking clarification with regard to the land holding in reply dated 19.01.2007, the stand taken by them in the application was reiterated. In February, 2007, M/s.Vimta Labs prepared the rapid environmental impact assessment for expansion from 900 TPD to 1200 TPD, where the extent of land was mentioned as 172.17 Ha.

139.MoEF granted *post facto* environmental clearances for the expansion on 09.08.2007. On 15.08.2008, the petitioner addressed the Government with regard to the allotment of land in the industrial complex for the Copper Smelter Plant II. As could be seen from the environmental clearance order dated 01.01.2009, it is clear that the land acquired from SIPCOT is 92.5 Ha. A Lease Deed was executed by the petitioner with SIPCOT on 16.02.2009 for an extent of 36.15 Ha, which is situated in SIPCOT industrial complex, Phase-II. In the inspection report of TNPCB with regard to the Copper Smelter Plant-I dated 05.05.2009, the total extent of land occupied is mentioned as 172.17 Ha, the land earmarked for solid waste storage/disposal, 29.14 Ha.

140.The other proceedings and correspondence between the petitioner and TNPCB and that of the MoEF were referred to, to demonstrate that there is gross discrepancy in the extent of land. In the report prepared by

M/s.Vimta Labs in June, 2015, for Copper Smelter Plant-II, it has been stated that the petitioner has 233.7 Ha in Zone-I, Copper Smelter Plant-II is located in 102.31 Ha and Copper Smelter Plant-II will be located in 128.805 Ha of land. Thus, it is submitted that non-availability of land is of serious consequence, as higher production of copper, more effluent will be generated and without adequate land/storage, handling of wastes is not possible. Thus, it is submitted that clearances and consents obtained by the petitioner from the MoEF and TNPCB were based on the representation that the land holding for Copper Smelter Plant would be 172.17 Ha.

141.During 2004, when the petitioner was producing at the rate of 900 TPD, they held land to an extent of 97.1 Ha, which is not sufficient for the petitioner to store slag and from 2007, they were producing 1200 TPD and were operating with an extent of 102 Ha. It is submitted that in addition to the land requirement for storage of waste, land is to be used for green belt and for

other infrastructure. Thus, it is submitted that the petitioner has a history of non-compliance and to state that the petitioner has been singled out is a fallacious argument. The order of closure is not a knee-jerk reaction, but a very belated action initiated by the government. With regard to the green belt requirement, it is submitted that the petitioner does not have the requisite green belt.

142.It is submitted that MoEF recommended a green belt of width of 500m. According to the No Objection Certificate issued by TNPCB, the petitioner initially was required to have 250m width of green belt. However, this was reduced to 25m by TNPCB in a most arbitrary manner. As per the consent conditions, 25m of green belt along the battery of the project is mandatory, but the photographs produced by the petitioner shows greenery only in patches. In terms of the guidelines issued by CPCB, there is a scientific reasoning for creation of a green belt. As per the NEERI report of

May, 2011, the green belt cover of the industrial area was only 12.1% as against the requirement of 25%. The petitioner did not plant the required number of saplings to comply with the green belt condition.

143.Further, it is submitted that the petitioner does not have adequate land to have the required extent of green belt cover. This is so because, when the environmental clearance was granted on 09.08.2007, the petitioner was operating the Copper Smelter in an extent of 102.31 Ha and an extent of 69.38 Ha was in the process of being acquired. The petitioner while addressing MoEF on 25.07.2012, stated that it has only 102.31 Ha, though earlier they had stated that they had 172.17 Ha of land. Therefore, the possibility of achieving the green belt for 43 Ha does not arise when the total land area was only 102.31 Ha.

144.It is submitted that an argument was advanced that the green belt is a common consent condition for both the Smelters. However, such an

argument is untenable, as it has been established by the respondent that the environmental clearance for Copper Smelter Plant-II has been obtained by playing fraud, as the same piece of land was being earmarked for both Copper Smelter Plants-I and II. The land allotted for Copper Smelter Plant-II has been cancelled on 28.05.2018; the environmental clearance for Copper Smelter Plant-II has lapsed on 31.12.2008; and the only surviving environmental clearance is that of 09.08.2007. Further, the water allocation shows that it is sufficient only for 21.4 Ha and not for 43 Ha.

145.Further, referring to the counter affidavit filed by the TNPCB, it is stated that the green belt has not increased beyond 12.8%, though the mandated green belt cover is 25%; out of 36 plantations, only 16 had the width of greater than 25m and there was no green belt available near rock phosphate storage area, gypsum storage and rain water harvesting. Thus, it is submitted that it is the duty of the 9th respondent to place the correct facts, otherwise, the

Court may be mislead by fraud. Further, this Court functioning both as a constitutional Court and an appellate Court can adjudicate facts and for such reason, this respondent is duty bound to place correct facts before this Court and cannot be prevented by the petitioner from doing so.

146.Further, the learned Senior Counsel argued on the health of the people in the locality, impact caused by the petitioner industry. By referring to the various decisions, it is submitted that the duty of reasonable care varies with the magnitude of risk involved. The copper slag, which is stated to have been disposed of by the petitioner, has been dumped and lying in private land and it is not meant for dumping in all locations either residential or otherwise. The learned Senior Counsel referred to the various complaints, copies of which had been filed in the typed set of papers filed by the Government and submitted that health is the basic feature of right to life. However, the petitioner's last priority is the health of the general public.

147.The petitioner is the largest industry in the area dealing with hazardous substances and hazardous wastes and, the people in the area have genuine apprehension in their minds and the incidence of various illness has been so high in the area. The learned Senior Counsel referred to the toxicological profile on the sulphur dioxide as issued by the US Health Department and also referred to the reports of the Organisations in India. After referring to these reports, it is submitted that TNPCB mentions only permissible level and the level of toxic substance is not estimated. Reference was also made to the Frequently Asked Question (FAQ) on SO_2 and how the respiration system would get affected. Report of the World Health Organisation with regard to the Arsenic was referred to and the FAQs on Arsenic.

148.Further, it is submitted that the medical camp, which is stated to have been conducted by the petitioner's cannot be relied on, as no urine tests

were performed. Reference was made to the National Clean Air Programme (NCAP) of the Government of India and it is submitted that only Thoothukudi District finds place in the State of Tamil Nadu and it is marked as the most polluted city in Tamil Nadu, as per the report of the Government of India dated 10.01.2019. The learned counsel further submitted that the CSR activities done by the petitioner cannot be referred to covering the aspect of health monitoring which is totally different. Reference was also made to the various provisions of the Factories Act, more particularly, Sections 2(cb), 41A, 41B, 41C, 41D, 90, 91 and 91A.

149.Further, commenting upon the reports submitted by the Doctor engaged by the petitioner, it is submitted that when compared with the Government report, it shows that the report of the petitioner's Doctor is incorrect. Thus, the learned counsel summed up by submitting that the petitioner has violated the environmental laws; the siting of the industry is

incorrect; the TNPCB and other authorities lacked monitoring the unit; the plant has complete lack of green belt; the stacks are inadequate; there has been no proper recording of emission levels; irregularities in the disposal of wastage; and operating without consent and without authorisation under HWM Rules continuously contaminating soil, water and air. The health monitoring is NIL and the general public are not informed of the hazardous operations and the petitioner has been given a very long rope and no further indulgence is required. Thus, it is submitted that the right to life/health is inherent right and quality of one's life cannot be compromised for an industry to profit, as the industry's right is subordinate to the right to life/health. Therefore, the petitioner has to be prosecuted and directed to remedy the environment.

150.Mr.A.Yogeshwaran, learned counsel appearing for the 10th respondent submitted that his client has filed a counter adopting the counter of the 9th respondent Ms.Fatima, as also the documents filed on her behalf. The

learned counsel prefaced by stating that he will address this Court initially on two issues, viz., with regard to air pollution and material balance.

151.With regard to air pollution, it is submitted that the same can be broadly divided into five parameters, viz.,

(i) inadequacy in the height of the stack;

(ii) increased ground level concentration of SO_2;

(iii) impact of SO_2 emissions on an hourly basis has not been assessed and factors such as low mixing height and coastal fumigation phenomena have not been taken into account;

(iv) increased SO_2 level at the plant site; and

(v) inadequate and faulty, potentially fraudulent Ambient Air Quality Monitoring.

152.It is submitted that the Environmental Protection Rules (EP Rules) specifies stack height for industries and standards for emission; the

purpose is to ensure that the total footprint of an activity is accounted for and adequate measures are provided to account not only for times when the industry is operating normally, but also during upset conditions. It is submitted that sulphuric acid plants are mentioned in serial number 23 of Schedule-I of the EP Rules and the formula for calculating the stack height has been specified, which is $H=14(Q)^{0.3}$ – Q is the maximum quantity of SO_2 expected to be emitted through the stack at 110% rated capacity of the plants and calculated as per norms of gaseous emission.

153.The learned counsel referred to the consent orders dated 14.10.1996, 19.04.2005 and 15.11.2006, mentioning the capacity, the required stack height and the existing stack height and has also given the calculation to justify their stand. It is submitted that the petitioner was granted consent to operate after the final expansion, by order dated 15.11.2006, and as per the EP Rules, the emission standard is 4 kg/tonne of sulphuric acid. It is submitted

that the amendment in the EP Rules in respect of reducing the emission standard to 2 kg/tonne was only on 07.05.2008 and this may not be relevant for calculating the height of the stack established in 1996 when the expansion happened, that is, in 2004 and 2006. It is submitted that TNPCB passed an order dated 19.04.2005, restricting the SO_2 emission to 1 kg/tonne while granting consent. This according to the learned counsel is meant to be over and above the design benefits offered by a stack of adequate height considering the toxicity of SO_2 and increased industrialisation in Thoothukudi. Therefore, it is submitted that this emission factor of 1 kg/tonne should not be used for calculating the stack height, as stack height can be calculated only as per the notified rules.

154.It is submitted that the petitioner industry seeks to justify their contention by stating that the Sulphuric Acid Plant-I (SAP-I) and SAP-II are separate streams, this submission is incorrect in the light of Note (iii) to Entry

23, Schedule-I of the EP Rules, which states that "plant having more than one stream or unit of sulphuric acid at one location, the combined capacity of all the streams and units shall be taken into consideration for determining the stack height and applicability of emission standards". Further, the petitioner contended that in terms of Entry 21 of Schedule-I of the EP Rules, SAP has two tail gas plants and hence, the combined capacity need not be taken into account. However, the Entry was amended only on 02.05.2011, vide GSR 354 (E) and does not mention of tail gas plants prior to this amendment and therefore, Entry 23 of Schedule-I is applicable.

155.It is further submitted that between 1996 and 2006, the annual copper production increased from 40,000 Tonnes Per Annum (TPA) to 4,00,000 TPA and the sulphuric acid production increased from 3,86,900 TPA to 15,33,000 TPA. However, the height of the main chimney stacks attached to the Smelter and SAP plants has remained unchanged at 60m. It is submitted

that using the petitioner's consented design specifications, the maximum Ground Level Concentration (GLC) of SO_2 and the distance at which this concentration will occur was calculated for a given wind speed using the Gaussian Dispersion Model by Dr.T.Swaminathan, Professor (Retd.), Department of Chemical Engineering, IIT Madras.

156.It is submitted that the result of the examination shows that the stacks attached to the SAPs alone contributed a maximum SO_2 GLC of 125ug/m^3 at a distance of 1.6 kms and also shows that the plume from the ISA furnace stack will descend to the ground at 811m from the plant and contribute to maximum GLC of 104 ug/m^3. Thus, even when the petitioner industry is discharging pollutants within parameters, there will be increased ground level concentration of pollutants. It is submitted that the petitioner's consultants while preparing the EIA reports for the years 2007, 2008 and 2015, have adopted a more sophisticated computer based dispersion model (AERMOD)

using 24 hours averaging periods. However, this masks potentially very high peak SO_2 levels occurring over hourly or 15 minute averaging periods. That apart, there has been failure to take into account coastal fumigation, mixing height in the region, all of which would render the petitioner's EIA studies invalid.

157.It is submitted that the failure to assess short term (hourly) levels of SO_2 emission is serious flaw, as the petitioner's modelling exercises have been limited to estimates of what annual average or daily average of SO_2 levels of the factory's emissions. It is submitted that phenomenon known as "coastal or shoreline fumigation" has not been noted in any one of the EIA reports while considering the impact of the petitioner industry. Further, it is submitted that the mixing depth (height) at every hour at the project site is another important parameter to study the impact of the petitioner industry in air environment. Thus, it is submitted that low mixing height, which means

emission from 60m stack, has very limited room for being dispersed during the period especially between 19.00 to 03.00 hours when the mixing height is less than 200m. Further, the EIA reports did not factor mixing height at the plant site especially during the worst case time periods.

158.Comparing the baseline figures in the 1994 EIA report with that of the 2000 EIA report, it is submitted that there is dramatic increase in SO_2 levels which are as high as 30 microgram/cubic meter, which cannot be ignored and therefore, the petitioner cannot claim that the industry has not contributed to SO_2 emissions. It is submitted that the AAQ monitoring has not been adequate and it is alleged that false readings were submitted to the CAC. It is submitted that the petitioner industry operates only seven continuous AAQ monitoring stations and six manual monitoring stations, which is contrary to the consent order dated 19.04.2005, condition no.14 which mandates that all high volume samplers can be replaced with online

continuous AAQ monitoring stations within three months. The consent condition also mandates the CAAQ stations to monitor SO_2, NOx, PM and Flourine and from the data available with TNPCB, CAA, fluorine is not even monitored, which is violation of the consent condition. Monitoring stations are not spread adequately around the industry, except at T.V.Puram and three of the industry's residential colonies are located inside the industry itself and the remaining two are located close to the industry.

159.As per the 2015 EIA report, the predominant wind direction at the factory site are North North-west and East North-east and AAQ monitors have to be placed downwind in these directions apart from other directions and this inadequacy was noticed in the report of the Committee dated July, 2013 constituted by NGT, which recorded that only one monitor is found in the downwind direction. Insofar as residential area is concerned only one monitoring is located in T.V.Puram and even this is not in the predominant

wind direction. Thus, it is submitted that the network of monitoring stations established by the petitioner is inadequate and does not represent the readings of areas affected by pollution caused by the petitioner. The CAAQ monitoring stations connected to TNPCB and CAC have been malfunctioning and it is generating false data to the TNPCB and to support such submission, the learned counsel referred to various charts filed in the paper book and by way of illustration, submitted that the CAAQ monitoring at gypsum pond was static at 0.3 ug/m^3 for more than 13 days in November, 2017. Therefore, the need to analyse the data available with TNPCB from 2015 till the date of closure of the factory, assumes importance and the same was obtained. Likewise, the data obtained from the CAC for the period 2015 to 2018 showed that the values of pollutants as recorded by the meters stayed constant for varying periods of time and apart from that, very low and unrealistic readings were recorded. This will go to show that the actual ambient air quality in the region was not monitored.

160.The learned counsel has drawn our attention to various data and statistics to support his submission that there is clear proof of the manner in which the petitioner has been tampering with the metres to reflect extremely low values that are not representative of the actual prevailing ambient air quality. It is further submitted that it is rather suspicious, as these factors escaped the notice of the TNPCB and the laxity of the TNPCB cannot be used in favour of the petitioner especially when, innocent lives have been harmed by toxic pollution.

161.It is submitted by Mr.AYogeshwaran that it is important to understand the concept of material balance (mass balance). It is submitted that everything has to go somewhere which is a fundamental principle of engineering. It is stated that law of conservation of mass says that when a chemical reaction takes place, the matter is neither created nor destroyed and this concept enables to track materials, for example, pollutants from one place

to another with mass balance equations. Referring to Condition No.18 of the consent order dated 19.04.2005, it is submitted that automatic sampling and analysis of concentrate once in every eight hours for heavy metals was directed, but no such report has been furnished. The consent order further prescribes yearly environmental audit focussing on mass balance for all pollutants. The TNPCB has also directed material, environmental and energy audits of the petitioner unit, however, the same have not been conducted or submitted to this Court. On 14.09.2005 show cause notice was issued to the petitioner for having failed to automatically sample copper concentrate for heavy metals and other impurities. After referring to smelting process to produce copper anodes and then electro-refined to produce copper cathodes, the pollutants such as arsenic in its total quantity should be present in the product and in the waste generated. The petitioner would state that in the counter affidavit filed by the petitioner in W.P(MD).No.16005 of 2018, the mass balance produced by the petitioner shows that there is no full accounting

of arsenic in the process and a huge quantum is unaccounted. The learned counsel referred to the documents filed by the TNPCB with regard to the concentration of arsenic in anode and waste system. After referring to those details, it is submitted that if measured concentration of a contaminant in a waste stream is less than the lower end of the range, it indicates inefficient pollution control process that fails to remove the contaminants from the process and lodge it as design in the waste stream. On the contrary, when concentration of a contaminant in a waste stream is higher than the higher end of the range, it renders the waste stream too contaminated to be permitted to be disposed of.

162.It is further submitted that the petitioner has stated that the total quantum of arsenic in copper concentrate for the financial year 2017-18 as 1246MT. According to the learned counsel, the petitioner has resorted to fraud and misrepresentation in order to balance this quantum, i.e., number in

the products and waste. It is submitted that the petitioner is guilty of inflating the quantum of anode produced, they mentioned spent anode in the input side, they inflated the quantum of spent anode and falsely increased the concentration of arsenic in anode, slag, ETP and Scrubber cake. With regard to the alleged inflated quantum of anode produced, the learned counsel referred to the counter affidavit wherein, the quantity has been mentioned as 3,92,544 tonnes, in the annual report it has been mentioned as 3,28,076 tonnes and the excess is 64,468 tonnes. It is submitted that one tonne copper concentrate is equal to 0.29MT copper anode [anode÷concentrate]. Based on this formula, the learned counsel referred to details furnished in a tabulated format with regard to the consumption of copper concentrate and anode produced from the year 2004-05 to 2017-18. Based on these data, it is stated that the petitioner industry has consistently produced anode in the range of 0.28-0.30MT per tonne of copper concentrate. The design production according to the petitioner for 2017-18 is 0.35MT and as per the annual report,

it is 0.287MT. Therefore, it is submitted that the anode production stated in the affidavit is false. If the production figure given by the petitioner is true, then the petitioner is guilty of having falsified the production figures to its shareholders in the United Kingdom and also to the Central Government/GST authorities in India. On the contrary, if production figure stated in the annual report is accurate, then the petitioner is guilty of forgery for having provided a misleading information to the Court. It is further submitted that the spent anode should not be mentioned as input, as it is a product from the process, i.e. recycled back into smelter.

163.The learned counsel has drawn our attention to a calculation done in respect of the quantum of spent anode, to support his contention that inflated quantum of spent anode has been resorted to in order to inflate the quantum of anode produced, thereby increasing the amount of arsenic apportioned to anodes. Similar exercise was done in respect of the

concentration of arsenic. It is submitted that the petitioner has falsely inflated the quantum of arsenic present. It is further submitted that in the year 2017-18, 721.58MT of arsenic was unaccounted, which is a clear proof to show that the petitioner has not fully accounted for the contaminants in the process and the quantum of arsenic has been released into the environment. As the petitioner, who has been operating without authorisation under the HWR Rules and in the absence of manifest as specified in Rule 19 of the said Rules, it is not possible to locate the hazardous waste generated and disposed of by the industry. The learned counsel referred to the guidelines of the United Nations with regard to the mercury removal process. It is submitted that in the category 'other waste', mercury has been mentioned and therefore, the same has to be necessarily recovered. However, the details furnished do not mention mercury nor there was a mention about the presence of mercury in other waste. Therefore, it is submitted that the petitioner has to explain as to where the mercury had gone and this is a very serious issue and the plant

established by M/s.Hindustan Unilever in Kodaikanal was shutdown for discharging 7.95kgs of mercury, whereas the petitioner would have generated a minimum quantity of 25.91 tonnes of mercury between 2004 and 2018.

164.It is further submitted that the expansion was done by the petitioner prior to consent or grant of clearance. On account of the pollution, the level of arsenic, copper and zinc in the soil samples drawn are very high. The sedimentary samples drawn also show very high presence of the three chemicals. It is further submitted that discharging arsenic above 50mg/kg is not permissible on account of high levels of pollutants, the soil has been contaminated and it has to be declared as hazardous and remediation of the site has to be done. That apart, all sites where slag was dumped, have also been contaminated and they are also to be declared as hazardous sites. The learned counsel stressed upon the need of prior environment assessment and environment impact study. The learned counsel referred to the letter from the

Monitoring Committee appointed by the Hon'ble Supreme Court to the TNPCB and submitted that violations have been pointed out and they are referred to, to show on what dates, the expansion took place. It is submitted that expansion from 391TPD to 900TPD was before obtaining environmental clearance and this is a huge increase and the environmental clearance was granted only on 22.09.2004 and no work could have been started by the petitioner before the same. To stress the importance of EIA and EC and to state that they are substantive requirements, the learned counsel explained the various steps, which have to be followed prior to obtaining EIA and EC. The learned counsel referred to a tabulated statement being part of the notes on submissions dated 20.08.2019 to state that the petitioner's establishment and expansions were all without prior assessments, consents or clearances. Further, referring to another tabulated column in the same notes, the learned counsel submitted that the petitioner has violated the conditions prescribed in the consent orders. Therefore, it is submitted that the petitioner should have

been proceeded then and there under Section 21 of the Air Act, Sections 37 and 44 of the Water Act and Section 15 of the EP Act.

165.It is further submitted that both the soil and water have been contaminated by the petitioner's operations and in this regard, the learned counsel seeks to adopt the submissions made by the first respondent especially with regard to the contamination of ground water. Further, with regard to the locations where slag was illegally dumped, it is submitted that all samples contained hazardous concentration of Arsenic, Copper, Zinc, Lead, Cobalt apart from extremely elevated levels of Iron, Calcium, Magnesium, etc. The learned counsel submitted that the petitioner's plant was shutdown and maintenance was carried out between 21.03.2013 and the early hours of 23.03.2013. At about 12.50 am, start-up operations reportedly commenced and the SAP blower was started to prepare SAP converter to receive SO_2 gas. Between 2.00 am and 2.45 am and again from 9.15 am to 11.15 am, SO_2

readings in the displays at CAC, TNPCB recorded very high levels as high as 1123.6 PPM and the wind direction at the relevant time was from West North-west to East South-east with the speed of 1.22 km/hour. The direction was towards the densely populated Thoothukudi town which is around 4kms from the petitioner unit and about 9kms from the coast. Further, the petitioner's AAQ monitored at SIIL colony recorded increased SO_2 level starting at 2.50am when the reading was 10ug/Nm3 to about 40ug/Nm3 by 3.50am and thereafter, there is a declining trend until 5.50am, but the levels remain at >20ug/Nm3 – higher than the reading at 2.50am. Between 5.50am and 6.05am, the online monitor in SIIL Colony registers a spike at about 60ug/Nm3 and the data from this monitor is only available up to 10.05am. By 6.15am, complaints were made by the residents of Thoothukudi. The petitioner claims that the SO_2 monitor connected to SAP-I was under calibration and the values recorded are not readings of actual emission but only calibration value. According to the learned counsel, this submission is

false because calibration ought to have been done before start-up, but the petitioner claims to have started calibration only after initiating the Sulphuric Acid plant's blower at 12.50 am on 23.03.2013; calibration was not a continuous process; the increase in emission level on 23.03.2013 has been gradual and not sudden. However, during calibration, zero gas is introduced and then one zero value is recorded, span gas will be introduced to check reading in the analyser and once the limited span gas introduced passes through the analyser, the levels will drop suddenly. This was shown to have been done during the calibration conducted by the petitioner industry on 27.04.2013 in the presence of the members of NGT. The AAQ stations at Sterlite colony recorded increase in SO_2 level, which indicates an increase in SO_2 concentration in ambient air. Therefore, the wind direction at the time was towards Thoothukudi and complaints of the people were reported. Thus, it is submitted that on 23.03.2013, the petitioner had emitted unknown quantum of SO_2 gas and this is more so because the monitor choked at 11.23

pm and the new meter was incapable of recording the actual higher quantum of SO_2 that ought to have been recorded. Thus, it is submitted that not only the incident regarding the gas leak and repeated non-compliance of the various consent conditions, operating without obtaining approvals, etc., are all to be taken into consideration and if done so, the order of closure is fully justified.

166.Mr.T.Mohan, learned counsel appearing for Mr.A.Suresh Sakthi Murugan, learned counsel appearing for Mr.S.Raju, State Coordinator, Makkal Athikaram (People Power), the 9th/10th/12th respondent referred to the categorization of the petitioner as per the CPCB Revised Classification of Industrial Sectors under Red, Orange, Green and White categories, 2016. After taking us through the Pollution Index of the petitioner, it is submitted that the data shows the degree of pollution load caused by the petitioner and its impact on environment and health. It is submitted that the petitioner's unit was operating without hazardous waste authorization for 10 years 2 months and 15 days and this is not ministerial violation. The hazardous waste was not

accounted for, 1,10,000 MT of slag was generated in a period of 1 year 2½ months with copper production of 40,000 TPA. It is submitted that the TNPCB was culpable and only now they have acted. Referring to the decision in ***Research Foundation for Science Technology National Resource Police vs. UoI & Anr. [2005 (10) SCC 510],*** it is submitted that when no hazardous waste authorization has been obtained, the industry should have been closed. It is submitted that from 17.04.2000 to 18.07.2004, the petitioner did not have authorization. Though subsequently there was renewal granted for five years from 19.07.2004 followed by another authorization dated 20.04.2006 for five years for the first extension and authorization dated 10.07.2008 for five years, for the period between 01.01.1997 to 16.03.1998, i.e., for 1 year 2 months and 16 days and 17.04.2000 to 18.07.2004 for 4 years 2 months and 29 days and 09.07.2013 to 09.04.2018 for 4 years and 9 months, the petitioner was operating, generating and disposing hazardous waste without valid authorization. Thus the total period is 10 years 2 months and 15 days.

167.It is submitted that in the 1995 rapid EIA report, the quantum of ETP cake expected to be generated was 50 tonnes per days (TPD). The gas cleaning cake is expected to be generated at the rate of 14 to 32 TPD. The petitioner's production was restricted to 40,000 TPA and the quantum of ETP cake that should have been generated based on the design rate in the rapid EIA report is 0.1278 tonnes per tonne of copper anode and for 40,000 TPA, it will be 5,112 TPA. In addition to the above, the gas cleaning cake should also be accounted for. Further, it is submitted that even assuming the lowest range of 14 TPD, the gas cleaning to be generated for 40,000 TPA is 1400 TPA. Thus, the total hazardous waste generation per annum, i.e., ETP cake plus the gas cleaning cake is equal to 6512 TPA. However, the authorization quantum of hazardous waste is much lower. Further, elaborating on the said submission, it is stated that the description of the hazardous waste are ETP cake [arsenic bearing sludge]; Scrubber cake; Spent catalyst; DM resin, Processed residues ESP/Gas Cooler/Pollution Dust; Oil containing cargo residue, washing water

and sludge; spent oil; ETP slime sludge from copper refinery and Fuel gas dust and other particulates [copper scrap with copper sulphate]. This submission is made by the learned counsel by referring to the report of NEERI of the year 2005 and 2011 and the Solid Waste Management plan submitted by the petitioner for expansion attaching de-bottlenecking. These documents were filed by the respondent in the typed set of papers. Further, the learned counsel mentioned about the 9 hazardous wastes, which have been stated by the petitioner in their application dated 25.06.2013 for authorization and submitted that apart from these, additional quantity of 3650MT of processed residue was added by stating that quantum increased was due to additional installation of back filter prior to scrubber in primary and secondary smelter to produce clean gypsum. In the application submitted by the petitioner for renewal of the HWM authorization dated 28.05.2014, apart from the nine hazardous wastes, ten new hazardous wastes/sources were added, totalling nineteen. The total quantity to be disposed in the SLF is stated as 1,07,778TPA from the quantity

of 1,07,204TPA shown as hazardous waste to be disposed in the SLF, in the previous application dated 25.06.2013. However, the authorization now sought is for total quantity of 1,47,328 TPA as against 1,46,902TPA in the 2013 application and thus, there has been an increase of 426MT. The nineteen hazardous wastes and their quantity have been recorded by the TNPCB in their inspection report dated 26.08.2014. Further, it is submitted that in the renewal application dated 05.07.2016, eighteen hazardous wastes have been mentioned, of which seventeen are under Schedule-I and one under Schedule-III. It was stated that the processed residue of 15 tonnes containing lead scale was to be disposed to authorized recyclers and the ESP dust, boiler dust, etc., was reduced to 15,000 tonnes from 36,500 TPA. However, in the inspection report of TNPCB dated 06.09.2017, 26 hazardous wastes were recorded. Further, it is submitted that the petitioner is operating a thermal power plant from 2011, but there is no record about the mode of disposal of hazardous wastes for any earlier period. The learned counsel had mentioned other details

to buttress the submission that there is unaccounted/huge variation/under reporting of hazardous waste generation; huge variation of ETP cake and scrubber cake generation; excess quantity of generation of ETP cake in the year 2017-18; suppression of generation of scrubber cake in hazardous waste monthly manifest for three months; scrubber cake disposal to beneficial uses; scrubber cake and ESP dust generation; disposal of ETP slime sludge to a person who is not authorized to handle the same and details regarding the hazardous waste storage and disposal before and after the construction of SLF. It is submitted that the total quantity of hazardous wastes disposed in the five Secured Land Fills are for the period from 2000 to July 2003 – 26,417DMT-capped; August 2003 to October 2005 – 1,03,067DMT-capped, November 2005 to March 2009 – 1,30,426DMT-capped, April 2009 to March 2014 – 2,63, 117DMT-capped, April 2014 to April 2019 – 1,94,005DMT-not capped [capacity available on 31.03.2018 is 13000DMT]. Thus, in all these years, the total quantity of hazardous wastes disposed in SLF is 7,17,032 DMT. The

learned counsel also elaborated upon the details with regard to each of the SLFs.

168.The learned counsel further submitted that there are inadequacies in the effluent treatment process. In this regard the reports of NEERI 1998, 1999 and 2011 were referred to. Further, it is submitted that even simple issues which were pointed out by the CPCB were not implemented by the petitioner. By way of illustration, it is submitted that simple replacement of water meters were deferred for several months stating it to be a capital investment project when such matters are available across the counter. Referring to the report of the TNPCB dated 14.03.2017, it is submitted that the report clearly shows non-functioning of the components and the defects in the ETP. Thus, it is submitted that flow meters in the inlet and the outlet of the ETPs, ROs were fixed in the year 2017 only; manual log books were not maintained properly; self contradictory explanations and

statements were taken to be proper explanation and renewal of consents were granted. As a result of the effluent treatment process having been operated with inadequacies and huge defects, heavy and toxic materials were released to the environment without proper treatment. Further, it is submitted that there has been excess production in violation of the consent order during the period September 2003 to August 2004, 2004-2005, 2016-2017 and April 2017 to 09.04.2018. It is submitted that excess production should be taken as a violation of the consent order because if production becomes higher, the HW generation increases as also pollution load and storage and disposal of HW, etc., eventually affecting the environment. The learned counsel also referred to a tabulated statement to state that several tonnes of unaccounted arsenic in the ETP cake, which has not been taken note of by the TNPCB.

169.Mr.N.G.R.Prasad, learned counsel assisted by Mr.E.Subbumuthuramalingam, learned counsel appearing for Mr.K.S.Arjunan,

who is the 9th/11th respondent submitted that his client is a permanent resident of Thoothukudi and he is the District Secretary of Communist Party of India [Marxist], Thoothukudi District. It is submitted that Article 19(1)(g) of the Constitution of India has to sub-serve Article 21 of the Constitution, Article 21 is a constitutional mandate and sustainable development is an invention. It is submitted that in the instant case, the bureaucracy has bent towards the petitioner industry. The business interest may be the interest of the Government, but not that of the Court. It is submitted that no public hearing was held when the petitioner started the industry. In this regard, the learned counsel referred to the decision of the Hon'ble Supreme Court in the case of ***Hanuman Laxman Aroskar & Anr. vs. UoI & Ors. [2019 SCC OnLine Sc 441].*** It is further submitted that the Hon'ble Supreme Court in its 2013 judgment did not dislodge the findings recorded by the Division Bench while ordering closure. Therefore, the Court is entitled to look into all the facts. It is further submitted that there was absolutely no bona fides on the part of the

Government in reducing the green belt from 250m to 25m. The damage caused by the petitioner is extensive and if allowed to function, it would be a case of renewed damage. It is further submitted that only 30% of the copper produced is consumed in India and the remaining is exported. The learned counsel referred to the 2013 judgment in the Sterlite case and explained as to what is the nature of the industry and the Precautionary Principle, the concept of sustainable development, etc. It is submitted that the petitioner is a red category industry and the same could not have been allowed to be established pursuant to the rapid EIA, more particularly, in the light of the recent decision of the Hon'ble Supreme Court. The Court can look into the aspect as to whether the rapid EIA was desirable, whether it was desirable not to conduct a public hearing. It is further submitted that the environmental clearance granted by the Central Government is not in accordance with the procedure under the EIA Notification dated 27.01.1994. Thus, it is submitted that the people's interest is paramount and the same needs to be protected. It is further

submitted that in the name of sustainable development, environmental degradation should not be allowed. Ever since the inspection of the plant, the public of Thoothukudi are opposing and continuously demanding it to be closed down permanently. The petitioner should not be allowed to take advantage of the orders of consent granted by the TNPCB. The over exploitation by the petitioner in the name of sustainable development is attributing to environmental deterioration affecting human existence, it has disrupted environmental equilibrium and denied the right of healthy environment to the public of Thoothukudi.

170.Mr.Balan Haridas, learned counsel appearing for Mr.Jimraj Milton, learned counsel for Mr.Hari Raghavan, Member of the Anti-Sterlite Committee submitted that his client is a resident of Thoothukudi and the struggle and protest against the petitioner commenced as early as 1996. All the protests were peaceful, protests were also done objecting to the expansion

of the unit and the public went on hunger strike on 12.02.2018. Several FIRs were registered against these peaceful protesters. On 15.04.2018, the public from 11 villages and persons from Thoothukudi town formed themselves into a movement called Anti-Sterlite Movement and thereafter, submitted representation on 23.04.2018 to the TNPCB and SIPCOT. On 10.05.2018, peaceful protest was conducted near the Collectorate. It is submitted that the prayer sought for by the petitioner's unit in W.P(MD).No.11190 of 2018 was to consider their representation and it was not for the purpose of issuing an order under Section 144 Cr.P.C. The learned counsel would state that the District Administration was colluding with the petitioner-industry. Though a Peace Committee Meeting was organized, the TNPCB was not requested to participate in the meeting. Referring to the proceedings of the Sub Divisional Magistrate and the Sub Collector, Thoothukudi dated 21.05.2018, it is submitted that the officers named therein are the officers who would have ordered for firing. The learned counsel referred to the order passed by the

District Collector dated 21.05.2018 promulgating the order under Section 144 Cr.P.C., in which there is a reference to the writ petition filed by the petitioner in W.P(MD).No.11190 of 2018. In the said writ petition, the protesters and the organisers were not impleaded. It is submitted that the petitioner had earlier moved the Madurai Bench of this Court in W.P(MD).No.7313 of 2018, which was disposed of on 04.04.2018. Therefore, there was no necessity for a second writ petition to be filed before the Madurai Bench in W.P(MD).No.11190 of 2018. It is submitted that in the order dated 18.05.2018, the Hon'ble Court while disposing of the writ petition, observed that the proposed protest is likely to trigger the law and order situation and invoking Section 144 Cr.P.C., would be highly recommended in public interest. Further, it is submitted that the petitioner and others were not furnished with the copy of the order passed under Section 144 Cr.P.C., and they came to be aware of the same only when the petitioner filed it before the NGT. The protest made by the public and others is to protect the environment

and such protest is covered under Article 51A(g) of the Constitution. Thus, by reading Articles 19(1)(a), 19(2), 38 and 51A(g), it is submitted that all would show that the protest of the respondents were legal and legitimate. The order passed under Section 144 Cr.P.C., is not saved under Article 19(2) of the Constitution, but only to scuttle the legitimate protest. On 10.05.2018, notice of protest to be conducted on 22.05.2018 was given; on 18.05.2018, the Madurai Bench of this Court had disposed of the writ petition filed by the petitioner in W.P(MD).No.11190 of 2018; and on 18.05.2018, a peace committee meeting was convened, but none of the private respondents were informed about the direction issued by the Court. Thus, the petitioner-industry in collusion with the District Administration, had created chaos to precipitate matters and this respondent is fully justified in inferring collusion between the petitioner and the authorities. It is submitted that shooting was uncalled for and no other measures were initiated to disburse the protesters such as use of water canon, launch of tear gas shells, etc. It is submitted that when protest go

beyond control, shooting may be resorted to with a view to control the protesters and injure them and not to kill anybody. However, the shooting done, on the ill-fated day, was to kill people, as the person who used the weapon, stood on top of the van. Further, it is submitted that the order under Section 144 Cr.P.C., is in SIPCOT and Thoothukudi South Police Station limit by prohibiting any public meeting or assembly of five or more persons or procession for a period from 22.00 hours on 21.05.2018 to 08.00 hours on 23.05.2018 and the order does not cover the entire Thoothukudi District. It is submitted that unfortunately, the District Collector was not available in Thoothukudi and had gone to Kovilpatti and only the Deputy Tahsildar was present, however, he was not in-charge of the area, where firing took place. It is submitted that it is one Mr.Sekar, who was the Special Deputy Tahsildar [Election], who was one of the officers deployed by the Sub-Divisional Magistrate in his order dated 21.05.2018 and it is he who had ordered firing. Apart from him, Mr.Kannan, Zonal Deputy Tahsildar, Thoothukudi, also

ordered firing. It is further submitted that because of the indiscriminate firing, innocent people died. The conduct of the petitioner who colluded with the District Administration and the conduct of the TNPCB have to be taken serious note of. The learned counsel referred to the decision of the Hon'ble Supreme Court in ***In Re Ramlila Maidan Incident vs. UoI & Ors. [(2012) 5 SCC 1]*** to explain the test of reasonableness and what would connote the breach of public order. By referring to various paragraphs of the judgment, explained under what circumstances, Section 144 Cr.P.C., is resorted to, it is submitted that the larger question would be whether Section 144 Cr.P.C., could be invoked to protect the assets of the petitioner, a private individual. The petitioner-industry had prevailed upon the District Administration to keep away TNPCB in the Peace Committee Meeting and the copies of Section 144 Cr.P.C., order was not served on any of the persons concerned. There was no emergent situation to invoke Section 144 Cr.P.C. Sufficient notice had been given by the protesters and it was the 100th day of the protest. The power

under Section 144 Cr.P.C., cannot be exercised in an arbitrary manner. It has been held that such power has to be exercised with great caution. By referring to the observations in ***Ramlila Maidan's*** case, it is submitted that what is important is the implementation of order under Section 144 Cr.P.C. The petitioner has to be blamed for the entire problem and they are at fault. They had filed two writ petitions, wherein directions were issued and with that direction, the order under Section 144 Cr.P.C., was passed. The respondents are unaware of any case where a private company had moved the Court for promulgating the order under Section 144 Cr.P.C. The learned counsel referred to the writ petition filed by the counsel for the party in W.P.No.12966 of 2018, wherein they sought for an enquiry into the shooting incident, in which an order came to be passed on 23.05.2018, wherein the Government informed the Court that One Man Enquiry Commission has been appointed by the State Government. The learned counsel invited the attention of this Court to the interim directions issued in W.P(MD).Nos.13124 of 2018 etc., batch

dated 13.05.2018 and also to the direction issued for conducting re-postmortem. It is submitted that the protesters were repeatedly made accused in criminal cases one after another and Habeas Corpus Petitions were filed before the Madurai Bench of this Court in H.C.P.(MD).No.881 of 2018 etc., batch and by judgment reported in ***(2018) 3 MWN(Crl.) 128 (DB)***, the Habeas Corpus Petitions were allowed and the detention under the National Security Act were quashed. A Public Interest Litigation was moved before the Madurai Bench of this Court by Mr.K.Kathiresan and others for registering criminal case against the persons responsible for killing 11 and more innocent people at Thoothukudi on 22.05.2018, in which an order was passed to transfer the investigation to CBI. The respondent Hari Raghavan was detained under National Security Act and H.C.P.(MD).No.1114 of 2018 was filed to quash the order of detention. The petition was allowed by order dated 01.08.2018.

171.The learned counsel relied on the decision of the Hon'ble Supreme Court in ***Vijay Shankar Pandey vs. UoI & Anr. [(2014) 10 SCC 589]*** and

Indian Council for Enviro-Legal Action wherein, the Hon'ble Supreme Court pointed out that pursuit of profit has absolutely drained them of any feeling for fellow human beings – for that matter, for anything else. And the law seems to have been helpless. The learned counsel referred to the decision of the Hon'ble Supreme Court in the case of ***T.N.Godavarman Thirumulpad vs. UoI & Ors. [(2008) 2 SCC 222]***, wherein there was a reference to the action initiated against the petitioner-Vedanta in other parts of the Country and in the said judgment, the Hon'ble Supreme Court prefaced that while applying the principles of sustainable development, one must bear in mind that development which meets the needs of the person without compromising the ability of the future generations to meet their own needs, is sustainable development. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***Kalabharati Advertising vs. Hemant Vimalnath Narichania & Ors. [(2010) 9 SCC 437]*** to explain the plea of legal malice which means something done without lawful excuse. It is an act which is

taken with an oblique or indirect object. Reference was made to the Queen's Bench decision in ***2019 UKSC 2019*** pertaining to the Vedanta in Zambia. The learned counsel referred to the decision of the Hon'ble Supreme Court in the case of ***National Legal Services Authority vs. UoI & Ors. [(2014) 5 SCC 438]*** and submitted that the Court had elaborately interpreted Article 21 of the Constitution of India and the Hon'ble Supreme Court observed that there is a growing recognition that the true measure of development of a nation is not economic growth, it is human dignity.

172.Mr.C.A.Sundaram, learned Senior Counsel prefaced his reply submissions by contending that the common jurisdictional fact is whether the petitioner is a polluter. The impugned order passed by TNPCB does not state that the petitioner is a polluter, as it only says the report has not been made available. Obstructing the flow of Uppar River is not pollution, not constructing physical barrier near the river is not an allegation of pollution.

There are 150 red category industries in the State of Tamil Nadu, which have been granted HWM authorization and again there is no allegation of pollution. Assuming all the allegations in the impugned orders are true, yet there is no allegation of pollution. It is submitted that all the decisions referred to and relied on by the respondents presuppose pollution, which is not the case of the petitioner. The Government by the impugned order, while endorsing the order of closure, does not anywhere indicate nor allege that the petitioner is a chronic polluter. Thus, if the factual matrix does not made out a case of pollution, there can be no order of closure for any other reason.

173.It is further submitted that the intervenors/impleaded parties cannot enlarge the scope of the *lis* and the submission made by the respondents do not array out of the *lis*, which is being considered by this Court and therefore, their arguments have to be eschewed. It is submitted that the Government traces its power to Section 18 of the Water Act and they would

state that it is a policy decision of the Government. If the Government contends that G.O.Ms.No.72 is an executive order, then it should fall in the light of Article 166(3) of the Constitution of India, as the procedures under the Transaction of Business Rules have not been adhered to. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in ***Delhi International Airport Limited vs. International Lease Finance Corporation & Ors. [2015) 8 SCC 446].***

174.The learned Senior Counsel referred to Rules 4, 8, 14 and 15 of the Transaction of Business Rules and submitted that there has been blatant violation of all these Rules and the procedure has not been followed and the matter was not considered by the council in a meeting or by circulation. If there is loss of revenue to the State, which undoubtedly has occurred due to the closure of the petitioner, it has to mandatorily be placed before the Finance Minister of the State and submitted that if according to the Government,

G.O.Ms.No.72 is a policy decision, then it is hit by Rule 35(2)(c)(ii) read with Entry-16 and Entry-16A of the II Schedule. Therefore, if the Government claims it to be an executive/policy decision, it will fail for not adhering to the Transaction of Business Rules in violation of Article 162 and Article 166 of the Constitution of India.

175.It is further submitted that it is the endeavour of the petitioner to show that the Government Order is an administrative order. An executive order cannot be a policy decision, as an executive order is one which implements a policy decision. However, in the instant case, the respondents have not shown as to what was the policy decision taken and if it is stated to be a policy decision, it has to be in accordance with the Transaction of Business Rules. The average payment of sales tax by the petitioner is to the tune of Rs.300 Crores. Therefore, there is a relinquishment of revenue on account of closure of the petitioner and necessarily, the matter requires to be

considered by the Finance Minister in terms of Rule 8 of the Transaction of Business Rules. Thus, when the Transaction of Business Rules has not been adhered to even assuming the Government Order is a policy decision, it deserves to be quashed.

176.Relying on the decision in the case of ***M.R.F.Ltd vs. Manohar Parrikar & Ors. [(2010) 11 SCC 374],*** it is submitted that if the procedures under the Transaction of Business Rules are not followed, the impugned Government Order is liable to be set aside. Thus, it is submitted that the impugned Government Order is an administrative order covered by the statutes, viz., the Water Act and the EP Act and therefore, it has to be seen as to whether the respondents have power to pass the impugned order as well as the manner of exercise of such power. The respondent-State cannot rely upon Article 48A of the Constitution to be source of power, as it is a guideline as to how the power is to be exercised.

177.To explain the directive principles, reliance was placed on the decision of the Hon'ble Supreme Court in ***Kesavananda Bharati vs. State of Kerala [(1973) 4 SCC 225]*** and the decision in ***Intellectuals Forum.*** Thus, it is submitted that directive principles or state policy are not source of power for the State and the State is to borne in mind the directives when enacting laws; there cannot be a writ of mandamus based on the directive principles, when there is a law governing the field and that is why, they are not enforcible by a Court of law, as they are guidelines to the State.

178.To explain as to what is "policy" and what is "law", reliance was placed on the decision of the Hon'ble Supreme Court in ***Gulf Goans Hotels Co. Ltd. & Anr. vs. UoI & Ors. [(2014) 10 SCC 673].*** It is further submitted that if the order is in larger public interest, there should be a policy and in the case on hand, the respondent traced it to only three reasons, which are not in public interest.

179.The submissions with regard to the lack of power of the State to order for permanent closure under Section 18(1)(b), were reiterated and it was submitted that Section 17(1)(l) of the Water Act has to be read along with Section 24 and Section 25; closure is a separate provision under Section 33A of the Act; and the power under Section 18 to give directions is to issue directions in *rem* and not in *personam* and the rights of the petitioner cannot be taken away without issuing notice, because direction is given to the TNPCB. Further, Section 18 deals with the performance of functions and there cannot performance of powers *vice versa*.

180.By way of explanation to Section 33A, the power to give directions for closure was included otherwise, there was no such power. Section 17(1)(l) does not deal with closure, as the word "closure" has not been included, but has been specifically included in Section 33A of the Act. Under the said provision, it is the Central Government which has got power to give

directions and it divests the State of such power and if that is so, there cannot be an order of closure under Section 18.

181.One more facet to be noted is that an order under Section 33A is an order in *personam* and that is why an appeal is provided to the NGT under Section 33B(c) whereas, the direction under Section 18 is a direction in *rem* and hence, no appeal remedy is provided.

182.The learned Senior Counsel referred to the preamble of the Water Act as to why separate Board to control pollution was constituted, the statement of objects and reasons of the Act, the amendment in 1978, in 1988, etc. It is further submitted that the power to order closure under Section 33A of the Act has been conferred on the Board and after which, the Government has got no power to exercise its jurisdiction. Further, it is submitted that the impugned Government Order is devoid of reasons and the Government

abdicated their power under Section 18A of the Act. In support of such contention, reliance was placed on the decision in ***Kranti Associates (P) Ltd. vs. Masood Ahmed Khan [(2010) 9 SCC 496]*** and ***State of Punjab vs. Bandeep Singh & Ors. [(2016) 1 SCC 724].***

183.It is further submitted that the respondents have failed to disclose as to what are the reasons which existed between 2013 and 2018 for ordering closure; why the TNPCB did not exercise their power; why no action was initiated prior to 2013; why action was not taken by TNPCB after the 2013 decision of the Hon'ble Supreme Court. Thus, it is submitted that the action of permanent closure is a *mala fide* act. In this regard, reference was made to the decision in ***Sarvepalli Ramaiah*** and ***Neerja Saraph vs. Jayant Saraph & Anr. [(1994) 6 SCC 641].***

184.It is submitted that the directions issued under Section 5 of the Environmental Protection Act are in *personam* and that is the reason, Section

5A provides for an appeal remedy whereas, this is not so when Section 18 of the Water Act is invoked and therefore, an order under Section 18 is an order in *rem*. In this regard, reference was made to Rules 4(3-a) and 4(3-b) of the EP Rules, 1986. Referring to Rule 4(5) of the EP Rules, it is submitted that to dispense with opportunity to file objections against the proposed direction, reasons should be recorded in writing.

185.It is further submitted that the petitioner is not a new industry and the Precautionary Principle can be applied only when there was no scientific knowledge. The petitioner is not the first copper industry in the country and several industries have been existing even prior to the petitioner.

186.It is further submitted that antecedents cannot be taken for holding a person guilty, as antecedents may be relevant for sentencing. The respondents cannot close the petitioner even today by referring to events

which occurred in 1995; the respondents seek to justify the order of closure by referring to antecedents which cannot be done. Therefore, there is gross jurisdictional flaw in the arguments of the respondents. While renewing the consent to operate in 2017, TNPCB found the petitioner to be a non-polluter. Therefore, the only question would be whether there was pollution between 2017 and 2019. Except for the five reasons mentioned in the order dated 19.04.2019, there are no other reasons. Therefore, not one of those five reasons made out a case of pollution, there can be no allegation of pollution against the petitioner, there was no mention in the impugned order about the events which took place between 1995 and 2013, and it is an ingenuity of the counsels for the respondents.

187.It is reiterated that the impugned Government Order is not a policy decision. Even assuming it was a policy, it does not refer to any antecedents. The events till 2013 are of no relevance to render a finding that

as on date, the petitioner is not a polluting industry and the events till 2013 may be relevant only when this Court proceeds to decide the relief to be granted in the writ petitions. Thus, it is the contention of the learned Senior Counsel that whatever happened before 2013 is a closed chapter and cannot be raised now and the respondents are barred by principles of *res judicata.* The 2013 judgment of the Hon'ble Supreme Court is *res judicata* qua the events occurred prior to 2013.

188.By referring to paragraph 50 of the 2013 judgment, it is submitted that closure can only be in accordance with law and therefore, it can only be for any other new reasons. The principles of *res judicata* will apply to all parties, the Government and the TNPCB. Before the Hon'ble Supreme Court, the respondents stated that the petitioner has complied with 29 out of the 30 conditions. However, now they are taking a different stand, which is impermissible. It is further submitted that principles of constructive *res judicata* is equivalent to the principles of *res judicata.*

189.The learned Senior Counsel by referring to a tabulated statement, submitted that all issues raised by the private respondents were raised by them as part of their pleadings before the Hon'ble Supreme Court in 2013. In this regard, the learned counsel referred to the various paragraphs of the pleadings before the Hon'ble Supreme Court and this Court by Mr.Vaiko, Ms.Fatima, Ms.Swetha Narayanan, Mr.K.S.Arjunan, National Trust for Clean Environment, Mr.Raju and the oral submissions made by their respective counsels. Therefore, it is submitted that the respondents cannot make a prayer for overruling the orders passed by the Hon'ble Supreme Court in the 2013 judgment.

190.It is submitted that there was certain adverse observation by NEERI in 1998, which showed pollution. The 1992 and 2003 NEERI reports did not allege any pollution. In the 2005 NEERI report, certain suggestions were made. Thus, taking note all these factors into consideration and that the

petitioner was operating without consent till 2012, the Hon'ble Supreme Court imposed a fine of Rs.100 Crores. Thus, the petitioner has already been sentenced for the said violation, the Hon'ble Supreme Court considered the period between 2005 and 2013 and having found no pollution, issued directions for permitting operations of the petitioner unit. The 2013 judgment of the Hon'ble Supreme Court has rendered findings on facts and the respondents cannot now reassess the same facts and state that the industry has to be closed especially when, the petitioner has already been punished. It is submitted that the principles of constructive *res judicata* will equally apply to principles of *res judicata* and it will apply to public interest litigants, apply to individuals, who are not parties to the earlier litigation. In this regard, the learned Senior Counsel referred to the decisions of the Hon'ble Supreme Court in ***Asgar vs. Mohan Varma [2019 (2) Scale 530]; State of Karnataka & Anr. vs. All India Manufacturers Organisation & Ors. [(2006) 4 SCC 683]; Joydeep Mukharjee vs. State of West Bengal & Ors. [(2011) 2 SCC 706];***

Daryao & Ors. vs. State of U.P. & Ors. [AIR 1961 SC 1457]; and ***Amalgamated Coalfields Ltd. vs. Janapada Sabha Cjjomdwara [AIR 1964 SC 1013].***

191.Mr.G.Masilamani, learned Senior Counsel appearing for the petitioner, while questioning the validity of the impugned Government Order, submitted that the powers conferred on TNPCB cannot be exercised by the Government and if done, it will be a scramble for power resulting in chaos. If the field of legislation is occupied, the State and TNPCB can exercise the power conferred under the Act and in the instant case, the State is trying to usurp the power of the TNPCB. If law mandates a thing to be done in a particular manner, it shall be done only in that manner. By passing a consequential order dated 28.05.2018, TNPCB has abdicated its power. It is submitted that Section 28 of the Water Act provides for appeal remedy and in terms of sub-Section (1) of Section 28, appeal lies against orders of the State

Board under Sections 25, 26 and 27 whereas, no appeal is provided against the order of the State Government, because the State Government cannot pass an order directly affecting an individual. Therefore, the State Government can give a general direction/guideline of something like a policy. The respondent-State does not trace its power to Section 29 of the Act and if it does so, then the procedure under the proviso to Section 29(1) has to be followed, which provides for "reasonable opportunity to be afforded to the affected".

192.Referring to Section 106 of the Indian Evidence Act, 1872, it is submitted that the burden is on the State to show that they have power to pass the impugned order and if the order is not under Section 29, then it is *void ab initio*. If the State would accept that the order is under Section 29 of the Water Act, then the petitioner can file an appeal against such order before the NGT. It is further submitted that all materials were available with the TNPCB and they thought fit not to renew the consent to operate, which would mean that it

can be renewed upon compliance of the directions. The TNPCB did not deem fit to seal the unit and nowhere in the provisions of the Water Act, this word is found or used. The power conferred on TNPCB to prohibit is only for a new industry and not in respect of an industry which is functioning. Further, the words "permanent closure" are not found in the Water Act or the Air Act. Assuming power exists for closure, then such power can only be at the hands of the TNPCB and not with that of the Government.

193.It is further submitted that the Hon'ble Supreme Court has held that the impugned order is an administrative order and not an executive order, as it has not gone through the trajectory to term it as a policy. The State Government was not reasonable in imposing the punishment of permanent closure. The exercise of power is draconian and whimsical. There was absolutely no need to seal the premises, as no secret operation was done by the petitioner. The petitioner is entitled to maintain the property and, the interest

of its shareholders, financiers, banks should not be affected. The sealing of the petitioner industry is in direct violation of Article 300A of the Constitution of India. It is a direct infraction of the right to property and, for the past 1½ years, the industry has been closed and it is an indirect way of driving the petitioner out. The classification of the industry as red, orange, green and white is not based on the size of the industry, but on the pollution index and, if the TNPCB or the State Government was to classify the industry, a thorough study is required.

194.Further, it is submitted that copper slag is not leachable, the phosphogypsum is being stored by the petitioner as per the TNPCB norms, hazardous waste is disposed as per the rules and, no pollution has been caused by the petitioner and the respondents are proceeding solely based on doubt. It is further submitted that during 2007, the petitioner achieved full capacity and there has been no increase thereafter. The AAQ could not have been affected

on account of the petitioner's operation, as several new industries have been established after 2007, including seven power plants and four more such power plants are in the pipeline. On the above submissions, the learned Senior Counsel submitted that it is for the Government to establish their source of power to sustain the impugned orders.

195.It is submitted that the impugned order has to stand on its own terms, which will be the first aspect of the matter and the second aspect is whether the petitioner unit is a polluting industry or not; is it violating Article 21 of the Constitution. The justification on the first aspect cannot be made applicable for the second aspect.

196.It is reiterated that the Hon'ble Supreme Court in its 2013 judgment, considered all issues up to 2013 and after taking note of the NEERI report of 2005, it was held that if such report is read as a whole, remedial

measures can be taken and, closure was not justified, if remedial measure was possible. Further, it is submitted that review petition was filed before the Hon'ble Supreme Court raising all points which have been urged before this Court by the intervenors and the review petition was rejected. Therefore, 2013 is a "full stop" for anything that had happened prior to the said date.

197.The learned Senior Counsel referred to the May, 2011 NEERI report and submitted that such report was prepared pursuant to orders passed by the Hon'ble Supreme Court dated 25.02.2011, by which an independent assessment of the situation and condition prevailing with the petitioner and its factories with reference to the environmental pollution, was directed to be conducted after a joint inspection with the officials of CPCB and TNPCB and the PIL petitioners. In addition to the officials of the CPCB and TNPCB and the PIL petitioner, Bhabha Atomic Research Centre (BARC), Mumbai was engaged for assessment of radon concentration at the industry site, as the issue

of monitoring radon was raised by one of the PIL petitioners, who alleged that the petitioner uses uranium tainted copper concentrate and, two members from BARC conducted the monitoring during 21st - 22nd April, 2011.

198.It is submitted that the petitioner seeks to rely upon the report to demonstrate before this Court that all factors were considered in the presence of all concern including the PIL petitioners. It is submitted that though the petitioner wanted to clear the slag, the respondents did not allow and, TNPCB did nothing for close to 1½ years and while so, to order permanent closure of the plant is a motivated action because if the petitioner industry was such a highly polluting industry and continuing to pollute, nothing prevented the respondents from initiating action earlier. Further, it is submitted that the May, 2011 NEERI report states that the assessment of UF and RO system indicates that the permeate (treated water) from RO system means stipulated limit of TNPCB concerned for all the parameters monitored; there is no

allegation that the petitioner did not maintain the zero discharge plant; there was no allegation that the RO plant was not working.

199.Further, it is submitted that in the said NEERI report, there is a reference to a chemical industry – Kilburn Chemical Limited, which is also located adjacent to a water body engaged in the manufacture of titanium dioxide, ferrous sulphate, hydrochloric oxide and that they were storing acidic effluent in unlined underground tanks with possibility of ground water contamination. It is submitted that though such is the finding in the report, TNPCB took no action against Kilburn, nor the public interest litigant did anything against Kilburn and the petitioner alone is being targeted.

200.Further, by referring to the report, it is submitted that there is a specific finding that the ground water characteristics from bore wells and dugwells located in villages around the petitioner do not indicate the presence

of marker pollutant, viz., arsenic, zinc, fluoride in concentration exceeding the IS Drinking Water Standards (2005). Further, the learned counsel referred to the findings in the report with regard to the surrounding area outside the industry premises and in particular, with regard to the fluoride and toxic metals and it was observed that randomly high concentration of PM_{10} and $PM_{2.5}$ at specific locations inside the industry premises may be due to implant fugitive emissions, raw materials storage and handling activities.

201.The report noted that in all the locations outside the industry premises (surrounding areas), the concentration of PM_{10} and $PM_{2.5}$ were within the stipulated norms. In the light of the said observations, recommendations were made, likewise, the report stated that the emission of particulate matter from waste heat recovery boiler was found to be more than the stipulated regulatory limit. Immediately, the petitioner changed the system adopted by them.

202.The learned counsel also referred to the findings in the report pertaining to the status of the waste generation and their management, granulated slag. Further, the report stated that as per the HWM Rules, copper slag generated from copper smelter has been categorized as non-hazardous waste and has been de-listed from hazardous waste category and it does not require disposal in SLF and also no specified type of time for the storage of the slag is delineated in the Rules.

203.Reference was also made to the findings regarding phosphogypsum and the parameters in Toxicity Characteristic Leaching Procedure (TCLP) and water leachate of phosphogypsum was found to be within the prescribed regulatory norms. It is submitted that though the CPCB granted time for constructing the pond as per the new design, it cannot be alleged that the petitioner has not complied with the same well before the expiry of the time limit especially when, the petitioner's existing pond has

better facilities than other industries, who are storing phosphogypsum, who do not have any such facility. In this regard, the learned counsel submitted that M/s.SPIC has been granted extension of time to construct the new type of gypsum pond as per the specifications of CPCB.

204.The learned counsel has drawn the attention of this Court to the conclusions, which have been drawn in the report in paragraph 12.0 and the recommendations made by the Committee in paragraph 13.0 of its report.

205.It is submitted that the TNPCB by proceedings dated 24.10.2011, issued directions under Section 31A of the Air Act, referring to the deficiency chart, which was taken note of by the Hon'ble Supreme Court while issuing directions, vide order dated 11.10.2011. Similarly, directions were issued under Section 33A of the Water Act and the directions have been complied with. Therefore, all issues cannot be re-visited once over again.

Further, the reference to the liberty granted by the Hon'ble Supreme Court in its 2013 judgment is to take fresh action and not to re-open an old issue. Further, it is submitted that though the major SO_2 emission is done by the thermal power plants, TNPCB has not taken any action against those plants. In this regard, reference was made to Notification No.SO 3305 (E), dated 07.12.2015, which notified the new emission of water standards for thermal power plants. In the light of the said notification, the averments made in the counter filed by the TNPCB *qua* power plants have to be rejected as false.

206.So far as the development of green belt is concerned, it is submitted that directions were issued under Section 31A of the Air Act, dated 24.10.2011, to improve the green belt development. However, when order of consent was issued in 2016/2017, there is no condition with regard to the green belt, which presupposes that the earlier conditions/recommendations have been complied with. It is further reiterated that copper slag has been

removed from the Schedule of Hazardous Material, which is not toxic and in spite of all these, TNPCB cannot argue that still it would be hazardous under the provisions of the Water/Air Act. If copper slag has been removed/deleted from the schedule, it would mean that it is non-hazardous and it is not an exemption from the provisions of the Act.

207.The learned Senior Counsel had referred to a tabulated statement containing the compliance status to the consent conditions and voluntary commitments by the petitioner with regard to the copper slag and phosphogypsum. One of the conditions in the consent order dated 19.04.2005, is that the slag shall be stored in an impervious platform before disposal and the unit shall furnish proposal for final disposal of slag in SLF or through export without accumulation on the premises. It is submitted that the petitioner had complied with the disposal of the slag in terms of Special Condition No.23 in the consent to establish dated 22.05.1995 wherein,

disposal was permissible for consent blasting to land filling and road laying, etc. The purchaser of the slag has stored it from 2010 and when samples were drawn in 2017, there was no leachate.

208.It is submitted that TNPCB had referred to a report submitted by M/s.SGS dated 12.10.2018, which is said to have been prepared six months after the petitioner had closed down. However, the methodology adopted is not the TCLP, and in the Manual of Sampling, Analysis and Characterisation of Hazardous Wastes, published by the CPCB, it is stated that the TCLP method is applicable to the determination of mobility of metals, semi-volatile organic compound in solids. Further, it is submitted that the compliance status will clearly show that the petitioner did not violate any of the consent conditions, the TCLP test results showed that it was within parameters, slag was deleted from the schedule of hazardous material and the regime for disposal of copper slag was mentioned in the NEERI report, which was

noticed by the Hon'ble Supreme Court and this was followed by an inspection by TNPCB and there is nothing to say that the slag is hazardous and hence, ordering closure on the said ground is not sustainable.

209.It is submitted that an information was obtained under the Right to Information Act (RTI Act) from the Gujarat Pollution Control Board seeking details regarding the consent and HW authorisation granted to M/s.Hindalco Industries Limited and in the consent order, granulated slag and phosphogypsum have been shown as by-products. It is submitted that NEERI had classified slag to be non-hazardous and the Hon'ble Apex Court accepted the said submission and now the TNPCB cannot say it is hazardous.

210.It is submitted that Rule 3(17) of the HWM Rules, 2016 defines "hazardous waste" to mean "any waste" which by reason of characteristics such as physical, chemical, biological, reactive, toxic, flammable, explosive or

corrosive, causes danger or is likely to cause danger to health or environment, whether alone or in contact with other wastes or substances and shall include waste specified in Part-A of Schedule-III in respect of import or export of such wastes or the wastes not specified in Part-A, but exhibit hazardous characteristics specified in Part-C of Schedule-III. It is submitted that Part-A of Schedule-III is applicable for import and export of hazardous wastes. In Part-B, Basel No.B2040 includes slag from copper production, that is, to process copper slag. However, Part-B is not included in Rule 3(17)(iii), which defines "hazardous wastes".

211.It is further submitted that Part-C of Schedule-III to the HWM Rules gives the "list of hazardous characteristics" and in Code No.H13, hazardous characteristic or material capable, by any means, after disposal, of yielding another material, example leachate, which possesses any of the characteristics listed in Code Nos.H1 to H12.

212.It is submitted that the National Metallurgical Laboratory (NML) in 2006 was engaged to carry out toxicity characteristic leachate procedure on the copper slag and it observed that slag is extremely stable with respect to the leachability of the inorganic elements present in the slag and poses absolutely no risk in terms of toxicity for storage, disposal, landfill and its use as a constitute of cement or bituminous pavement. The results of the study indicate poor leachability of the heavy metals and assures long term stability and it recommended that slag is safe to be considered for use in Portland cement, building materials and bituminous pavement constructions and slag samples are non-toxic and pose no environmental hazard from the view point of leachability of heavy metals. Thus, it is submitted that the petitioner has not violated the terms of the HWM Rules.

213.It is submitted that the TNPCB relied upon a research paper submitted in the Stanford University and the process, which was examined in

the report, where units had smelters which were very old and operating without permits, metal smelting technologies. Furthermore, the unit was also a mining location and wastes generated were from both mines and smelting process and there were no documented evidences of solid wastes or water management. In terms of technology, there has been lot of advancement and the technology adopted by the petitioner is the most efficient metal smelting technology as on today.

214.Though certain observations were made by the learned Senior Counsel by contending that Mr.Michael Parsons was only a student at Stanford and the report does not deserve to be looked into etc., are not taken into consideration and those submissions would stand eschewed, as it is not germane to the issue argued before us.

215.It is further submitted that the allegations against the petitioner would boil down to three viz. SLF is not proper; phosphogypsum is leachable,

polluting the land and green water; and copper slag is leachable, hard metals are getting into the earth. Had the TNPCB conducted a source apportionment study as directed by the NGT to be done, all these allegations cannot be made against the petitioner, because the question is whether the petitioner is polluting and not that the water quality is alleged to be bad. Thus, in the absence of any colossal action between the petitioner and the alleged pollution, order of closure could not have been passed.

216.It is further submitted that the respondents would contend that TDS and sulphates must be included as marker pollutants and there is a big fallacy in the said submission, as if there is no increase in arsenic, zinc and fluoride, then there can be no increase in TDS and sulphates. The respondents do not dispute that the petitioner is a zero discharge unit whereas, there are several industries in the SIPCOT Industrial Complex discharging effluent apart from 11 lakh cm^3 sea water drawn per day by the thermal power plant.

217.The learned counsel referred to the report on the impact of the thermal effluents on the CV belt at Thoothukudi Bay. It is submitted that the petitioner has a thermal power plant within the factory premises, which is also a zero discharge plant whereas, the other three plants, which were existing in Thoothukudi, are discharging into the sea.

218.The learned Senior Counsel, referring to a paper presented on impact of thermal effluents on seaweed bed of Thoothukudi Bay, submitted that the study shows that thermal (heat) is one of the seven major categories of environmental pollution and thermal power plant contributes significantly to environmental pollution. The thermal pollution due to cooling water, waste water and fly ash slurry discharge are bound to have detrimental effects on the hydrography of the receiving waters. It is submitted that the study states that hot water effluent generated by the cooling condenser in thermal power plants with particular reference to the Thoothukudi Thermal Power Station (TTPS) is

pumped directly into the Bay and in addition, there is waste water outlet also located one kilometre westward of the hot water outlet.

219.It is further submitted that the pollution from TTPS over the years had created a barren intertidal area almost devoid of seaweeds and seagrass beds and also changed the once blue clear waters of Thoothukudi Bay into an area with high turbidity and non productive bottom muddy area. It is submitted that the study reveals that dumping of thermal and waste water effluents and fly ash into Thoothukudi Bay has caused extensive damage to this fragile system whereas, the petitioner's captive thermal plant is zero discharge plant whereas, the other three thermal power plants in Thoothukudi discharge into the sea.

220.It is submitted that the argument of the petitioner is not that the thermal power plants are violating their consent conditions, but the argument

is that they are causing pollution and this is precisely the reason as to why the petitioner insists upon a source apportionment study.

221.It is submitted that the respondent relied upon a report on impact of other industries on ground water contamination and according to TNPCB, this is an apportionment study. However, the TNPCB does not give any remarks in respect of solar evaporator plants and no checks have been made on the panels, nor any study on the TDS contribution of seafood processing plant. This argument is put forth to state that the report relied on by the TNPCB cannot be construed as a source apportionment study.

222.The learned Senior Counsel referred to a sample scope document to demonstrate as to how source apportionment study for an area has to be conducted and without doing so, the petitioner has been victimised, that too, without any scientific analysis. It is reiterated that M/s.Greenstar

Fertilizers Limited has been granted extension of time for constructing the gypsum storage pond beyond the time limit prescribed by CPCB, which came to an end in September, 2019. It is further submitted that TNPCB argued that the SLF is not proper. However, no show cause notice was issued to the petitioner in this regard, nor there was any allegation about improper maintenance of the SLF and the fact that consent was granted to the petitioner will show that such argument before this Court is not tenable. The SLF Cell-I was inspected by the authorities of Anna University and reported to confirm to all requirements. Therefore, if according to TNPCB, there is anything new to be done, then the petitioner has to be directed to do so and the same cannot be a reason for closure of the unit. Compared to the other copper smelting plants in the Country such as Hindustan Copper, Birla Copper, etc., the petitioner has the latest state of art technology in the country and there is no justification for closure of the petitioner's unit.

223.It is submitted that though the order passed by the NGT was set aside by the Hon'ble Apex Court on the ground of lack of jurisdiction, the report submitted by the fact finding committee has evidentiary value. The 2013 incident is not attributable to the petitioner and even assuming it had happened, the same cannot be a ground to close down the industry for an alleged past incident. This is more so because, there is no allegation made by TNPCB of any recurrence of such incident.

224.Further, reiterating his earlier submissions, the learned Senior Counsel would state that the impugned Government Order, ordering permanent closure, is an administrative decision and, not a policy decision. Further, Article 48A of the Constitution cannot be pressed into service, when closure is under the Water Act and if there is a challenge to a statutory enactment, Article 48A can be pressed into service to sustain the enactment and in other circumstances, when the field is occupied by legislation, Article 48A cannot be brought in.

225.It is further submitted that Article 37 of the Constitution will be applied while making laws, and directive principles of state policy cannot be applied while exercising an executive power under the Water Act. Reference was made to Rule 10(1)(a)(ii) of the Transaction of Business Rules to submit that the impugned Government Order cannot be treated as a policy decision. In this regard, it is submitted that the decision in the case ***M.P.Oil Extraction*** relied on by the respondents is distinguishable. To emphasis his submissions, reliance was placed on the decision in the case of ***Balco Employees' Union*****,** where there was a policy of disinvestment and the decision of the Government to a policy of disinvestment was subject matter of challenge and hence, the Apex Court held it cannot interfere with a policy decision. Thus, by applying the tests in paragraph 57 of the ***Balco Employees' Union's*** case, it will be clear that there is no policy decision while passing the impugned Government Order.

226.It is further submitted that if according to the Government, the original decision taken in 1994 to permit the petitioner to establish the unit was a policy decision, then without a policy decision, the petitioner cannot be closed down. With regard to a single person legislation, the learned Senior Counsel referred to the decision in ***S.P.Mittal.*** In the said decision, several considerations were taken note of, Auroville was treated as a class apart. Therefore, it is submitted that there are no special circumstances brought out by the respondents to treat the petitioner differently and if so, there should be material and there should be application of mind of such material. The statute does not create a separate classification within the red category industries and the respondents cannot create any sub-classification under the said category. That apart, the classification of the industries into various categories such as red, orange, etc., has already been done by CPCB and there can be no further sub-classification, that too, without consultation with CPCB. Therefore, it is clear that the action against the petitioner is clearly discriminatory.

227.It is submitted that the decision in the case of ***Prof.M.V.Nayudu*****,** which was referred to by the respondent, was a case where the decision was based on scientific uncertainty whereas, in the petitioner's case, there is no such uncertainty, as all authorities have submitted reports and there is sufficient scientific data available in favour of the petitioner and therefore, the decision in ***Prof.M.V.Nayudu*** would support the case of the petitioner.

228.With regard to the allegation regarding the calibration done by the petitioner during midnight, the petitioner has given a detailed explanation and the equipment, which was used earlier in SAP-I, needed calibration once a month and as of now, the equipment has been changed. The learned Senior Counsel also referred to the rejoinder submissions in this regard.

229.Mr.P.S.Raman, learned Senior Counsel appearing for the petitioner submitted that the first issue he would address is on the value of

evidences and the onus of proof. It is submitted that the reports of various statutory authorities and other technical bodies merit acceptance and these reports would supersede all raw data given by the respondents/intervenors. It is submitted that the principle 'anti inter mortem' stands on much higher pedestal, that is, the evidence just before the dispute had arisen. It is submitted that there was an inspection by TNPCB on 27.02.2018 and further inspection on 28.02.2018 for authorisation under the HWM Rules. The last date on which air samples were drawn was on 30.03.2018 and water sample on 30.04.2018 and all these test reports do not suggest anything against the petitioner. Therefore, any subsequent data cannot be given any weightage. Further, by referring to the information secured under RIT Act, it is submitted that the AAQ monitoring prior to the closure of the petitioner and after closure of the petitioner has remained unchanged except particulate matter which has increased. In this regard, the learned counsel referred to the submissions in the sur-rejoinder filed by the petitioner to the rejoinder filed by the respondents.

The fact that there has been increase in the particulate matter after the closure of the petitioner unit would show that the petitioner is not the attributer. The learned counsel referred to the National Air Quality Index and submitted that Thoothukudi is safer than Chennai. Thus, it is submitted that other than the shooting incidence, there was no change of circumstances for closure or for permanent closure.

230.Nextly, addressing on the issue as to the provocation and circumstances leading to the impugned order, it is submitted that there is not even simmering discontent between 2013 and 2018. On 14.11.2016, the petitioner informed the National Stock Exchange about the grant of consent for expansion and only after the petitioner started the expansion work, during December 2016, protests started. During February, 2018, the petitioner applied for renewal of consent of the existing unit for which, an inspection was conducted on 27.02.2018 by the TNPCB. On 21.03.2018, the protesters

convened a meeting in Thoothukudi and objected to the very running of the plant, though the initial protest during February, 2018 was only against expansion. As a consequence, on 09.04.2018, TNPCB rejected the application for renewal of consent challenging which, an appeal was filed before the Appellate Tribunal in which, TNPCB filed counter raising only five grounds which were mentioned in the order dated 09.04.2018. The case was adjourned to enable the respondents to make submissions and it was directed to be listed on 24.05.2018 and unfortunately on 22.05.2018, shooting took place. It is submitted that there is no earlier precedent of such order of permanent closure.

231.It is submitted that the question would be as to whether merely because of public outcry, the State can take a knee jerk reaction, it is submitted that it cannot be done so and to support such submission, reliance was placed on the decision of the High Court of Kerala in the case of ***Harrisons Malayalam Limited***. Arguing on the proportionality of the decision to close

down, reference was made to the decision in ***Lafarge Umiam Mining (P) Ltd. vs. UoI [(2011) 7 SCC 338]*** and ***Hanuman Laxman Aroskar,*** wherein doctrine of proportionality was applied. When the petitioner addressed the respondents requesting them to permit them to maintain the plant, they were informed to dismantle the machinery and leave the State and this will clearly show the mental state in which the decision was taken.

232.With regard to the allegation that there was a misrepresentation on the land holding, it is submitted that the public interest litigant Ms.Swetha Narayanan has specifically raised the issue before the Hon'ble Supreme Court, which was not dealt with and therefore, deemed to have been rejected. However, the petitioner has answered and can demonstrate that there was no misrepresentation. By referring to the extent of land, which was allotted to the petitioner when they started the plant and when they informed about the extent of 68 Ha of land, which is in the process of being allotted, it is submitted that it would be used for future expansion, green belt and SLF.

233.The learned counsel referred to the communications sent by the petitioner to MoEF and submitted that there is no misrepresentation with regard to the land holding. With regard to the classification of the land, it is submitted that there is no notification issued under Section 28 of the Town and Country Planning Act and therefore, there is no Master Plan for Thoothukudi. With regard to the green belt requirement, it is submitted that this issue was also raised by Ms.Swetha Narayanan and Mr.Vaiko and all these were considered by the Hon'ble Supreme Court, an inspection was ordered by the committee consisting of officials of CPCB and TNPCB and the Hon'ble Supreme Court accepted the report as to the existence of the green belt. Thus, the petitioner having established the existence of the green belt, the subsequent orders of consent do not make any reference to the same, as the issue has been done and dusted.

234.With regard to the stack height, the learned counsel referred to the report of NEERI, the physical characteristics of the stacks in SAP-I and

SAP-II and also submitted that it is the TNPCB which has to prescribe the stack height in terms of Section 21(5)(iv) of the Air Act. Therefore, it is submitted that the respondent cannot now say that the stack height should have been higher by combining both the plants. With regard to the issue pertaining to material balance and copper concentrate, the learned Senior Counsel submitted that there will be three issues, which need to be taken note of, viz., (i) the quantum; (ii) air quality; and (iii) the process adopted. In this regard, the learned counsel referred to the documents on copper concentrate and copper manufacturing – global scenario and also explained with regard to the quality of the copper concentrate used by the petitioner. Referring to a writer on air pollution control measures, it is submitted that the petitioner employs best in class technologies across its plant in Thoothukudi and referred to the *Isa Smelt* technology adopted by the petitioner as well as the global scenario.

235.The learned Senior Counsel made an elaborate reference to the note on various parameters in particular, regarding mercury fixation, bag

house operation, CO emission, secondary case scrubbers, etc. While on this issue, the learned Senior Counsel also referred to the note on stack height calculation and submitted that as per the calculations to be adopted based on the formula, the stack height is to be 55.1m (basic emission norms) and 44.75m (basic actual emission), which are lower than the actual height of 60.38m available with the petitioner, which was prescribed by TNPCB. With regard to the allegation that the health of the people has been affected, more particularly, with regard to the incidence of cancer, reference was made to the cancer register to state that Thoothukudi has less than the State average of cancer cases. The study average is 80.2% per one lakh population and in Thoothukudi, it is 63.5 % and in the Human Health Index, Thoothukudi ranks number three in the State of Tamil Nadu. In this regard, reference was made to the affidavit filed by the District Collector, Thoothukudi before the Hon'ble Supreme Court and nothing alarming was reported. The Doctor, who was nominated by the petitioner, had undertaken a very thorough exercise and he

had gone to each village and a register has been maintained and therefore, the allegation made by the intervenors alleging that the petitioner is the reason for deterioration of the health of the people of Thoothukudi is unsubstantiated.

236.With regard to the issue relating to sustainability of the petitioner's unit, the learned counsel referred to the various copper smelting plants in the world and in particular, a plant in Germany, which is located in the heart of the city. It is submitted that the petitioner adopted best practices even before TNPCB imposing any condition and after the petitioner had adopted such practices, it was imposed as the consent condition. In this regard, the environment improvements and the best practices adopted by the petitioner were referred to including the steps taken for energy conservation. It is submitted that these best practices, which have been implemented by the petitioner have not been done by any other plants in South-East Asia. That apart, with regard to the air quality improvement, the petitioner had voluntarily

undertaken several steps without even the same being imposed as one of the conditions in the order of consent. To substantiate the contention that the plant is maintained well, the learned counsel referred to various photographs to show that there were several migratory birds, which would prove that there is no water contamination. Further, it is submitted that the petitioner had proposed a desalination plant so that water is not drawn from the river, Thamirabarani and this was under active consideration before closure.

237.Mr.A.Yogeshwaran, learned counsel appearing for Ms.B.Poongkhulali, learned counsel for the 9th respondent submitted that the foremost submission made by the learned Senior Counsel for the petitioner is on the ground of *res judicata* that events which had occurred prior to the 2013 judgment of the Hon'ble Supreme Court cannot be looked into. It is submitted that in order to ascertain the correctness of this submission, it would be necessary to take note of the pleadings and the findings rendered by this Court.

Referring to a tabulated statement in the common additional rejoinder to the counter affidavit filed by the petitioner, it is submitted that the arguments of Mr.Vaiko with regard to the location of the industry is not the contention, which has been raised by the 9th respondent. In this regard, the learned counsel referred to paragraph 10 of the counter affidavit filed by the 9th respondent (Ms.Fatima) wherein, it has been submitted that Thoothukudi Master Plan – land uses schedule shows that Meelavittan Village, where the petitioner's industry is located, does not have any survey number, which has been classified as "special industrial use zone" and it is only "general industrial use zone". In G.O.Ms.No.1730, the Government has clearly indicated the nature of activities that can be permitted in designated zone and the petitioner industry could not have been permitted to establish and operate its industry at the present site. As per the land use map of Thoothukudi, the industry has been located on lands classified as "general industrial use zone and agriculture use zone". However, in the consent application, it has been

claimed that the site is classified as "institutional use zone". Further, as per the RTI reply dated 19.09.2018, the villages of Swaminatham and Palayakayal have alone be classified as "special industrial and hazardous use zone".

238.It is submitted that the petitioner has not controverted these submissions, but their contention is that SIPCOT leased the land in the industrial complex and there is no illegality. It is submitted that SIPCOT is not the planning authority, but a company established by the Government for the purpose of setting up of industrial complexes, SIPCOT cannot violate the town planning laws and it cannot replace, nor take on the responsibility of the local authority in any District, which is solely incharge of zoning and planning. Further, it is submitted that in the counter affidavit filed in W.P.No.16005 of 2018 by the Pollution Control Board and the State of Tamil Nadu, it has been admitted that the industry is located in a non-confirming area, but have stated that action needs to be initiated by the Department of Town and Country Planning.

239.To emphasis the importance of the Master Plan, strict adherence to the zonal classification, impermissibility of reclassification, etc., reliance was placed on the decision in the case of ***R.K.Mittal & Ors. vs. State of U.P. & Ors. [Manu/SC/1471/2011]; M.C.Mehtha vs. UoI & Ors. [Manu/SC/04788/2004]; Palani Hills Conservation Council vs. State of Tamil Nadu & Ors. [Manu/TN/0991/1995]; Lal Bahadur; Besant Nagar Residents vs. MMDA & Ors. [(1990) 1 MLJ 445]; Sushanta Tagore & Ors. vs. UoI & Ors. [Manu/SC/0176/2005],*** the decision of the High Court of South Africa (Western Cap High Court, Cap Town) ***In Intercape Ferreira Mainliner (Pty) Ltd., and Ors. vs. Ministry of Home Affairs and Ors.,*** *Case No.20952/2008;* and ***Bitou Local Municipal vs. Timber Two Processors CC,*** *Case No.9221 of 2007;* and the decision of the Supreme Court of US *in* ***State of Georgia McClure vs. Davidson, 258 Ga.706 Ga (1988).*** Thus, it is submitted that the Master Plan has the force of a statute, the petitioner industry is sited in violation of the Master Plan and activity not confirming to the

zoning and town planning regulations cannot be permitted, as it would lead to disastrous consequences.

240.It is submitted that in the common additional rejoinder filed by the petitioner, the contentions regarding green belt were raised before the Hon'ble Supreme Court by Ms.Swetha Narayanan and Mr.Vaiko. Referring to the affidavit filed by Ms.Swetha Narayanan before the Hon'ble Supreme Court wherein, there is a reference to the May, 2011 NEERI report, it was stated that the total green belt at the time when NEERI inspected and submitted report, was only 7.76% of the total industrial lands as against stipulated 25% and after referring to the NEERI report, it was stated that it clearly shows non-compliance of the EC conditions stipulated by MoEF apart from stating that the May, 2011 NEERI report glosses over the fact that the petitioner's compliance was to even adjudge and as per the stipulation of the August, 2007 EC/stipulations, 43 Ha out of 172.17 Ha (and not 26 Ha out of 102.5 Ha)

should be greened. However, the contention of the 9th respondent before this Court is that the petitioner does not possess adequate land for maintaining green belt as mandated by TNPCB. Initially, the TNPCB by order dated 01.08.1994, mandated development of 250m wide green belt. This was arbitrarily reduced to 25m by order dated 22.05.1995 on a request made by the petitioner. The November, 1998 report of NEERI shows that the petitioner failed to develop even the reduced extent of green belt. Before the Hon'ble Supreme Court, the consideration was only with regard to the correctness of the reduction of the size of the green belt to 25m and the Hon'ble Supreme Court did not go into the issue of presence or absence of green belt, as there is no finding rendered in the 2013 judgment.

241.The petitioner has further contended that the contention raised by the 9th respondent in the notes on submission is similar to the contentions raised by the National Trust for Clean Environment in W.P.Nos.15501 to

15503 of 1996 before this Court and this submission is incorrect and in this regard, the learned counsel referred to paragraph 7 of the affidavit filed in the said writ petitions. The learned counsel also referred to the affidavit filed by Ms.Swetha Narayanan before the Hon'ble Supreme Court in I.A.Nos.33-44/2012 and submitted that the contention raised by Ms.Fatima, the 9th respondent is that the unit should have adequate space for development of green belt for minimum width of 25m under the battery limit of the industry, which is lacking. In this regard, the learned counsel has drawn the attention of this Court to paragraph 51 of the counter affidavit filed by the 9th respondent, which contains a tabulated statement giving the extract of the consent orders *qua* the green belt requirements and among other things, it is submitted that there is no 20m green belt around the gypsum pond, slag storage yard, landfill, etc., which hugs the periphery of the petitioner's factory.

242.Further, it is stated that the lack of green belt is established by the google earth satellite images, which clearly indicate that there has never

been any green belt, which has the width of 25m as claimed by the petitioner. If the green belt had been maintained as alleged, the growth would have been substantial and the trees would survive without any maintenance. Further, the absence of green belt has allowed toxic dust and fugitive emission, including re-suspended dust from the movement of heavy vehicles to be carried out by the winds to the residential areas nearby. To impress upon the need to provide such green belt for buffer areas, reliance was placed on the decision of the Supreme Court of Victoria at Melbourne in ***Casey City Council vs. Seventh Day Adventist Church,*** in ***Case No.366 of 2010***, the decision of the European Court of Human Rights in ***FADEYEVA vs. Russia, 45 EHRR (2007) 10, Application No.55723/2000, 9th June, 2005*** and ***M.C.Mehtha vs. Union of India & Ors. [AIR 2004 SC 4016]***.

243.Further, the learned counsel submitted that the petitioner has been illegally operating out of 102.3 Ha of land in violation of the clearance

dated 09.08.2007 requiring 172.17 Ha, thus, played fraud on the authorities. After referring to the land details as mentioned in paragraph 24 of the counter affidavit of the 9th respondent, it is submitted that the petitioner operated Copper Smelter Plant-I out of 102.3 Ha. They did not acquire the land for the existing Plant-I as undertaken by them, but only acquired the land for Plant-II and attempted to pass off the same as lands specified for Plant-I. The total extent acquired by the petitioner after issuance of the clearance dated 09.08.2000 is 131.3 Ha, which has been utilised for its Plant-II, according to the clearance obtained and not for Plant-I. It is further submitted that a thorough comparison of the survey numbers of the parcels of land listed by the petitioner industry towards Plant-I and II clearly demonstrates the fraud committed by the petitioner by repeating the same parcels of land as being available for both. Further, it is submitted that the petitioner in their letter dated 25.06.2012, addressed to MoEF have stated that "In 1200 TPD EC – the existing land usage area may be taken as 102.31 + 30 = 132.31 Ha in which,

green belt of 43 Ha has been completed considering 33% area coverage. The same area to be noted in place of 172 Ha". Thus, the petitioner has attempted to amend the terms of the clearance by mere letter correspondence with MoEF and confusing the authorities regarding the land availability.

244.It is further submitted that it is only in the inspection report of TNPCB dated 27.02.2018, it has been revealed that the land available for Plant-I was only 102.3 Ha and not 172.12 Ha. It is submitted that need to comply the requirements to obtain the environmental clearance are non-negotiable and they are mandatory. In support of such contention, reliance was placed on the decision in ***Pondicherry Environment Protection Association vs. UoI [W.P.No.11189 of 2017, dated 13.01.2017];*** order of the NGT – Western Zone Bench in ***Shri.Arvind V.Aswal & Ors. vs. Arihant Realtors & Ors. [Misc.Application No.607 of 2013 in Appeal No.77 of 2013,*** *dated* ***13.01.2014]*** and in ***Common Cause & Ors. vs. UoI [W.P.(C) Nos.114 & 194 of 2014, dated 02.08.2017].***

245.The learned counsel submitted that the industry is operating in less than mandated area of land and referred to the averments in paragraphs 36 to 45 of the counter affidavit of the 9th respondent. Thus, it is submitted that if an order has been obtained by playing fraud, then it is a nullity and to buttress the said submission, reliance was placed on ***A.V.Papayya Sastry & Ors. vs. Government of A.P. & Ors [(2007) 4 SCC 221].***

246.The learned counsel next moved on to submit regarding the mercury content in the copper concentrate. It is submitted that it is not disputed, but admitted that copper concentrate contains 2.25 PPM of mercury. Insofar as the petitioner is concerned, it is an extreme case of under-reporting. The petitioner had filed a one page note for the sur-rejoinder filed by the 9th respondent on 18.12.2019 wherein, it is stated that the gas cleaning session is sufficient to remove mercury. The learned counsel referred to the research paper on mercury emission from industrial sources in India and its effects in

the environment wherein, it has been stated that the petitioner uses Australian Copper Concentrate containing 5.0 kg mercury per kg.

247.Referring to the documents filed by the 9th respondent, it is submitted that the minimum mercury emission is 5.81mg and the maximum is 15mg and therefore, reporting 2.25 PPM, is gross under reporting. The 9th respondent had obtained an analysis report of the copper concentrate from CPR Labs Private Limited, which shows that the content of mercury is 28.0mg/kg. The learned Senior Counsel for the petitioner raised serious objection to rely upon the test report and that it should be discarded, as it has no sanctity. So far as the plant in Germany is concerned, it is submitted that mercury removal tower was installed in the year 1998 itself. It is submitted that elemental mercury will escape all traditional gas cleaning systems. Further, it is submitted that in the annual return filed by the petitioner under the HWM Rules for the period from April, 2014 to March, 2015, the quantity

of mercury recovered has not been mentioned, though the petitioner admits that traces of mercury are found. The learned counsel further submitted that based upon the quantity of mercury that would have been generated from the operations conducted by the petitioner from 2004 to 2008, they should have recovered 28.91 tonnes of metric, if the quantum of mercury is taken at the minimum of 5.0 PPM and maximum is taken as 15 PPM, they should have recovered 66.17 tonnes of mercury. Therefore, the petitioner is a polluter and the contention that there is no pollution is absolutely wrong.

248.Further, it is submitted that the petitioner is guilty of inflating the amount of annual production. Imported cathode, anode cannot be taken to consider the gross anode, gross imported anode, which will not generate slag and therefore, the quantum of anode has to be taken as 3,28,076 MT and not 3,92,544 MT. Further, the arsenic concentrate is higher, that is, 569 PPM and not 514 PPM. Further, with regard to the material balance constitute, it is

submitted that inconsistent stand was taken as to whether it was dry MT or wet MT. In this regard, reference was made to the reply affidavit filed by the petitioner to the counter affidavit of the 9th respondent and it is submitted that the statement regarding material balance furnished by the petitioner cannot be trusted. It is further submitted that the petitioner functioned without valid authorisation under the HWM Rules, 2016 as well as under the earlier rules of 1989 and 2008. The authorisation under the 2008 Rules was issued on 10.07.2008 and expired on 09.07.2018 and the petitioner continued to operate without the mandatory authorisation.

249.To emphasis the dangers surrounding the hazardous waste, reliance was placed on the decision of the Hon'ble Supreme Court in ***Research Foundation for Science Department and Industrial Resources Policy vs. UoI & Anr. [(2005) 13 SCC 186].*** It is submitted that in the said decision, the Hon'ble Apex Court directed closure of all units that do not have authorisation.

The petitioner is liable to be closed on the ground that they were operating without authorisation from 2013 onwards. It is further submitted that as per the 2008 authorisation, permission was granted for nine categories of hazardous wastes that would be generated by the industry and the manner of disposal was also mentioned. The petitioner has not been accounted for its wastes and mass balance for its operations having indicated gross violation, with huge quantity of arsenic unaccounted in support of such situation, TNPCB failed to take any action. After referring to the various other details, it is submitted that the petitioner has been generating and disposing of huge quantity of extremely hazardous waste without any permission in law and without following any of the safeguards inbuilt in the Rules.

250.It is submitted that following the Basel Convention, the HWM Rules has incorporated a robust system to monitor hazardous waste from cradle to grave. In the case of the petitioner, due to failure of TNPCB to perform its functions and due to illegal and high handed functioning of the

petitioner industry, the entire system has been broken and compromised putting people at risk. In this regard, the learned counsel referred to Rule 19, which mandates different colour manifest, each corresponding to a different stage in the waste disposal process. The petitioner would state that upon analysis of the petitioner's document in 2016-2017, they illegally disposed of 1503.93 tonnes of arsenic bearing scrubber cake containing at least 600 kg of arsenic (40 PPM). Between April, 2014 and March, 2017, the petitioner illegally disposed of 3489.53 tonnes of toxic ETO waste containing between 7 and 26 tonnes of arsenic including an unauthorised agent, viz., M/s.Suhan Chemicals. It is submitted that the said entity is an unauthorised facility because they are authorised only to spent anode containing nickel to an extent of 610 MT/A according to Maharashtra Pollution Control Board. Further, there is also discrepancy in the quantity of production as between the annual report of the parent company of the petitioner and the annual return to be filed under the HWM Rules.

251.The next contention advanced by the learned counsel is with regard to the air pollution. The first of the submissions being on the inadequate stack height. Referring to the total production, the learned counsel seeks to establish before this Court about the inadequacy in the stack height. It is submitted that earlier emission norms have nothing to do with the stack height, which has to be established in accordance with the provisions of the EP Rules. It is further submitted that the readings shown in the existing CAAQ monitors connected to TNPCB are false. The learned counsel referred to the readings and submitted that the value remains constant and therefore, the data has to be rejected as unreliable. It is further submitted that the petitioner is responsible for maintaining the monitors and the data produced is untrustworthy. The response now sought to be given by the petitioner for the static data cannot be countenanced. Thus, it is submitted that all these averments of gross under-design and fraudulent monitoring have escaped the

notice of TNPCB is suspicious and vindicate long standing complaints of the public about the insufferable air pollution. It is submitted that the laxity of TNPCB cannot be used in favour of the petitioner industry, an offender especially when, innocent lives have been harmed by toxic pollution.

252.The next submission of the learned counsel is with regard to the particulate matter, which is formed through chemical reaction when SO_2 reacts with atmosphere/moisture, silicates are formed, which are particulate matter. The learned counsel explained the industry pollutant auction ratio. With regard to the 2013 incident, the learned counsel sought to demonstrate that the explanation offered by the petitioner cannot be accepted. It is false to state that what was done by the petitioner was in calibration exercise. Merely because there has not been any incident after 2013, is no ground to show any leniency to the petitioner. The report of the TNPCB with regard to the piezometric borewells was referred to, to show that sea water has nothing to

do with the high chloride levels and the increase attributable to the petitioner and not the sea water, as the sea is 10 km away from the petitioner's unit.

253.With regard to the plea of constructive *res judicata* raised by the learned Senior Counsel for the petitioner, it is submitted that there can be no *res judicata* in a public interest litigation, nor the principles of constructive *res judicata* could be applied in public interest litigation. In this regard, reliance was placed on the decision in ***V.Purushothaman vs. UoI [(2001) 10 SCC 305]***. Thus, it is submitted that the petitioner has been given a long rope and TNPCB has shown laxity in their approach and nothing more is required to be extended in favour of the petitioner and the orders impugned may be affirmed.

254.Mr.T.Mohan, learned counsel appearing for Mr.A.Suresh Sakthi Murugan, learned counsel referred to the rapid EIA report of the year 1994, 1998 NEERI report, NEERI report dated 19.02.1999, NEERI report of the

year 2011 and referred to the various observations contained in those reports and pointed out the areas where deficiencies were found, as to how RO system is operated at suboptimal capacity, etc. It is submitted that when a defect in the meter was pointed out, the petitioner took a stand, it amounts to a capital expenditure and they took eight months to rectify the same when such meters were easily available in the market. Further, the learned counsel referred to convenience set Part-A (page nos.241, 242 and 243) wherein, observations have been made such as ETP-I was choked, no flow meter in ETP-I, no logbook, pin hole leakage, Zero Liquid Discharge (ZLD) not properly maintained, etc. The learned counsel also referred to a research article, which is a study conducted by Mr.Rangarajan. It is further submitted that the spikes, which had occurred, cannot be ignored and every single incident is a matter of concern.

255.Mr.C.S.Vaidyanathan, learned Senior Counsel appearing for the TNPCB submitted that TNPCB has become like a drum receiving beating on

both sides, as a regulator it has to bear with this. The onus to show that the order is valid, is not on TNPCB, but it is for the petitioner to show that it is not valid. This is so because, the petitioner is required to take consent to operate and on its own, should prevent pollution and the onus is on them to show that there is no pollution. After referring to the relevant paragraphs of the 2013 judgment of the Hon'ble Supreme Court, the Court interfered with the order because, it was not an order of closure passed by a regulator, viz., the TNPCB or the Government. Thus, the subject matter before the Hon'ble Supreme Court was not an order of closure by TNPCB. It is submitted that there was an argument on behalf of the petitioner that drinking water standards cannot be taken into consideration. However, the Hon'ble Supreme Court took note of the drinking water standards and therefore, the methodology adopted is correct. The Hon'ble Supreme Court found that there was pollution caused by the petitioner and the environment was affected. The thirty directions issued by TNPCB were based on report/inspection and is a continuing direction and

if the petitioner continues to pollute, the past conduct can be taken into consideration.

256.With regard to the contention regarding the plea of *res judicata,* reliance was placed on the decision in ***T.N.Godavarman Thirumulpad.*** Further, it is reiterated that in the 2013 judgment of the Hon'ble Supreme Court, what was considered is how a Court should test a public interest litigation and not as to how a regulator like TNPCB should act. In these cases, before this Court, it is a holistic exercise, though one is in the nature of appellate power and another, exercise of jurisdiction under Article 226 of the Constitution.

257.It is further submitted that even though the petitioner stated that they are a zero discharge unit, yet the Hon'ble Supreme Court found that they were polluting industry, hence, now to state that they are zero discharge and

therefore, there is no pollution, is an incorrect statement. Referring to the physico-chemical characteristics of ground water samples, it is submitted that the parameters were found to be not complying with drinking water standards. The baseline, which has been referred to by the petitioner is of no relevance, as the Hon'ble Supreme Court tested the parameters as against drinking water standards and therefore, the petitioner cannot rely on the baseline data, nor they can make an argument that drinking water standards cannot be taken. Referring to a charge contained in page 2 of Volume-R2 filed by TNPCB, it is submitted that there is no improvement between 2011 and till date, and 2013 till date. In fact, figures show that the position has worsened. Therefore, any remedial measure will not yield results and the only solution is to close down the plant permanently. The details in the chart show that all parameters are above the drinking water standards even after 2011-2013.

258.It is further submitted that on an average, the petitioner has made seven times profit over the investment made by them by operating all

these years. Post closure of the plant, a technical committee is to be constituted to assess the damage caused by the petitioner and suggest remedial measures for which, the petitioner has to pay. The decision in the case of ***63 Moons Technologies Ltd. (Formerly known as Financial Technologies India Ltd.) & Ors. vs. UoI & Ors. [(2019) SCC OnLine SC 624]*** is clearly distinguishable on facts. In the said case, in terms of Section 396(4) of the Companies Act, 1956, a draft order has to be sent to the affected parties whereas, there is no such requirement in the instant case. The case on hand is a case relating to an environmental issue arising under the Air Act and Water Act and all other cases are one time orders including the decision in ***Mohinder Singh Gill vs. Chief Election Commissioner, [(1978) 1 SCC 405].*** The Hon'ble Supreme Court in ***63 Moons Technologies Ltd.,*** has not overruled, but explained ***Mohinder Singh Gill***. The principle has not been watered down and hence, additional grounds can be looked into and subsequent materials can be taken note of. Reliance was placed on the decision in ***Indian Handicrafts***

Emporium & Ors. vs. UoI & Ors. [(2003) 7 SCC 589] and the decision in ***State of Madhya Pradesh & Ors. vs. Uday Singh & Ors. [(2019) SCC OnLine SC 420].*** Thus, there is a duty cast upon the petitioner to comply with all norms.

259.With regard to the disposal of slag, the learned Senior Counsel commented upon the suspicious nature of the document, viz., the letter sent to Mr.A.Paul, as this document was not produced till November, 2013. The petitioner cannot divest its responsibility over the slag and they are to be held responsible at all times. Further, continuing his submissions, it is stated that the petitioner's case cannot be compared to earlier cases such as ***Vellore Citizens Forum*** etc., because the violation committed by the petitioner is not capable of being remedied, hence the decision for closure is correct. The order passed by the NGT having been set aside, no part of the order can be looked into even the report of the Committee submitted before the NGT. The report

submitted by M/s.SGS shows that the soil in and around the area is contaminated. It is submitted that up to 2013, the matter was before the Courts in various stages and even after that when TNPCB took action, it was interfered by NGT. Therefore, it cannot be stated that TNPCB was glossing over the deficiencies.

260.Mr.K.V.Viswanathan, learned Senior Counsel submitted that the Government Order, ordering permanent closure is an exercise of statutory powers under Section 18(1)(b) of the Water Act. In terms of the Transaction of Business Rules and in particular, Rules 6 and 7, the matter has to be dealt with by the Department in-charge and need not go to the Cabinet, as it is not a subject under Schedule-II of the Rules. Further, the impugned Government Order passed under Section 18(1)(b) of the Water Act is to give effect to the policy of the Water Act. The Transaction of Business Rules, more particularly, Rule 10 is not attracted, since the respondent is exercising its

statutory power and when the statute gives authorisation to pass an order of closure, the Finance Committee of the Government cannot say that it cannot be done.

261.Mr.C.A.Sundaram, learned Senior Counsel for the petitioner submitted that in the counter affidavit filed by the official respondents, it has been stated that the decision to close down the petitioner permanently is a policy decision of the State Government. If that be so, then the respondents should show that the provisions of the Tamil Nadu Transaction of Business Rules were followed to term it as a "policy decision". In this regard, the learned Senior Counsel referred to the decision in the case of ***Gulf Goans Hotels Co. Ltd.,*** and ***Delhi International Airport Ltd.*** During the course of argument, it has been accepted by the respondent-State that the impugned order is not a policy, though the learned Advocate General had brought out as to the various Department Heads, who were part of the decision-making

process and ultimately, the decision being taken by the Hon'ble Chief Minister, yet it was contended that it is not a policy decision in the sense it is being projected. Taking note of the said submission, Mr.C.A.Sundaram, learned Senior Counsel submitted that the if the respondent-Government state that the impugned Government Order is in exercise of a statutory power, then his arguments based on the Transaction of Business Rules will not apply and such argument goes and all that has to be seen is whether there was existence of power and whether such power could have been exercised.

262.Referring to the decision of the Hon'ble Supreme Court in ***Air India Cabin Crew Assn., & Ors. vs. Yeshaswinee Merchant & Ors. [(2003) 6 SCC 277],*** it is submitted that if the legislator has authorised the Government, only the concerned Department of the Government should take action. The object of the Air and Water Acts is to abate pollution. The Hon'ble Supreme Court in its 2013 judgment interfered because the Court ordered closure and

not the regulator, viz., TNPCB and therefore, there is no question of principles of *res judicata* to be applied. With regard to the prayer made by a third party stating that he is a shareholder of the company and needs to be impleaded is liable to be rejected. This prayer has been made after the arguments were concluded on 7th of August, 2019 wherein, a specific argument was made that petitioner company is not a citizen and cannot seek protection under Article 19(1)(g) of the Constitution.

263.Mr.Vijay Narayan, learned Advocate General submitted that the power of closure is traceable to Section 33A of the Water Act and it is one of the functions of the Board under the Act. It was mentioned that in 2018, the State Government has filed its counter in the writ petition before the Madurai Bench in W.P.(MD) No.16005 of 2018.

264.Mr.Balan Haridas, learned counsel appearing for Mr.Jimraj Milton, learned counsel for the 10th respondent submitted that disposal of

copper slag is a condition in the consent order, TNPCB did not verify whether this was disposed according to the directions, yet granted renewal of consent. There has been no verification done by TNPCB before granting renewal. Though the petitioner had violated condition nos.10, 11 and 12 of the consent order (Vol.R2; page 266 and 268), no action was taken and there was continued pollution. It is further submitted that renewal of consent was granted by order dated 13.04.2016. Within three months thereafter, on 14.07.2016, the District Collector addressed the petitioner to remove the slag, which was dumped. No action was taken by the authorities to enforce the order which would clearly show that the District Administration was in connivance with the petitioner. On 24.09.2016, a review meeting was called for by the District Collector and the officials of the petitioner participated, yet no action was taken and show cause notice was issued only on 14.03.2017 for which, reply was given by the petitioner and once again directions were issued. However, no action was taken and the petitioner is habitual polluter.

265.As the authorities though issued show cause notice, issued directions, they failed to exercise their statutory power, which is a clear case of malice in law. The order under Section 133 Cr.P.C., was issued to Smt.Leelavathy and not to Mr.A.Paul. The said Smt.Leelavathy requested for measuring her property, which was measured on 31.10.2017 and Smt.Leelavathy accepted the measurement. Once again on 07.05.2018, Smt.Leelavathy sends a letter seeking measurement of her property. This was with a view to circumvent the letter given to her on 06.11.2017 to remove the slag within one week. Thereafter, Smt.Leelavathy agrees to construct a wall. Further, it is submitted that TNPCB should have suspended the petitioner's operations on account of non-renewal of HWM Rules. This would show that the officials acted hand in glove with the petitioner. The petitioner being a habitual pollutant, who has disregarded rules, cannot speak about corporate social responsibilities. The report of the Collector/PWD filed before the

Hon'ble Supreme Court (R10 Volume-IV page 6, 66 and 70) shows that a fresh water tank has been fully polluted. Epidemiological study of water shows that it is unfit for drinking purposes. The people of the area have suffered enough due to the greed of the petitioner and therefore, the petitioner should be permanently closed and shutdown.

266.By way of concluding remarks, Mr.C.A.Sundaram, learned Senior Counsel submitted that what are required to be seen are with regard to (i) existence of power; (ii) exercise of power; (iii) procedure followed in the decision-making; and (iv) whether the procedure was directory or mandatory. Referring to Section 17(1)(l) of the Water Act, it is submitted that there is no power to close the industry, as Section 17 is an exhaustive provision and not inclusive and that Section 17 is subject to if there is any other provision in the Act, the same would apply.

267.It is further submitted that Chapter-IV of the Water Act deals with 'powers and functions of the Boards'; powers and functions are synonymous. Section 18 also falls in Chapter IV and Section 18(1) deals with 'performance of its functions' under the Act, which are enumerated in Section 17. Further, it is submitted that consent is granted by the Board in terms of Section 25 of the Act, which finds place in Chapter V of the Act and it is not a function of the Board. Further, it is reiterated that on account of the closure of the petitioner industry, there is relinquishment of revenue to the State and therefore, Rule 10(2)(a) of the Transaction of Business Rules is to be mandatorily followed and the file ought to have been placed before the Finance Committee and this procedural error goes to the root of the matter. With the above submissions, the learned Senior Counsel prayed for setting aside the impugned orders.

268.We have elaborately heard the learned Senior Counsels for the parties and have given our anxious consideration to the grounds canvassed and also perused the voluminous materials placed on either side in the form of various paper books. The major issues which are to be decided are enumerated below apart from other issues and questions which shall be considered and decided as we proceed. The issues have been culled out from the elaborate and erudite submissions made on either side :-

268.1. Whether the TNPCB has power to order closure under Section 17 of the Water Act; whether the functions of the TNPCB/State Board as enumerated in Section 17 of the Water Act empower the Board to order closure of the petitioner's unit; whether the Government has power to issue direction under Section 18 of the Water Act to direct closure and permanently sealing the petitioner's unit?

268.2. Whether there was pollution caused by the petitioner's unit warranting its sealing and permanent closure?

268.3. Whether the judgment of the Hon'ble Supreme Court in the petitioner's case reported in ***(2013) 4 SCC 575*** (02.04.2013) operates as *res judicata* in respect of issues and incidents prior to the date of judgment, could the theory of "washing off" be applied?

268.4. Whether the order of closure/sealing, a knee jerk reaction to be firing incident; was it actuated by public outcry; was it *mala fide*, discriminatory and unfair?

268.5. Whether the "spike" incident as projected by the respondent is correct or the explanation offered by the petitioner that their unit was in

testing mode, is an acceptable explanation and whether the action initiated by TNPCB in this regard was right?

268.6. Whether copper slag is hazardous and whether the petitioner would be right in contending that copper slag having been removed from Schedule-I of the HWM Rules, 2016 and consequently, to be treated as non-hazardous?

268.7. What are the duties and responsibilities cast on the petitioner in respect of the slag generated in the manufacturing process and after disposal of the same to authorized purchasers?

268.8. Whether the TNPCB/District Administration were slack in their approach, did not initiate timely action against the petitioner while causing pollution?

268.9. Whether the Ambient Air Quality Monitoring Equipment was effective; whether the data collected by TNPCB from those equipment was analysed; what was done with the data, which is stated to have been generated and what is required to be done by TNPCB in this regard?

268.10. Whether TNPCB was really a watch dog of the petitioner industry; did the TNPCB possess requisite infrastructure in terms of staff, equipment, etc., to monitor the petitioner industry, and were there any inadequacies in the procedures?

268.11. What is the effect of non-renewal of the HWM authorisation; what should have been done by TNPCB; and whether non-renewal of HWM authorisation for other red industries in the State can be cited by the petitioner to justify its continued operation; was there any plausible reason as to why the HWM authorisation was not renewed for the

petitioner; and whether there is any provision for deemed renewal of such authorisation and if the answer to the said question is in the negative, what should have been done by TNPCB and other statutory authorities?

268.12. Whether the petitioner industry was justified in continuing to operate their unit after grant of an order of stay of closure by the Tribunal/Court without obtaining renewal of consent to operate from TNPCB?

268.13. What are the powers of the Chairman of TNPCB?

268.14. What are the effects of the reports submitted pursuant to the orders passed by NGT; can they be relied on by the petitioner, after the orders of NGT were set aside by the Hon'ble Supreme Court ?

268.15. Whether there was any mis-representation with regard to the extent of land available with the petitioner while securing environmental clearance from MoEF?

268.16. Whether the location of the petitioner industry is correct; and whether they can be permitted to function in the said industrial complex; and whether there was a Master Plan in place for Thoothukudi District and if so, whether there was any violation of the Master Plan?

268.17. Whether there was violation of height of the stack established by the petitioner?

268.18. Whether there was failure on the part of TNPCB and State/District Administration in not taking timely action on the huge stock of slag dumped in private land, near a water course affecting its free flow and resulting in flooding of the entire town?

268.19. Whether the petitioner has complied with the norms of storage of gypsum; whether they had fulfilled the conditions imposed by

CPCB with regard to the design of the gypsum pond; and whether the petitioner would be entitled to refer to certain other industries for whom, extension of time had been granted for constructing the gypsum pond as per the approved design of CPCB?

268.20. Whether the petitioner is right in contending that thirty conditions imposed on the petitioner having been complied with, it cannot revisited and if so, what is the effect of the conditions imposed in the consent order from time to time, and whether the petitioner can challenge or interpret a condition in the order of consent ?

268.21. Whether the petitioner has fulfilled the green belt norm as prescribed by TNPCB and the importance in strict compliance?

268.22. Whether the petitioner should be exonerated on the ground that no source apportionment study was conducted by TNPCB with regard to presence of heavy and toxic metals in the ground water?

268.23. Whether there is any reasonable explanation as regards the presence of heavy metal as pointed out in the reports of NEERI; and whether the same is attributable to the petitioner alone?

268.24. Whether the TNPCB was right in granting consent to establish Plant No.II of the petitioner on 14.11.2016, when the consent to operate Plant No.I was not renewed from 2013-2014 and renewed only on 13.04.2016 till 31.03.2017?

268.25. What is the effect of the directions issued by TNPCB pursuant to inspection; and what is the obligation cast upon the petitioner on such directions?

268.26. Was the State Government right in interpreting or understanding the order passed by the Madurai Bench of this Court in

W.P.(MD) No.11190 of 2018 filed by the petitioner; and was there any direction to the State to promulgate an order under Section 144 Cr.P.C.?

268. 27. Whether the State can prohibit public from protesting on the ground that the functioning of the petitioner industry is detrimental to their life and liberty?

268.28. Bearing in mind the various principles propounded by the Hon'ble Supreme Court such as Precautionary Principle, Sustainable-Development Principle, Polluter Pays Principle, etc., what should be the approach of TNPCB and the State Government?

268.29. If orders of consent issued by TNPCB to operate the unit are time bound, what are the consequences of non-renewal of consent; and what is required of a regulator like TNPCB to do in such contingencies?

268.30. Whether the petitioner is right in contending that there is scientific uncertainty as to the role of the petitioner in causing pollution and in the absence of source apportionment study, can liability be fastened on the petitioner?

268.31. Whether the grounds mentioned in the order dated 09.04.2018, rejecting renewal of consent are separable; and whether the Court exercising its power as an appellate authority can modify the order passed by the regulator, the TNPCB and whether this Court exercising power as an appellate authority over orders of the TNPCB can examine all issues?

268.32. Whether the petitioner is entitled to seek protection under Article 19(1)(g) of the Constitution of India; and whether a shareholder could be permitted to implead herself as one of the writ petitioners along with the petitioner industry at this stage of proceeding?

268.33. Whether in the given facts and circumstances, the principle of inter-generational equity could be applied or not?

268.34. Whether the State and Central government were justified in objecting the 1998 NEERI report which was adverse to the petitioner ?

268.35. Whether the contention of the petitioner that the alleged inadequacies pointed out in the impugned order was remediable and whether the petitioner should be given an opportunity to remedy the breach ?

268.36. Whether there was any misrepresentation by the petitioner in their land holding?

268.37. Whether the private respondent is right in alleging that the petitioner had inflated their production values?

268.38. Issues relating to Ground water, hazardous waste management, ambient air quality, phosophogypsum, incident of 23rd March 2013 – emission of Sulphur dioxide and health of the public.

269.We proceed to consider the above issues cumulatively as they are interlinked and inextricably intertwined, we will be also considering other issues though not specifically listed out above, which in our opinion are the main issues.

270.Before the Court proceeds to consider as to whether the orders of closure passed by the TNPCB and the Government suffer from a vice of lack of jurisdiction, it would be necessary to first take up the question as to what would be the effect of the judgment of the Hon'ble Supreme Court dated 02.04.2013. This question assumes importance and requires precedence for the reason that the petitioner pleads that events and incidents, which have

taken place prior to the decision of the Hon'ble Apex Court dated 02.04.2013, cannot be looked into and cannot be referred to by the TNPCB or for that matter the Court. The petitioner pleads that if the respondents are permitted to do so, it will be clearly hit by the principles of *res judicata*. Thus, the argument of the petitioner appears to be that after the decision of the Hon'ble Supreme Court dated 02.04.2013, by which the judgment of the Division Bench of this Court directing closure of the petitioner was set aside and the petitioner was permitted to resume production, directed to pay a sum of Rs.100 Crores as compensation for the damage caused by them to the environment, none of the incidents or events which occurred prior to 02.04.2013 can be referred to, to pass an order sealing and permanently closing the petitioner's unit. Therefore, before considering the correctness of the orders impugned in these writ petitions, we need to steer clear as to whether the events, which took place prior to 02.04.2013, are still be germane; whether the TNPCB/Government are entitled to refer to and take note of the

events which took place prior to the said date. To find an answer to this question, we need to take note of the nature of reliefs sought for in those cases, which ultimately were dealt with by the Hon'ble Apex Court in the judgment dated 02.04.2013. Several writ petitions were filed before the Division Bench of this Court and the earliest of which being, a writ petition filed in the year 1996. These writ petitions were filed challenging the environmental clearance granted by MoEF and, the consent orders issued under the Air Act and the Water Act by TNPCB. The 1996 writ petitioner was a voluntary body. The other writ petitions were also Public Interest Litigations with varied prayers and all of them essentially wanted the petitioner-industry to be closed once for all. The Division Bench, by common judgment and order dated 28.09.2010, allowed the same with a direction to the petitioner to close down its plant. It further declared that the employees of the petitioner would be entitled to compensation under Section 25FFF of the Industrial Disputes Act, 1947 and directed the District Collector, Thoothukudi, to take all necessary and

immediate steps for the re-employment of the workforce of the petitioner in some other company/factory/organisation so as to protect their livelihood and to the extent possible, take into consideration their educational and technical qualification and also experience in the field.

271.Aggrieved by such order, the petitioner filed appeals before the Hon'ble Supreme Court in which, an order of interim stay was granted on 01.10.2010. Consequently, the petitioner started operating the unit. The Division Bench while allowing the writ petitions and directing closure of the petitioner unit, was primarily convinced that the industry is situated within the prohibited distance of 25kms from an ecologically sensitive area, as it is within 25kms from 4 of the 21 Islands in the Gulf of Mannar. That no public hearing was conducted before grant of environmental clearance by the MoEF. The Division Bench held that there was undue haste on the part of the Governmental authority in granting permission and consent to the petitioner

more particularly, that the petitioner was permitted to conduct a rapid Environmental Impact Assessment instead of a regular assessment.

272.Further, the Division Bench held that though TNPCB imposed a condition on the petitioner to develop a green belt of 250m width around the battery limit of the industry, which was contemplated under the environmental management plan, but subsequently based on a representation given by the petitioner to TNPCB, the green belt requirement was reduced to a minimum width of 25m, was not tenable.

273.Further, with regard to the pollution caused in the area, the Division Bench took note of the report of NEERI, 2005 wherein, it was recorded that the ground water samples taken from the area indicate that the copper, chromium, lead, cadmium and arsenic and the chloride and fluoride contents were too high when compared to Indian Drinking Water Standards.

274.The petitioner, in their appeals before the Hon'ble Supreme Court contended that they, being a zero-discharge plant, do not discharge any effluent and consequently, there will be no effect on any of the area stated to be ecologically sensitive within 25kms of the industry. Further, it was contended that no notification was issued by the Government of Tamil Nadu under Section 35(4) of the Wildlife (Protection) Act, 1972 declaring the 21 Islands of Gulf of Mannar as a National Park.

275.With regard to the aspect of conduct of public hearing prior to the grant of environmental clearance, it is submitted that in terms of EIA notification dated 27.01.1994, the same is not mandatory. Relying upon the very same notification, it was contended that rapid EIA was permissible to be conducted and therefore, the same cannot be a ground for ordering closure. With regard to the reduction of the green belt area from 250m to 25m, it was

contended that normally 25% of the land area alone is insisted as green belt and nothing more, and TNPCB rightly modified the condition.

276.With regard to the report of NEERI that there was severe pollution, it was contended that the same was factually incorrect and, in this regard, the reports of NEERI submitted during 1998, 1999, 2003, 2005 and 2011 were referred to as well as the joint inspection report of TNPCB and CPCB of September, 2012.

277.Further, with regard to the accumulation of gypsum and phosphogypsum, which come out from the petitioner's plant as part of the slag, non-hazardous, as per the opinion of CPCB, the same can be used in cement industry, for filling up low lying area, building/road construction material, etc., and has no adverse environmental effect.

278.The original writ petitioners sought to sustain the order of the Division Bench directing closure of the petitioner industry reiterating that the unit is situated within the prohibited distance from ecologically sensitive area more particularly, when the Government of Tamil Nadu and Central Government have been treating the Gulf of Mannar as a Marine National Park and extending financial assistance for development of its ecology. Further, it was submitted that proposal for issuance of declaration under Section 35(4) of the Wild Life Act is pending concurrence of the Central Government, therefore, the area would be disturbed, if the plant continues at Thoothukudi and should not have been permitted in the present location.

279.With regard to the reduction in the green belt width, it was contended that TNPCB very casually reduced the green belt width, without noting the consequences thereof. It was further submitted that the petitioner initially proposed to establish the plant in Gujarat State, which was opposed

vehemently, decided to shift the plant to Goa wherein also, there was opposition and thereafter, intended to set up the plant in Maharashtra and invested Rs.200 Crores in construction after obtaining environmental clearance. However, on account of the opposition by the farmers, the Government of Maharashtra had revoked the licence granted to the petitioner. However, the petitioner somehow obtained environmental clearance from MoEF without public hearing, and the consent under the Water Act and Air Act from TNPCB, for their unit at Thoothukudi.

280.Further, it was contended that the petitioner has been operating for more than a decade without consents and approval from the statutory authority, which fact is clear from the report of NEERI, 2011. Further, it was contended that the petitioner mis-represented material facts in the Special Leave Petition and also when they moved for grant of an order of stay. Further, the MoEF and TNPCB had not applied their mind to the nature of the

industry as well as pollution fall out of the industry and the capacity of the unit to handle the waste without causing adverse impact on the environment as well as on the people living in the vicinity of the plant. Further, it was contended that in ***Vellore Citizens Welfare Forum*** case, it was held that a right to clean environment is part of a right to life guaranteed under Article 21 of the Constitution of India.

281.Various reports of NEERI were referred to, to state that the waste water sample upon testing showed that the petitioner was operating inefficiently, as the levels of arsenic, selenium and lead in the treated effluent as well as the effluent stored in the surge ponds were higher than the standards stipulated by TNPCB. Further, it was contended that in the counter affidavit filed by the Union of India before the High Court, they did not disclose whether apart from the rapid EIA done by M/s.Tata Consultancy Services (TCS), was there any independent evaluation of the rapid EIA by the

Environmental Impact Assessment Authority. Further, the TNPCB in its 'No Objection Certificate' dated 01.08.1994, has stipulated in Clause 18 that the petitioner has to carry out rapid EIA for one season more than monsoon as per EIA notification dated 27.01.1992, and this clause will show that TNPCB did not apply its mind as to whether there was sufficient rational analysis of the nature of the industry, nature of pollutant, quantum of fall out of the plant or method for handling the waste. Thus, it was contended that the finding of the Division Bench of this Court that the petitioner's plant continues to pollute the environment has been substantiated by the inspection report filed before Court by NEERI as well as TNPCB from time to time and in particular, the joint inspection report of TNPCB and CPCB showed that the direction issued to improve solid waste disposal has not been complied with.

282.It was further contended that one of the conditions of the consent order issued by TNPCB was that no slag to be disposed in the

premises. On the contrary, huge quantum of slag was stored in the premises and though direction was given to dispose of at least 50% more than the monthly generated quantity of both slag and gypsum, they were not complied with. Thus, it was contended that unless the petitioner's plant is shut down, they will not be able to clear huge quantity of slag and gypsum lying in the plant premises. Further, it was submitted that it is not correct to state that slag is non-hazardous waste, as it contains arsenic, which will certainly jeopardise the environment. The TNPCB as well as the State of Tamil Nadu accepted before the Hon'ble Supreme Court that 21 Islands including the 4 Islands are ecologically sensitive area and notwithstanding the fact that four of the 21 Islands were near Thoothukudi, TNPCB gave the consent under the Water Act because, the petitioner represented that their plant is zero-effluent discharge.

283.The intervenor before the Hon'ble Supreme Court, a public interest litigant, submitted that a Marine Biosphere is an ecologically sensitive

area and if in the consent order, the condition was stipulated that the plant of the petitioner has to be situated beyond 25kms from ecologically sensitive area, then this condition has to be complied with and in any case, the petitioner is liable to compensate for having damaged the environment.

284.After noting the contentions raised by the petitioner, the Hon'ble Supreme Court pointed out that the first question which has to be decided is whether the High Court could have interfered with the environmental clearances granted by MoEF and Government of Tamil Nadu. After referring to Section 3 of the EP Act and Rule 5(3) of the EP Rules and the notification dated 27.01.1994, it was observed that the language of the notification did not lay down that public hearing was a must. It was pointed out that as per the amended notification issued by the Government of India dated 10.04.1997, the Impact Assessment Agency should conduct a public hearing, however, the environmental clearance was granted to the petitioner on

16.01.1995, prior to the amendment dated 10.04.1997, and therefore, public hearing was not a mandatory requirement. Further, the Hon'ble Supreme Court pointed out, as per the procedure laid down under the EP Act and EP Rules and notification dated 27.01.1994 as amended by notification 04.05.1994, and as explained by the Explanatory Note issued by the Government of India, rapid EIA was permissible in certain circumstances and therefore, the High Court could not have allowed the writ petitions on the ground that environmental clearance was issued to the petitioner on the basis of inadequate rapid EIA.

285.It was further observed that the decision of the Central Government to grant environmental clearance to the plant of the petitioner could only be tested on the anvil of well recognised principles of judicial review. After noting a few decisions on the said point, the Court observed that the well-recognised principles of judicial review are under three circumstances, viz.,

(i) when the environmental clearance granted by the competent authority was clearly outside the powers of the EP Act, EP Rules or notifications issued thereunder;

(ii) when the environmental clearance suffers from Wednesbury unreasonableness; and

(iii) if the environmental clearance is granted in breach of proper procedure.

286. Thus, the Court proceeded to examine as to whether the Division Bench of the High Court while exercising power of judicial review had exceeded the well-recognised principles and circumstances of judicial review. Accordingly, it held that conduct of public hearing prior to grant of environmental clearance was not mandatory and hence, the High Court could not have interfered with the order granting environmental clearance.

287.With regard to the second ground, it was pointed out that there was no material placed to show that the grant of environmental clearance was wholly irrational and frustrated the very purpose of the EIA notification dated 27.01.1994. Noting that in several cases it was held that it is not for the Courts to decide what projects are to be authorised, but as long as they follow the statutory process, it is for the responsible authority. With regard to the location of the industry, within the prohibited distance from ecologically sensitive area, it was pointed out that the petitioner's plant is situated in SIPCOT industrial complex and the condition imposed in the consent to establish was made without noticing that the industrial complex is within 25kms of ecologically sensitive area and hence, the High Court was wrong in saying that the petitioner had violated the condition.

288.In paragraph 38 of the judgment, the Hon'ble Supreme Court has, in our view, added a note of caution. It was observed that no doubt Gulf

of Mannar is an ecologically sensitive area and the Central Government may exercise its powers under Rule 5(1)(v) of the EP Rules to prohibit or restrict location of industries to preserve biological diversity of Gulf of Mannar. Further, it was pointed out that as and when the Central Government issues an order under Rule 5 of the EP Rules, appropriate steps may have to be taken by all concerned for shifting of the industry of the petitioner from SIPCOT industrial complex.

289.To be noted that the State Government, in their submissions, had mentioned that a proposal has been sent by the Chief Wild Life Warden to the State Government for approval of the proposal to declare Gulf of Mannar as a Marine National Park under Section 35(4) of the Wild Life Act, but declaration has not been finally notified. Nextly, the Hon'ble Supreme Court examined the green belt requirement and held that if TNPCB after considering the representation of the petitioner has reduced the width of the green belt

from 250m to 25m and when it is not shown that this power exercised by TNPCB was vitiated by procedural breach or irrationality, the High Court could not have interfered with the exercise of such power by TNPCB.

290.Further, the Hon'ble Supreme Court held that the High Court did not record any finding that there was breach of mandatory provision, High Court did not record a finding that by reducing the green belt width from 250m to 25m, it will not be possible to mitigate the effect of fugitive emission and High Court merely stated that TNPCB was generous to the petitioner and accordingly, the Hon'ble Supreme Court held that with regard to the width of the green belt, it is for TNPCB to take a decision.

291.With regard to the contention of the respondents that MoEF and TNPCB did not apply its mind fully, the Hon'ble Supreme Court held that it is for the administrative and statutory authorities empowered under the law to

consider and grant environmental clearance and when no ground for interference with the decision of the authorities on well recognised principles of judicial review is made out, High Court could not have interfered with the decision of the authorities. After making such an observation, the Hon'ble Supreme Court also pointed out that after environmental clearance is granted under the EP Act and EP Rules and notification, and after consent is granted under the Air Act and Water Act, the industry continues to pollute the environment so as to affect the fundamental rights and life under Article 21 of the Constitution, the High Court could still direct the closure of the industry by virtue of its power under Article 21 of the Constitution, if it came to the conclusion that there were no other remedial measures other than closure of the petitioner industry to protect the environment. The Hon'ble Supreme Court then, proceeded to examine whether there were materials before the High Court to show that the plant of the petitioner did not maintain the standards of emission and discharge of effluent as laid down by TNPCB and

whether there were no remedial measures other than the closure of the industry of the petitioner to protect the environment. The Hon'ble Supreme Court noted that the Division Bench of the High Court had relied on the report of NEERI of 2005. After extracting the relevant finding in the said report, it was noted that the report of NEERI of 2005 shows emission and effluent discharge, which have affected environment, but, however, pointed out that the report read as a whole does not warrant a conclusion that the plant of the petitioner could not possibly take remedial steps to improve the environment and that the only remedy to protect the environment was to direct closure of the plant of the petitioner. Thereafter, the Hon'ble Supreme Court took note of the directions issued earlier directing a joint inspection by NEERI with officials of CPCB and TNPCB, the report submitted by NEERI, synopsis of TNPCB specifying the deficiency and the submission of the petitioner that they have removed the deficiency, etc. After taking note of the joint inspection report, it was pointed out that out of 30 directions, the petitioner has complied with 29

directions and only one more direction under the Air Act was to be complied with. Thus, it was pointed out that the deficiencies in the plant of the petitioner, which affected the environment as mentioned by NEERI, have been removed and therefore, the order of the High Court directing closure of the plant is liable to be set aside. After coming to such a conclusion, the Hon'ble Supreme Court proceeded to consider the contention on behalf of the intervenor that the petitioner was liable to pay compensation for the damage caused by them to the environment. After taking note of the NEERI reports of 1998, 1999, 2003 and 2005, the Hon'ble Supreme Court pointed out that the petitioner did pollute the environment through emission, which did not confirm to the standards laid down by TNPCB under the Air Act and through discharge of effluent, which did not confirm to the standards laid down by TNPCB under the Water Act. It was noted, TNPCB did not renew the consent to operate for considerable period, yet the petitioner continued to operate its plant without such renewal. Thus, for the damages caused to the environment

from 1997 to 2012 and for operating the plant without valid renewal for a fairly long period, the petitioner would liable to compensate by paying damages. After having held so, the Court proceeded to determine the quantum of compensation payable for which, it took note of the magnitude and capacity of the petitioner and made the petitioner liable for a compensation of Rs.100 Crores and issued direction as to how the money is to be utilised.

292.The next issue, which was considered by the Hon'ble Supreme Court, is with regard to the mis-representation and suppression of material facts by the petitioner before the Hon'ble Supreme Court in the Special Leave Petition and at the time of obtaining interim order. Reading of paragraph 48 of the judgment clearly shows that the Hon'ble Supreme Court held that the petitioner had mis-represented and suppressed material facts in the Special Leave Petition, however thought fit not to deny relief to the petitioner on the said ground taking note of the number of employees, who are dependent on

the petitioner and the other persons, who are indirectly employed. Thus, a reading of paragraph 48 of the judgment would show that the relief granted to the petitioner was not on the ground that Rs.100 Crores was directed to be paid as compensation, but for other reasons noted in the said paragraph. Paragraph 49 of the judgment pays encomium to the writ petitioners before the High Court and the intervenor before the Hon'ble Supreme Court for having taken up the cause of environment both before the High Court and the Hon'ble Supreme Court and for having assisted the Court on all dates of hearing with utmost sincerity and hard work. The Hon'ble Supreme Court pointed out that very few would venture to litigate for the cause of environment, particularly against the mighty and the resourceful, but the writ petitioner before the High Court and the intervenor before the Hon'ble Supreme Court not only ventured, but also put in their best for the cause of the general public.

293.Two important factors emerge from the observations made by the Hon'ble Supreme Court in paragraph 49. Firstly, the effort of the writ

petitioner before the High Court and the intervenor before the Supreme Court was appreciated. Secondly, the Hon'ble Supreme Court was conscious of the fact that the petitioner is mighty and resourceful and it will not be an easy task, rather an uphill task for the writ petitioner before the High Court to litigate for the cause of environment against the mighty and resourceful petitioner.

294.Paragraph 50 of the judgment is a clear indicator as to what the Hon'ble Supreme Court had to say in the matter and a careful reading of the said paragraph will give an answer to the question framed by us. By way of repetition, it is pointed out that the petitioner seeks to apply the principle of "washing off", which is normally applied in service law jurisprudence. It is argued by the petitioner that they having paid Rs.100 Crores of compensation, none of the incidents, which were subject matter of the earlier round of litigation, can be looked into to assess as to whether the petitioner has to be closed down and sealed permanently.

295.The first sentence of paragraph 50 shows that the appeals filed by the petitioner were allowed and the judgment of the Division Bench of the High Court was set aside consequence thereof, would be the order of closure stood revoked. The last sentence of paragraph 50 is very crucial wherein, the Hon'ble Supreme Court has made it clear that the judgment will not stand in the way of TNPCB issuing directions to the petitioner including a direction for closure of the plant, for protection of the environment in accordance with law. Therefore, in our considered view and proper understanding, the theory of "washing off" cannot be applied to the case on hand. The judgment of the Hon'ble Supreme Court, more particularly, the observations in paragraphs 42 and 45 clearly show that the petitioner did pollute the environment, violated the orders of consent, operated the plant for a considerable period of time without valid consent, etc. Therefore, to state that on payment of compensation of Rs.100 Crores, all the past misconducts stood wiped off is an argument, which is stated to be out rightly rejected as fallacious.

296.A careful reading of the decision of the Hon'ble Supreme Court will show that the appeals were allowed on the ground that the Division Bench of the High Court while setting aside the order of environment clearance and consents granted to the petitioner, transgressed the well-recognised principles of judicial review. In no part of the decision, the petitioner has been exonerated. The fact that the unit is within the prohibited distance of ecologically sensitive area, has been affirmed. The relief, the petitioner gets is on account of a technicality because notification is yet to be issued declaring the Gulf of Mannar as a National Park, though recommendation has been made as early as on 30.04.2003. It is not clear as to why the State of Tamil Nadu is sitting tight on the proposal, are there any hidden beneficiaries who would benefit by delaying the publication of the notification. Conscious of the factual position, the Hon'ble Supreme Court has pointed out, if notification is issued, the petitioner has to shift.

297.With regard to public hearing to be conducted prior to the grant of environmental clearance, the petitioner has been granted relief because, the mandatory public hearing condition was introduced by way of an amendment in 1997, but by then in the year 1995, the petitioner has been granted environmental clearance. However, in the recent decisions of the various High Courts including this Court, it has been held that whether conduct of public hearing prior to the grant of environmental clearance is mandatory or directory, depends upon facts of each case or the magnitude of the impact that would be caused on environment, if a particular industry is granted environmental clearance. Therefore, in our considered view, the petitioner cannot take advantage of this fact to state that they have been wholly exonerated.

298.With regard to the rapid EIA, the Hon'ble Supreme Court noted that the EIA notification dated 27.01.1994 provided for a rapid EIA. At the

same time, the Hon'ble Supreme Court has also noted the fall out of the regular EIA etc., but declined to exercise power by applying the principles of judicial review.

299.With regard to the green belt requirement, it was held that there was no material placed before the Court to show that there was breach of mandatory provision, nor did the High Court record a finding that by reducing green belt to 25m, it will not be possible to mitigate the effect of fugitive emission.

300.With regard to the pollution, which has been caused, the Hon'ble Supreme Court referred to the report of NEERI, 2005 and in paragraph 42 of the judgment, relevant observation has been extracted and it has been specifically pointed out that NEERI report of 2005 did show that the emission and effluent discharge affected the environment. However, the

Hon'ble Supreme Court held that if the report is read as a whole, it does not warrant a conclusion that the plant of the petitioner could not possibly take remedial steps. Therefore, to state that there was a "clean chit" granted to the petitioner would be a statement, which is contrary to facts. Thus, taking note of all these factors, the Hon'ble Supreme Court had made the observations in paragraph 50, as pointed out earlier. Apart from that, the Court also noted that the petitioner is guilty of mis-representation and suppression of material fact in the Special Leave Petition and while obtaining interim orders, however, did not deny relief to the petitioner bearing in mind the plight of its employees and others. Therefore, the petitioner has not been exonerated by the Hon'ble Supreme Court and payment of Rs.100 Crores does not wipe away the earlier deficiencies, violations, etc., and it will be well open to the respondents to refer to them while taking a final decision in the matter, regarding permanent closure.

301.By way of illustration, when a person accused of a crime is convicted by a criminal court and sentence is imposed, on appeal, the appellate court while agreeing with the findings of the trial court that the accused is guilty and confirming the conviction, may exercise discretion to alter the sentence. In fact, the conviction suffered by the petitioner, which ultimately led to an order of closure by the High Court, was subject matter of appeal before the Hon'ble Supreme Court.

302.The learned Senior Counsel for the petitioner referred to the decisions in the case of ***Forward Construction Co. vs. Prabhat Mandal Andheri [AIR 1986 SC 395]; Asgar; All India Manufacturers Organisation; Daryao;*** and ***Amalgamated Coalfields Ltd.*** These decisions were referred to in support of his submissions that the principles of constructive *res judicata* would apply and the respondents cannot rely upon any of the events which were prior to 02.04.2013, the date on which the Hon'ble Supreme Court

delivered its verdict. On facts, we have found that the said contention is not acceptable and we have given our reasons for the same. In ***Forward Construction Co.,*** the question arose as to whether the subject writ petition is barred by *res judicata,* which plea was rejected by the High Court primarily for two reasons. Firstly, in the earlier writ petition, the validity of the permission granted under the Development Control Rules, was not an issue and secondly, the earlier writ petition was not a bona fide one. The Hon'ble Supreme Court, on facts, held that the High Court was not right in holding that the earlier judgment would not operate as *res judicata.* One of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. It further held that an adjudication is conclusive and final not only as to the actual matter determined, but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of original action both in respect of the

matters of claim or defence. On the second issue as to whether the earlier writ petition was lacking in bona fides, the Hon'ble Supreme Court held that in view of Explanation (vi) to Section 11 of CPC, it cannot be disputed that Section 11 applies to public interest litigation as well, but it must be proved that the previous litigation was the public interest litigation not by way of private grievance.

303.We have, in the earlier paragraphs, referred to the 2013 judgment of the Hon'ble Supreme Court and the observations, findings and liberty granted in various paragraphs and more particularly, in paragraph No.50. Considering the factual position which is involved in the present case, Section11 cannot be applied and the decision in ***Forward Construction Co.,*** does not render assistance to the petitioner.

304.In ***Asgar***, the Hon'ble Supreme Court held that in deciding as to whether a matter might have been urged in the earlier proceedings, the Court

must ask itself as to whether it could have been urged. In deciding whether the matter ought to have been urged in the earlier proceedings, the Court will have due regard to the ambit of the earlier proceeding and the nexus which the matter bears to the nature of the controversy. In the said decision (paragraph 40), the Hon'ble Supreme Court referred to the Constitution Bench Judgment in ***Direct Recruit Class II Engg. Officers' Association vs. State of Maharashtra [(1990) 2 SCC 715]*** and the decision in ***Forward Construction Co.,*** wherein it was pointed that an adjudication is conclusive and final not only as to the actual matter determined, but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming into legitimate purview of the original action both in respect of the matters of claim or defence. In the said case, the appeal arose before the Hon'ble Supreme Court against an order of the High Court dismissing a petition under Article 227 of the Constitution of India holding that the claim

set up by the appellant before the Executing Court for the value of the improvements alleged to have been made by them on the land in dispute under the statute was barred by the principles of constructive *res judicata.* In our considered view, the decision did not deal with the public interest litigation. Secondly, the finding rendered was on examination of the factual position. Therefore, the decision cannot render support to the case of the petitioner.

305.In the case of ***All India Manufacturers Organization***, the appeals, which were against the orders passed by the High Court in three public interest litigations, whereby the writ petitions which were filed to direct the State of Karnataka to continue to implement a certain project known as Bengaluru-Mysore Infrastructure Corridor Project, were dismissed. One of the appellants before the Hon'ble Supreme Court contended that the dispute between the State of Karnataka and Nandi is not barred by the principles of *res judicata*, constructive *res judicata* or estoppel arising from the judgment

and proceedings in ***H.T.Somashekar Reddy vs. Government of Karnataka [(1999) 1 Karnataka Law Journal 224(DB)]***. The Hon'ble Supreme Court discussed the doctrine of *res judicata* and pointed out that the doctrine is based on larger public interest and is founded on two grounds, one being that no one ought to be twice vexed for one and the same cause and second, public policy that there ought to be an end to the same litigation. After referring to various decisions including the decisions in ***Forward Construction Co.,*** and ***Direct Recruit Class II Engg Association***, on facts held that the **prayer** made the relief sought for in ***H.T.Somashekar Reddy's*** petition and the findings in ***H.T.Somashekar Reddy*** judgment and the claims and arguments in the appeals before the Hon'ble Supreme Court were substantially the same and therefore, the judgment in ***H.T.Somashekar Reddy*** operates as *res judicata.* The said decision is wholly distinguishable on facts.

306.As noted by us, the Hon'ble Supreme Court in the petitioners case primarily interfered with the order of the Division Bench directing

closure on the ground that the Court transgressed the well recognized principles of judicial review under Article 226 of the Constitution of India. On facts, we found that the petitioner was not exonerated by the Hon'ble Supreme Court. This is precisely the reason as to why the Hon'ble Supreme Court granted liberty to the regulator, the TNPCB, to pass orders including an order of closure.

307.In ***Daryao,*** a bunch of writ petitions filed under Article 32 of the Constitution of India was placed for disposal. The opponents raised a preliminary objection against the maintainability of the writ petition on the ground that in each case, the petitioner had moved the High Court for a similar writ under Article 226 of the Constitution of India and the High Court rejected those petitions. The Hon'ble Supreme Court while answering the question as to whether the rule of *res judicata* to be merely a technical rule or is it based on high public policy, held that if the rule of *res judicata* itself embodies a

principle of public policy which in turn is an essential part of the rule of law, then the objection with the rule cannot be invoked where fundamental rights are in question may lose much of its validity. It was further held that the rule of *res judicata* as indicated in Section 11 of CPC has no doubt some technical aspects, for instance, the rule of constructive *res judicata* may be said to be technical but the basis on which the said rule rests is founded on consideration of public policy. It was further held that it is in the interest of the public at large that a finality should attach to the binding decision pronounced by Courts of competent jurisdiction and it is also in public interest that individual should not be vexed twice over the same kind of litigation.

308.In our considered view, the decision may to a certain extent support the case of the respondents. The Hon'ble Supreme Court in the 2013 judgment found as a matter of fact that the petitioner had caused pollution and damage to environment has been done on account of their activities apart from

operating the plant without obtaining an order of consent to operate. Nevertheless, the Hon'ble Supreme Court thought fit to grant liberty to the petitioner to remedy and therefore, permitted reopening of the plant subject to fulfilment of conditions. There was no complete exoneration of the petitioner of the damage caused. Therefore, the question of the petitioner being vexed twice would not arise. Therefore, the decision in the case of ***Daryao*** does not assist the case of the petitioner, equally so, the decision in ***Amalgamated Coal Fields Limited*** in which, the decision in the case of ***Daryao*** has been referred. Therefore, in our considered view, the decisions referred to by the learned Senior Counsel for the petitioner as referred supra are all factually distinguishable and the plea of constructive *res judicata* or *res judicata* would not apply to the facts and circumstances of the case on hand.

309.While on this issue, it is beneficial to refer to the decision of the Hon'ble Supreme Court in ***Rural Litigation and Entitlement Kendra***. While

considering the plea of *res judicata* and its applicability to the public interest litigation, the Hon'ble Supreme Court pointed out that every technicality in the procedural law is not available as a defence when a matter of great importance is for consideration before the Court. Even if it is said that there was a final order in a dispute of such type (public interest litigation), it will be difficult to entertain the plea of *res judicata.*

310.Therefore, the petitioner cannot seek to restrain the regulator or the State Government from exercising their powers on the technical ground that certain issues were raised in the earlier round of litigation and ultimately, the Hon'ble Supreme Court permitted reopening of the plant and therefore, all issues prior to 2013 are done and dusted. Such a plea can never be countenanced in the case before us.

311.The respondents had contended that the petitioner being a red category industry discharging hazardous substance can be located only in an

area classified as 'special hazardous use zone'. It is interesting to note that neither the State nor the Pollution Control Board have taken a firm stand on the point canvassed by the 9th respondent. This may be for various reasons, more particularly, because the petitioner is located in an industrial complex developed by a Government of Tamil Nadu undertaking. Be that as it may, the issue having been raised by the Court, it is necessary for the Court to take a decision on the said issue.

312.In the brief note on submissions filed by the learned Senior Counsel for the petitioner in paragraph B, they have dealt with misrepresentation of land area and land use classification. On a perusal of the response given by the petitioner to the contention raised by the respondents, we find the entire response deals only with the extent of land/land area and does not deal with the classification. During the course of argument, it was pointed out that the location of the industry was one of the contention raised

by the Hon'ble Supreme Court stating that the industry is located within the prescribed distance of an ecologically sensitive location. While dealing with this issue, we noted that the Hon'ble Supreme Court did not reject the contention but observed that in the event a notification is issued by the Government, the petitioner would have to vacate. We had expressed our surprise as to why notification has not been issued by the State Government and noted the inordinate delay. The point now canvassed before us by the 9th respondent is by contending that the petitioner being a red category industry cannot be located in a 'general industrial use zone' or an 'agricultural use zone' and permission can be granted only in an area classified as 'special industrial and hazardous use zone'. There appears to be no dispute on the said contention, as the Government in G.O.Ms.No.1730 dated 24.07.1974, while mentioning about the permitted usage of various zones, designated 'special industrial and hazardous use zone' for industries which are involved in handling, manufacturing and storage of toxic material. There is no challenge

to the notification issued by the Government with regard to the zonation. Consequently, the petitioner cannot question its applicability. The resultant conclusion to be drawn is that the petitioner being a red category industry generating hazardous substances cannot be located in any other location except in 'special industrial and hazardous use zone'. If such is the factual position, the question to be considered is whether the industrial complex in which the petitioner industry is in existence could have permitted the petitioner industry of such magnitude producing toxic and hazardous substances. The answer to the question should be that the petitioner could not have been permitted to establish a red category industry in a 'general industrial use zone' or in an 'agriculture use zone'.

313.The next dispute which was raised by the learned Senior Counsel for the petitioner is with regard the existence or otherwise of a Master Plan for Thoothukudi classifying the usage. It is not in dispute that the

petitioner is located in a village called Meelavittan. The Master Plan has been produced by the 9th respondent which shows the land use schedule. In Meelavittan Village, none of the survey numbers have been classified as a 'special industrial and hazardous use zone' and the usage zones available in Meelavittan Village are Mixed Residential Use Zone, Commercial Use Zone, General Industrial Use Zone, Educational Use Zone, Agricultural Use Zone, Municipal Limits, Transportation and Coastal Regulation Zone. It is to be pointed out that the Survey Nos.1119 to 1125 of Meelavittan Village form part of the area allotted and used by the petitioner which falls in 'agricultural use zone'.

314.From the records placed, we find that in Meelavittan Village there is no special industrial and hazardous use zone or controlled industries use zone. Therefore, there is serious flaw in permitting the petitioner to be located in the area where they have presently established their plan. While discussing the issue regarding the total extent of land held by the petitioner,

we have pointed out that the orders passed by the TNPCB, the classification of the land has been shown as 'general industrial use zone'. The petitioner while applying for renewal of their consent to operate, vide application dated 31.01.2018, they have mentioned the land use classification as 'institutional use zone'. However, in the Master Plan of Thoothukudi, in Meelavittan Village, there is no institutional use zone, there is no controlled industries use zone and there is no special industrial and hazardous use zone. The information furnished under the Right to Information Act dated 19.09.2018 along with the annexures shows that in Thoothukudi District only in two Villages lands have been earmarked as special industrial and hazardous zone, namely, Swaminatham and Palayakayal. Therefore, there is serious error in the location of the petitioner industry in the land in question.

315.The petitioner countered the submission of the 9th respondent by referring to certain response between SIPCOT and the DTCP stating that the entire area has been approved as industrial estate and the activity done by the

petitioner is an industrial activity which is permissible at the given location. We have seen the Master Plan for Thoothukudi District as well as the information obtained under the Right to Information Act with regard to the land use zones in Meelavittan Village and we find that there is no special industrial and hazardous use zone in the said village. The lands which have been allotted to the petitioner partly fall in 'general industrial zone' and partly in 'agricultural use zone'. The question is whether there was reclassification of the classification as it originally stood and shown to remain as such even as on date. The change of classification is permissible but subject to the procedure under the provisions of the Tamil Nadu Town and Country Planning Act, 1971 (for brevity the "1971 Act"). A change in the Master Plan or a detailed development plan involves rigorous procedure and the persons in the locality are entitled to be heard before such reclassification is done. It is more a serious matter if an agricultural use zone is converted into an industrial use zone.

316.It may not be necessary for us to go into the various statutory provisions in the 1971 Act and the procedure to be followed for reclassification. The respondent-State has not placed any document before us showing that the general industrial use zone lands have been reclassified as special industrial and hazardous use zone or for that matter, agricultural use zone has been converted as special industrial and hazardous use zone. However, the endeavour of the learned Senior Counsel of the petitioner is to convince this Court that the petitioner is located in a land which is properly classified. We test the correctness of the submission by considering the documents which have been placed by the petitioner [Volume 7 Page 3].

317.On 02.08.2002 the Project Officer, SIPCOT, Thoothukudi, has addressed his Superior Officer at Chennai stating that the petitioner has requested the land classification details and had forwarded the request to the Head Office. In the said letter, there is a mention about an earlier letter dated

23.02.1987 where the SIPCOT has mentioned about the zonal classification and based on the said letter, DTCP, Tirunelveli accorded approval to the SIPCOT Industrial Complex vide order dated 24.04.1987. In the said communication dated 02.08.2002, there is no indication or reference regarding change of classification and only refers to approval of industrial complex layout. The Director of Town and Country Planning, Madras, addressed the Commissioner, Thoothukudi Panchayat vide letter dated 23.02.1987, by which the consent was granted for construction and commissioning of the petitioner in the land in SIPCOT industrial complex. The permission granted by the DTCP is of little avail *qua* zonal classification of the land in question. The SIPCOT by letter dated 16.08.2002, addressed the petitioner stating that their Project Officer has approved the layout, vide letter dated 23.02.1987 for allotment to major chemical industries. SIPCOT cannot change the classification of the land and the said communication cannot improve the situation in favour of the petitioner.

318.The next document referred to by the learned Senior Counsel for the petitioner is a communication from the Member Secretary (Incharge), Local Planning Authority, Thoothukudi to the Commissioner, Town Planning, Chennai dated November, 2014. The said communication is pertaining to the application filed by the petitioner for putting up construction in the land allotted to them. Interestingly, there is a clear reference to the classification of the land as it stood on the date of allotment in favour of the petitioner. The classification of the land is 'general industrial' as per the revised approval plan in LP/DTCP.245/2001. The other details mentioned in the communication may not be relevant, as it pertains to the type of construction which the petitioner proposed to undertake. However, the said communication notes the fact that several objections have been received against the petitioner and they are all pending. Further, the communication mentions that an additional extent which has been allotted to the petitioner is from the general industrial use zone and controlled industrial use zone. In the details of Master Plan,

Thoothukudi which was placed before us, we find that in Meelavittan Village there is no controlled industrial use zone. Even assuming that a portion of the general industrial use zone was converted as controlled industrial use zone, then it remains to be seen whether such conversion was legal. Even assuming the conversion was legal, it will not in any manner enure in favour of the petitioner since the petitioner can be located only in a special industrial and hazardous use zone and nowhere else. Therefore, the communication of the Member Secretary (Incharge), Local Planning Authority, Thoothukudi does not assist the petitioner rather does otherwise.

319.The petitioner relied upon a letter from the Chairman and Managing Director, SIPCOT to the Commissioner, Town and Country Planning dated 13.05.2014 informing about the obtaining of a layout approval initially in 1987 and subsequently in 2001 by way of revised approval and this includes the land allotted to the petitioner and other red category industries.

The layout approval has nothing to do with the categorization of industries by the Pollution Control Board. It may be true that the land allotted to the petitioner forms part of an approved layout. However, that does not improve the situation because, unless and until the land is classified as special industrial and hazardous use zone, the petitioner cannot be located in the said land and SIPCTO by mentioning the word "Red Category Industry" cannot improve the case of the petitioner. Further, the authorities themselves would admit that the SIPCOT Industrial Complex is located in Meelavittan and Therkkuveerapandiyapuram Villages, where there is no piece of land classified as special industrial and hazardous use zone and most of the red category chemical industries are located in general industrial use zone. Therefore, it is clear that the petitioner could not have been permitted to locate their industry inside the Industrial Complex as it suffers from the zonal disqualification. During the course of argument, it was submitted that the issue pertaining to the zonation cannot be raised at this distance of time and 20

years is definitely a too long period and status quo prevailing cannot be dislodged on this ground assuming the respondent has made out a case.

320.To be noted, the first of the writ petitions filed before this Court as Public Interest Litigation, was much prior to the petitioner starting commercial production. These writ petitions of the year 1996 questioned the grant of environmental clearance. Therefore, the objection for location of the industry, which started in 1996, has not died down till date. In fact, the Hon'ble Supreme Court in the 2013 judgment appreciated the efforts of the public interest litigants and the NGOs with specific reference to the magnitude of the petitioner and that very few people would be able to maintain a challenge against industries of such magnitude. Therefore, if the location of the industry is hit by the zonation notification, there cannot be any via-media to the same. That apart, no attempt can be made by the State to now unsettle things to suit any third party. Thus, the 9th respondent is perfectly justified in

her stand with regard to the zonation and accordingly, we sustain the objection raised by the 9th respondent with regard to the location of the petitioner industry. While we are in this issue, it would be relevant to refer to a few decisions which have dealt with the industries which were located in violation of the zoning restrictions as per the Master Plan.

321.In ***M.C.Mehta vs. UoI [(2004) 6 SCC 588]***, the Hon'ble Supreme Court dealt with industries which discharge highly toxic effluents and which did not affirm to the use zones. One of the questions which fell for consideration was, can the Government plead justification for violation of law and throw to winds the norms of environments, health and safety or is it possible to help the workers even without violating the law, if there is a genuine will to do so. It was held that regularization cannot be done if it results in violation of right of life enshrined under Article 21 of the Constitution. It was further held that the question will have to be considered

not only from the angle of those who have set up industrial units in violation of the Master Plan, but also others who are residents and are using their premises as allowed by law. Further, it was held that the question cannot be examined only from the angle of the industry or even those who are employed there in the said industry. With regard to the importance of the Master Plan, it was held that the Master Plan is required to define the various zones into which Delhi may be divided for the purposes of development and indicate the manner in which the land in each zone is proposed to be used. The preparation of the zonal development plan provides for proposed land use and it also provides that no person shall use or permit to be used any land or building otherwise than in conformity with the plan in a zone. Further, it was pointed out that the relevant enactment, namely, the Delhi Development Act , 1957 provides for detailed procedure for modification of the Master Plan and the Zonal Development Plan and in terms of Section 14, there is a prohibition for use of land in contravention of the plan. The Court referred to the decision

in the case of ***Virendra Gaur,*** wherein among other things a contention was raised that there has been change of user and two decades had passed. This argument was rejected and it was held that the self-destructive argument to put a premium on inaction cannot be accepted.

322.In the case of ***Hamer,*** before the European Court of Human Rights, the case originated by way of an application by a Dutch national with regard to a Holiday Home of the applicant inside a forest which was demolished by the domestic authorities. The interference of the applicant's possession was intended to control the use of the property in accordance with the general interest, since it involved bringing the property into conformity with the land-use plan establishing a forested zone in which no building was permitted. The debate, therefore, was on the proportionality of this interference. It was held that the financial imperatives and even certain fundamental rights such as ownership, should not be afforded priority over

environmental protection considerations, in particular when the State has legislated in this regard. It was further held that the public authorities, therefore, assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective. In the said case, action was initiated after twenty seven years after the offence was established and the authorities allowed a further five years to elapse before instituting criminal proceedings. The Court noted that the authorities knew or should have known the existence of the applicant's house for a long time, however, failed to take appropriate action and thus, contributed to the continuation of a situation which could only be detrimental to the protection of the forested area which the legislation sought to protect. Ultimately ,the Court held that the applicant did not suffer any disproportionate interference with her property rights.

323.In the case of ***Bitou Local Municipality vs. Timber Two Processors CC & Ors.,*** before the High Court of South Africa in ***Case No.9121/2007*** dated 11.06.2008, the applicant sought for a declaratory order that operation of commercial sawmill on the farm was unlawful. One of the arguments by the respondent was that they were singled out by the applicant and did not apply the law equally and universally. The Court while rejecting the argument, held that the said submission not only amounts to an admission of their own illegal conduct, but also without merit.

324.In ***A.V.Papayya Sastry vs. Government of Andhra Pradesh [(2007) 4 SCC 211]***, the question was whether there was fraud played by the land owners in collusion with the Port Trust Officers and the land ceiling authorities. The Hon'ble Supreme Court held that it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law, quoting Chief Justice Edward Coke, who

proclaimed; “Fraud avoids all judicial acts, ecclesiastical or temporal”. It was further held that fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. It was further held that fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

325.In our view, this decision would be of relevance with regard to the submission made by the petitioner with regard to the extent of land held by them, when they sought for environmental clearance for the expanded capacity. Had the MoEF been rightly informed by the petitioner about their land holding, in all probabilities, environmental clearance for the increased capacity would not have been granted. In fact, the report of the Committee,

which inspected the petitioner's plant pursuant to the directions of the Hon'ble Supreme Court, noted the conduct of the petitioner and also the extent of land held by them and in no uncertain terms stated that it is not conducive to consider the petitioner's application for expansion. We have also found that the petitioner did not give a straight forward answer to the query raised by the MoEF with regard to the actual holding. Therefore, we can safely conclude that the act of the petitioner was deliberate as a result of which, they stood to gain and it needs to be construed as a deliberate deception and anything obtained out of it, should necessarily to be vitiated.

326.In our understanding of the judgment of the Hon'ble Supreme Court, the "conviction" of the petitioner has been affirmed and the "sentence" imposed on the petitioner, viz., closure was interfered and an opportunity was given to remedy the breach. Therefore, the respondents would be entitled to take note of the events which had occurred prior to the decision of the Hon'ble

Supreme Court dated 02.04.2013 and the principles of *res judicata* cannot be made applicable in the instant case, equally so the theory of "washing off" cannot not be applied.

327. Next we move on to consider the issue regarding the power of TNPCB and Government to order closure/permanent sealing.

328.The TNPCB by order dated 09.04.2018, rejected the petitioner's application for renewal of consent under the Water Act and Air Act. In the said order, the TNPCB pointed out that the petitioner has not complied with the following conditions, which were imposed when the consent was renewed on the previous occasion, they being

(i) Ground water analysis report taken from borewells within the unit premises as well as surrounding areas have not been furnished to ascertain the impact on ground water quality;

(ii) The unit has not removed the copper slag dumped/stored along with river Uppar and patta land, thereby obstructing the flow. It has also not constructed any physical barrier between river Uppar and slag land fill area of patta land so as to prevent slag from reaching the river;

(iii) Authorization issued to the unit on 10.07.2008, got expired on 09.07.2013 but the unit continues to generate & dispose the hazardous waste without valid authorization under Hazardous and Other Waste (Management & Transboundary Movement) Rules, 2016. The application submitted by the unit was returned for want of additional details and the unit has not resubmitted the same;

(iv) As per renewal condition, the unit should have analysed the parameters of heavy metals such as Arsenic in the ambient air through Board's laboratory as done for the other parameters such as NOx, PM_{10} and SO_2. As the Board Laboratory does not have this facility, the unit should have engaged the services of MoEF & CC/NABL accredited laboratories and furnished report to Board. The

unit has not complied with the same and as such there is no authenticated reporting on the presence of Arsenic in the ambient air; and

(v) During the inspection on 22.02.2018, the unit has been directed to construct a gypsum pond as per CPCB guidelines. But the unit has not complied till 31.03.2018.

329.Consequential order dated 12.04.2018 was passed issuing directions under Section 33A of the Water Act and Section 31A of the Air Act to stop production operations. The petitioner was directed not to resume production without obtaining prior approval/renewal of consent from the Board. On 23.05.2018, the TNPCB issued direction for disconnection of power supply. On 28.05.2018, the Government by G.O.Ms.No.72, after referring to Article 48A of the Constitution of India, ordered that under Section 18(1)(b) of the Water Act, in the larger public interest, the Government endorsed the closure direction of TNPCB and also directed the TNPCB to seal the unit and close the plant permanently. Consequent upon the

Government Order in G.O.Ms.No.72, TNPCB issued directions by order dated 28.05.2018 to seal the premises of the petitioner's unit with immediate effect. These orders are impugned in W.P.Nos.5772, 5756, 5801, 5708, 5792 and 5793 of 2019 respectively.

330.The petitioner's contention is that the direction for closure and permanent sealing of the petitioner's unit under Section 18(1)(b) of the Water Act read with Article 48A of the Constitution is beyond the 'powers and functions' of TNPCB as enumerated in Section 17 of the Act. By referring to the preamble of the Water Act, emphasis is laid to the words "powers and functions" appearing therein, the statement of objects and reasons, which refer to establishment of unitary agency in the Centre and State to provide for prevention, abatement and control of pollution and referring to the preamble to the Amendment Act 53 of 1988, it is submitted that Section 17 falls within Chapter-IV of the Water Act dealing with "powers and functions of Board";

whereas Section 33A falls within Chapter-V dealing with "prevention and control of water pollution", because, Chapter-IV refers to "powers of the Board" owing to the fact that Section 18 deals with "powers of the Central Board" to give direction, which also falls within Chapter-IV.

331.It is further submitted that Sections 24 to 27 and 32 of the Water Act deal with prohibitions, restrictions and obligations of the operator/occupier to comply with conditions. However, a perusal of Section 17 would reveal that these are activities that the Water Act mandates on a State Board to comply with and therefore, in the nature of functions of the Board. Further, it is submitted that TNPCB has not specifically stated under which sub-Section of Section 17(1)(l) of the Water Act, could an order be passed under Section 33A. Thus, an order under Section 17(1)(l)(i) of the Water Act is in the nature of an order in rem such as orders passed in the other provision of the Section and when the legislature intended an order under this

Section to be in personam, that is specific to an industry, it has specifically indicated the same in the exception under clause (ii) of Section 17(1)(l). Further, Section 17(1)(l) of the Water Act cannot be deemed to encompass the Board's power to prohibit an industry. Further, to assert the submission that the function exercised under Section 17(1)(l)(i) is a function in rem, Section 16(1)(c) was referred to whereunder, the Central Board is required to provide technical assistance and guidance to State Board. Further, Section 18(1)(b) of the Water Act was also referred to, to state that the Central Board is equally empowered as the State Board to pass order under the said provision. Further, it is contended that under Section 33A, an order passed by a State Board is made subject only to direction, if any, issued by Central Government and not the State Government. In this regard, reference was made to Section 5 of the EP Act whereunder, the Central Government has been vested with the very same powers as are contained in Section 33A of the Water Act; the Water Act was amended in 1988 and Section 33A was inserted vesting similar power on

a State Board only. Therefore, recognising the similar power granted to the Central Government under the EP Act, Section 33A states direction issued by the State Board subject to the direction, if any, of the Central Government and this is why the said Section contains a *non obstante* clause.

332.It is further contended that the fact that the State Government is not included in Section 33A is owing to the fact that under Section 23 of the EP Act, the Central Government has been granted power to delegate its function to the State Government, which has been done in the year 1988. Therefore, the State Government does not enjoy the power to issue direction under Section 33A of the Water Act, the very same powers have been delegated to the State Government under Section 23 read with Section 5 of the EP Act. Therefore, it is submitted that the State Government can also issue direction of closure, but the same would be in exercise of power under the EP Act and such power can be exercised after issuing due notice to the industry,

which may be waived for reasons to be recorded in writing. Therefore, a direction issued by the State Government under Section 18(1)(b) of the Water Act cannot include a direction under Section 33A.

333.The contention of the State is that the functions of the Board have been distributed among various provisions of the Act and therefore, the contention raised by the petitioner is wholly unsustainable.

334.To have a clear picture of the object and intent of the Water Act, we need to consider the entire Act as a whole and examine as to whether the contentions raised by the petitioner are sustainable. The Water Act was enacted in the year 1974 and came into effect on 23.03.1974. The first amendment to the Act was during 1978 by Amendment Act 44 of 1978. The statement of objects and reasons of Amendment Act 44 of 1978 states that in the process of implementation of the 1974 Act, certain drawbacks have come

to the notice of the Government and consequently it has become necessary to make certain amendment in the Act. Paragraphs 3 and 4 of the statement of objects and reasons would be relevant. In paragraph 3, it has been stated that certain States are finding it difficult to provide full time Chairman for the State Board and therefore, it proposes to amend the Act for appointment of a Chairman of the State Board either on full time or on part time depending on specific situation. Paragraph 4 of the statement of objects and reasons states that there should be an integrated approach for tackling the water and air pollution problem and therefore, proposed that the existing Board for the prevention and control of water pollution should authorize to perform functions relating to the prevention, control and abatement of air pollution. The amendment proposed and brought about by Act 44 of 1978 would clearly demonstrate that the State envisaged a plan to give requisite effect for effective implementation of prevention and control of water pollution. The next amendment was in the year 1988 by Amendment Act 53 of 1988, the Bill

inter alia seeks to make the following amendments to the Act, viz.,

(i) the Central Board and State Board for the Prevention and Control of Water Pollution are proposed to be renamed as "Central State Pollution Control Board" as these Boards deal with both water and air pollution control;

(ii) the Central Board is proposed to be empowered to exercise the powers and perform the functions of the State Board in specific situations, particularly when a State Board fails to act and comply with the directions issued by the Central Board. It is also proposed to recover the cost of the exercise of such powers and the performance of such functions by the Central Board from the person or persons concerned, if the State Board is empowered to recover such costs under the provisions of the Act, as arrears of land revenue or of public demand;

(iii) it is proposed to make it obligatory on the part of a person to obtain the consent of the relevant Board for establishing or taking any steps to establish any industry, operation or process which is likely to cause pollution of water and also to empower the Boards to limit

their consents for suitable periods so as to enable them to monitor observance of the prescribed conditions;

(iv) in order to effectively prevent water pollution, the penal provisions of the Act are proposed to be made stricter and bring them at par with the punishments prescribed in the Air (Prevention and Control of Pollution) Act, 1981 as amended by Act 47 of 1987;

(v) in order to elicit public co-operation, it is proposed that any person should be able to complain to the Courts regarding violations of the provisions of the Act after giving a notice of sixty days to the concerned Board or the officer authorised in this behalf;

(vi) it is proposed to empower the Boards to give directions to any person, officer or authority including the power to direct closure or regulation of offending industry, operation or process or stoppage or regulation of supply of services such as water and electricity;

(vii) for increasing the financial resources of the Boards, it is proposed to empower them to raise monies by means of loans and debentures.

335.In the statement of objects and reasons, apart from other things, it has been mentioned that over the past few years (prior to 1988), the implementing agency (like TNPCB), have experienced administrative and practical difficulties in effectively implementing the provisions of the Water Act. The ways and means to remove the difficulties were thoroughly examined in consultation with the implementing agency. On taking into account the views expressed, it was proposed to amend certain provisions of the Act in order to remove such difficulties. Paragraph 3(iii) of the statement objects and reasons states that the amendment in the Act is proposed to make it obligatory on the part of the person to obtain the consent of the relevant Board for establishing or taking any steps to establish any industry, operation or process, which is likely to cause pollution of water and also to empower the Boards to limit their consents for suitable period so as to enable them to monitor observance of the prescribed condition. Paragraph 3(vi) states that the amendment is proposed to empower the Board to give directions to any

person, officer or authority including the power to direct closure or regulation of the offending industry, operation or process or stoppage or regulation of supply of services, such as water and electricity. Thus, the Amendment Act 53 of 1988 was brought about on account of practical difficulties faced by the implementing agency, one among which is the TNPCB.

336.Bearing in mind the purpose of the amendment, we shall now proceed to examine the other provisions of the Act, which are as follows:-

"(i) Section 2(a) defines "Board" to mean the Central Board or a State Board;

(ii) Section 2(c) defines "member" to mean a member of a Board and includes a Chairman thereof;

(iii) Section 2(e) defines "pollution" to mean such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid,

gaseous or solid substance into water, whether directly or indirectly, as may, or is likely to create a nuisance or render such water removal harmful or injurious to public health or safety or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms;

(iv) Section 2(h) defines "State Board" to mean a State Pollution Control Board constituted under Section 4 of the Act; Section 2(j) defines "stream" to include river, water course, whether flowing or for the time being dry, inland water, whether natural or artificial, and sub-terranean waters, sea or tidal waters; and

(v) Section 2(k) defines "trade effluent" to include any liquid, gaseous or solid substance, which is discharged from any premises used for carrying on any industry, operation or process or treatment and disposal system, other than domestic sewage."

337.(i) Chapter-II deals with "Central and State Boards" and it has 11 Sections viz., Sections 3 to 12 (including Section 11A);

(ii) Chapter-III deals with "Joint Boards" consisting of Sections 13 to 15;

(iii) Chapter-IV deals with "Powers and Functions of Boards" consisting of three Sections, viz., 16 to 18;

(iv) Chapter-V deals with "Prevention and Control of Water Pollution" consisting of Sections 19 to 33A;

(v) Chapter-VI deals with "Funds, Accounts and Audit"; Chapter-VII deals with "Penalties and Procedure"; and

(vi) Chapter-VIII deals with "Miscellaneous" - provisions such as Central Water Laboratory, State Water Laboratory, Analysts, Reports of Analysts, etc.

338.For the purpose of these writ petitions, it may not be necessary for us to deal with Chapters-II and III and we may straight away proceed to refer to Chapters-IV, V and VII. As mentioned, Chapter-IV deals with "Powers and Functions of Boards". Section 16 deals with "Functions of the Central Board". Section 17 deals with "Functions of the State Board". Section 17(1) commences by stating that "subject to the provisions of the Act, the functions of a State Board shall" be as mentioned in sub-Clauses (a) to (o). Sub-Clause (l) of Section 17(1) would be relevant and the same is quoted hereunder: -

"*Section 17(1)(l): - to make, vary or revoke any order –*

(i) for the prevention, control or abatement of discharges of waste into streams or wells;

(ii) requiring any person concerned to construct new systems for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or to adopt such remedial measures as are necessary to prevent, control or abate water pollution."

339.Thus, in terms of Section 17(1)(l), subject to the provisions of Water Act, the TNPCB is entitled to make, vary or revoke any order and such making or varying or revoking any order would be for the prevention, control or abatement or discharge of waste into streams or wells or to require any person to construct new systems for disposal of sewage and trade effluent or to modify, alter or extend any such existing system or to adopt such remedial measures as are necessary to prevent, control or abate water pollution.

340.The argument of the petitioner is that power exercised under Section 33A would not fall within Section 17(1)(l), because Section 17(1)(l)(i) is a power to pass a general order and sub-clause (ii) deals with contingencies pertaining to specific industries; the State having not spelt out clearly under which sub-Section of Section 17(1)(l) of the Water Act, an order under Section 33A would lie, the order is without jurisdiction.

341.Section 18 deals with "power to give directions". Sub-Section (1) of Section 18 states that in the performance of its function under the Act, the Central Board shall be bound by such directions in writing, as the Central Government may give to it and every State Board shall be bound by such directions in writing, as the Central Government or the State Government may give to it. Proviso states that where a direction given by the State Government is inconsistent with the direction given by the Central Government, the matter shall be referred to the Central Government for its decision. However, such contingency does not arise in the case on hand.

342.Section 33A deals with "Power to give Directions" and the said provision starts with a *non-obstante* clause stating that notwithstanding anything contained in any other law, but subject to the provisions of the Water Act, and to any directions that the Central Government may give in this behalf, a Board may, in exercise of its powers and performance of its functions under

the Water Act, issue any directions in writing to any person, officer or authority and such person, officer or authority shall be bound to comply with such directions. It is not disputed that the Central Government has delegated its power, therefore, the argument that only the Central Board can give directions under Section 33A, which would be binding, and not the State Government is an argument, which is not tenable.

343.As mentioned earlier, Amendment Act 53 of 1988 was brought about because there were practical difficulties in effective implementation of the provisions of the Act. The Amending Act made it obligatory on the person to obtain consent of the Board for establishing or taking steps to establish a polluting industry. The Amending Act also empowered the Board to limit an order of consent for suitable period. The Amending Act also proposed to empower the Board to give directions to any person including the power to direct closure of an offending industry. Thus, if the argument on behalf of the

petitioner that Chapter-IV should be construed as a water tight compartment and the other provisions of the Act via., Sections 25, 27 and 33A cannot be looked into, is to be accepted, it would render the provisions of the Act redundant. At this juncture, it is to be seen as to what is the duty of the Court. The duty is to get the real intension and purpose of the legislature and what it seeks to achieve. It has to construe the statute as a whole, more particularly in Environment Laws. What is to be seen is the general object which the enactment seeks to secure. Therefore, Court has to necessarily examine the scope of the statute. The cardinal principle of statutory construction is to save and not to destroy.

344.To be noted that the petitioner had no fundamental right to establish a polluting industry, but for the order of consent granted under the provisions of the Act, the petitioner could not have established or commenced production of its industry. Under Section 24, there is a prohibition from

establishing a polluting industry, this prohibition is modified by grant of orders of consent, which are subject to conditions. The conditions are sacrosanct, non-negotiable . A consent order issued by the Board is not a licence to pollute, it is incumbent upon the grantee to comply with the conditions in the consent order individually as well as collectively.

345.Bearing in mind the object of the enactment more particularly, the object of Amendment Act 53 of 1988, if one reads Sections 17(1) and 17(1)(l), it is abundantly clear that the State Board, viz., TNPCB, may vary or revoke any order, "any" order would include an order of consent, because it is an order passed under Section 25 of the Act falling under Chapter-V. Further, the position is clear, if one reads Section 41 of the Act, which falls in Chapter-VII dealing with "Penalties and Procedure". Sub-Section (1) of Section 41 deals contingencies where there is failure to comply with directions under Sections 20(2) or 20(3) or an order issued under Section 32(1)(c) or a direction

issued under Section 33(2) or Section 33A. Likewise, Section 44 which deals with "penalty for contravention of Section 25 or Section 26" states that whoever contravenes the provisions of Section 25 or Section 26 shall be punishable with imprisonment for a term which shall not be less than one year and six months, but which may extend to six years and with fine. Thus, on a conjoint and plain reading of the various provisions of the Water Act, as mentioned above, it is clear that the TNPCB may make, vary or revoke any order for prevention, control or abatement of discharges of waste into streams or wells. Section 2(j) defines "stream" to include river, water course, inland water, sub-terranean waters, sea or tidal waters, and the same being an inclusive definition, should be given the widest meaning.

346.The argument of the petitioner that sub-Clause (i) of Section 17(1)(l) deals with situation in rem and sub-Clause (ii) of Section 17(1)(l) deals with situation in personam is an artificial distinction, which is sought to

be drawn and if accepted, would make the provision unworkable. Sub-Clause (i) and sub-Clause (ii) of Section 17(1)(l) cannot be read in disjunction because, Section 17(1)(l) states that subject to the provisions of the Act, the Board may make, vary or revoke any order. Any order would mean an order of consent or a direction issued under Section 33A etc. The argument that sub-Clause (i) of Section 17(1)(l) speaks of only discharges of waste into streams or wells cannot be given a restrictive meaning, as stream has been defined in the widest possible term under the Water Act.

347.The objects of the Water Act are to empower the Board to give directions to any person, officer or authority including the power to direct closure or regulation of offending industry, operation or process or stoppage or regulation of supply of services such as, water and electricity. Therefore, the contention raised by the petitioner that the order is without jurisdiction is not tenable. Yet another argument was that under Section 18(1)(b), a direction is

issued by the State to the TNPCB and not to the petitioner industry, which would imply that such a direction cannot be in personam.

348.A reading of the impugned Government Order in G.O.Ms.No.72 shows that the Government under Section 18(1)(b) of the Water Act, in the larger public interest, endorsed the closure direction of the TNPCB and also directed the TNPCB to seal the unit and close the plant permanently. There are three facets to the impugned Government Order. The first of which being, it is in exercise of power under Section 18(1)(b) by which, the State Government is empowered to issue directions to the State Board, which shall be bound by the direction. The second facet is that the Government thought fit to invoke such power under Section 18(1)(b) in larger public interest and precisely for such reason, in paragraph 2 of the impugned Government Order, Article 48A of the Constitution was referred to where under, the State shall endeavour to protect and improve the environment. The third facet has two

limbs to it. The first of which being, a direction endorsing the closure direction of TNPCB. The second is a direction of the State Government to the TNPCB to seal the unit and close the plant permanently. Therefore, to state that the power under Section 18(1)(b) can be invoked only to issue direction in rem and not in personam is an argument, which does not merit acceptance.

349.Another submission made on behalf of the petitioner is that before such direction is issued, notice should have been issued to the petitioner. The petitioner applied for renewal of consent to operate the copper smelter plant. An inspection was conducted and report was submitted by the Joint Chief Environmental Engineer, Tirunelveli, dated 27.02.2018, who had noticed that the petitioner had defaulted in compliance of certain earlier directions. Therefore, the Board rejected the application for renewal of consent.

350.The learned Senior Counsel appearing for the petitioner prefaced his submissions by contending that the order rejecting the application for renewal of consent was without notice to the petitioner and is in violation of the principles of natural justice, however, added a caveat by stating that without giving up such plea, the petitioner requests the Court to adjudicate the correctness of the impugned order on merits. Thus, the petitioner seeks for an adjudication on merits, hence it may not be necessary for us to elaborate on whether the order suffers from violation of principles of natural justice and whether the petitioner was entitled to a notice and opportunity before the impugned orders were passed etc.

351.The other argument was that an order under Section 18(1)(b) is not an appealable order and therefore, it is clear that such direction can be only in rem. This argument is also not tenable for the reason that the direction issued by the State Government is to the TNPCB endorsing the order of

closure passed by TNPCB, which is a direction, which can be issued by the TNPCB in exercise of power under Section 33A. After the Government Order in G.O.Ms.No.72 was passed, TNPCB has passed an order under Sections 33A and 31A of the Water Act/Air Act dated 28.05.2018, which order is an appealable order. Therefore, the argument that direction can be issued under Section 18(1)(b) only in rem and not in personam is not tenable. That apart, the petitioner has been visited with earlier orders of closure and none of those orders were put to challenge by the petitioner on the ground now canvassed before us stating that the Board does not have power to issue such a direction under Section 17(1)(l), though it may fully not be right to say that the petitioner is estopped from raising such contentions, nevertheless the Court can take note of the conduct of the petitioner that the petitioner was aware of the legal position and precisely for such reason, such contention was not raised at any earlier point of time, when closure orders were passed. Thus, for the above reasons, it is held that the impugned Government Order does not suffer

from the vice of lack of jurisdiction and the Board as well as the Government are entitled to exercise their power under Sections 17(1)(l) and 18(1)(B) read with Section 33A. Accordingly, the issues are answered against the petitioner.

352.As noticed above, Section 17 deals with 'functions of State Board'. Sub-Clause (f) of Section 17(1) states that subject to the provisions of the Water Act, a State Board shall inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents and to review plans, specifications or other data relating to plants setup for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required under the Act. Section 2(k) defines “trade effluent” to include any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any industry, operation or process, or treatment and disposal system, other than domestic sewage. The definition being an inclusive definition has to be given wide connotation. Taking note of the definition of trade effluent, a

careful reading of Section 17(1)(f) would show that it confers power on the Board to cause inspection not only the trade effluents, works and plants for treatment of sewage for its efficiency but also in connection with the grant of any consent as required under the Act. Thus, reading of Sections 17(1)(f) and (l) would clearly indicate that the TNPCB has got power to cause inspection in connection with the grant of consent and may vary or revoke any order or consent which can be a consent to establish or a consent to operate. Further, Section 24 of the Water Act would also be a relevant provision. The said provision deals with prohibition on use of stream or well for disposal of polluting matter, etc. Section 24(1) states that subject to the provisions of the said Section, no person shall knowingly cause or permit any pollution. The mandate of the statute as rightly submitted by the learned Senior Counsel for the TNPCB, is a command, a duty cast upon the industry or the person. Therefore, the petitioner cannot wriggle out of the rigour of the statute. This aspect is amplified, if Section 25 is taken note of. Section 25 deals with

restrictions on new outlets and new discharges. Sub-section (1) of Section 25 states that subject to the provisions of the said section, no person shall, without the previous consent of the State Board, establish or take any steps to establish any industry, operation or process, etc. Therefore, the petitioner cannot claim that they have a right to establish a polluting industry. There is no such right conferred on the petitioner, much less a fundamental right. Sub-section (4) of Section 25 deals with the power of the State Board with regard to the power to impose conditions while granting consent under Section 25(1) which states that the State Board may grant its consent, subject to such condition as it may impose and the rigour of the said provision is further amplified, if we peruse sub-Clauses (i) to (iii) in Section 25(4)(a). In terms of Section 25(4)(b), the State Board is entitled to refuse consent for reasons to be recorded in writing. The condition that may be imposed would vary depending upon the type of activity done by the concerned industry. The said conditions are binding on the industry.

353.Section 27 of the Act deals with "refusal or withdrawal of consent by State Board". Sub-section (1) of Section 27 states that a State Board shall not grant its consent under Section 25(4) for the establishment of any industry, operation or process, etc., unless the industry so established complies with the conditions imposed by the Board to enable it to exercise its right to take samples of the effluent. Sub-Section (2) of Section 27 gives power to the State Board to review from time to time any condition imposed under Section 25 or Section 26 and shall be subject to any variation made under sub-section (2) of Section 27 and shall continue in force until revoked under that sub-section. Section 33A commences with a non-obstante clause giving powers to the Board to issue directions to any person subject to the provisions of the Act and any direction that the Central Government may give in this behalf. The position becomes much clearer if read along with the statement of objects and reasons, more particularly, paragraph 4 which states

about the need for integrated approach for tackling environmental problem relating to pollution, the object for establishing a Central Board.

354.The Air Act, which came into force on 29.03.1981, was amended by Amendment Act 47 of 1981 and from the statement of objects and reasons, more particularly, paragraph 3(v) which states that a bill seeks to make the amendment in order to elicit public cooperation, it was proposed that any person should be able to complain to the Court regarding violation of the provisions of the Act after giving a notice for 60 days to the Board or officer authorized in this behalf. As contained in the Amendment Act 58 of 1988 of the Water Act, in Amendment Act 47 of 1981 of the Air Act, paragraph 3(vii) proposes to empower the Board to give direction to any person, officer or authority including the power to direct closure or regulation of offending establishment or stoppage or regulation of supply of services such as water and electricity. Some of the important provisions of the Air Act are, Section

2(a) which defines 'air pollutant' to mean any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment; Section 2(b) defines 'air pollution' to mean the presence in the atmosphere of any air pollutant; Section 2(h) defines 'chimney' to include any structure with an opening or outlet from or through which any air pollutant may be emitted; Section 2(i) defines 'control equipment' to mean any apparatus, device, equipment or system to control the quality and manner of emission of any air pollutant; Section 2(j) defines 'emission' to mean to any solid or liquid or gaseous substance coming out of any chimney, duct or flue or any other outlet. Chapter-III of the Air Act deals with the "powers and functions of Boards". Section 16 falling under Chapter-III deals with 'functions of Central Board' and Section 17 deals with 'functions of State Boards'; Sub-section (1) of Section 17 states that subject to the provisions of the Air Act and without prejudice to the performance of its

functions under the Water Act, the State Board shall carry out the functions enumerated in sub-Clauses (a) to (j) under Section 17(1); Sub-Clause (e) provides power to inspect, at all reasonable times, any control equipment and by order issue directions to take steps for prevention, control or abatement of air pollution; sub-Clause (f) to inspect air pollution control areas, assess the quality of air and take steps for prevention, control or abatement of air pollution; Section 18 which also falls in Chapter-III deals with 'power to give direction; which is pari materia to Section 18 of the Water Act. Section 21, which falls in Chapter-IV, deals with 'restrictions on use of certain industrial plants', which provision is in pari materia with Section 25 of the Water Act. The provision clearly shows that without the previous consent of the State Board, no person can establish or operate any industrial plant in an air pollution control area, the entire State of Tamilnadu; Sub-section (5) of Section 21 enumerates the conditions which are to be complied with by every person to whom consent has been granted by the State Board and one such

condition being the specification of the chimney as mentioned in Section 21(5)(iv); Section 22 of the Air Act states that no person operating any industrial plant, in any air pollution control area shall discharge any air pollutant in excess of the standards laid down by the State Board under clause (g) of Section 17(1) of the Air Act; Section 31A gives the power to give direction, which is in pari materia to Section 33A of the Water Act. In the light of the above discussion, it is held that the impugned orders do not suffer from any lack of jurisdiction.

355. The next enactment which we need to take note is the 'EP Act' which is an Act to provide for protection and improvement of environment and for matters connected therewith.

Section 2(a) defines 'environment' and it is an inclusive definition, includes water, air land etc. Clause (b) of Section 2 defines 'environmental pollutant' to mean any solid or gaseous substance present in such concentration which is injurious to environment;

Section 2(d) defines 'handling', in relation to any substance to mean the manufacture, processing or treatment, etc;

Section 2(e) defines ' hazardous substance' to mean any substance or preparation which by reason of its chemical or physic-chemical properties or handling is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment. Hazardous substance as defined under the EP Act has been given the widest meaning. The question, thus, would be whether it could be given a restrictive meaning as argued by the petitioner with regard to copper slag and gypsum, which we shall deal with in the later part of this order.

356. While we look at the provisions of the National Green Tribunal Act, 2010 [NGT Act] in particular, Section 20 of the said Act where under the principles which are to be applied by the Tribunal have been set out. Section 20 states that the Tribunal while passing any order or decision or award, apply

the principles of sustainable development, the precautionary principle and the polluter pays principle. It is the submission of the learned Senior Counsel for TNPCB that the three principles set out under Section 20 of the NGT Act will equally apply to a proceedings under Article 226 of the Constitution of India.

357. In our considered view, the learned senior counsel is right in his submission for more than one reason. Firstly, these principles have been evolved by various decisions of the Hon'ble Supreme Court which had come to stay much prior to being made as part of the 2010 statute. Constitutional Courts exercising power under Article 226 have applied these three principles while deciding environmental issues. Therefore, we are required to apply these principles to the cases on hand. The second reason as to why these principles have to be applied is on account of the directions issues by the Hon'ble Supreme Court to decide the correctness of the order rejecting the application for grant of consent, ordering closure by the TNPCB exercising

power as an appellate authority. Therefore, we shall in the later part of this order consider the applicability of these three principles.

358.The learned senior counsel appearing for the petitioner contended that to exercise power under Section 33A or Section 31A, there has to be pollution and in other words, the factum of pollution is absolutely necessary, the power under Section 33A is a power to be exercised when there is urgency, when situation arises suddenly, the act of pollution continues and following the normal course of action will delay matter and only to tide over such contingency, the power of the Chairman can be exercised and not otherwise.

359.TNPCB refers to the resolution in PB.Ms.No.9 dated 11.03.1994 by which power to issue direction had been delegated to the Chairman of the Board. It is submitted that none of the conditions/factors warranting exercise of such power has arisen in the case of hand for issuing

the impugned direction. It is submitted that the refusing to renew the consent to operate is not final since upon compliance of the condition imposed, the consent can be renewed. It was further submitted that an inspection was said to have been conducted on 18.05.2018 and 19.05.2018, whereas there is nothing on record to show such inspection and assuming that there was such inspections, the alleged inspection report dated 23.05.2018 does not render any finding warranting direction under Section 33A/Section 31A. Further, there was no allegation that the petitioner had commenced production. The Taxi receipts which were relied on by the respondent to prove the inspection cannot be a valid document, the Taxi receipts would falsify the stand taken by the first respondent Board in the counter affidavit. That the respondent Board admits that the petitioner was allowed to retain access to the plant and cannot complaint about people going inside and coming outside the factory and this appears to be the only justification to allege that the petitioner resumed production.

360.Thus, what is required to be considered is the effect of the resolution of the Board dated 11.03.1994 and whether the petitioner is right in contending that the Chairman of the Board can exercise his delegated powers only under emergent situation and not otherwise. On a careful reading of the resolution/order dated 11.03.1994, we find there is reference to the frequency during which the full Board meets and regarding the need to issue directions under Section 33A/Section 31A when urgency arises etc. Further, the resolution also mentions about cases of polluting industries contravening the provisions of the Water or Air Act and liable for closure and action getting delayed and till such time, the offence continues. The Board took note of the power under Section 12(3-B) of the Water Act which empowers the Board by general or special order and subject to such conditions and limitations, if any, as may be specified in the order, delegate to any officer of the Board such of its powers and functions under the Act as may be necessary. After taking note of the said provision, proposal was placed before the Board to delegate its

powers to the Chairman for issue of necessary show cause notices and directions for closure, prohibition, etc., so as to ensure that prompt action could be taken to tackle any emergency. The Board after careful examination, vide resolution dated 24.02.1994 decided to delegate powers to the Chairman under Section 12(3-B) of the Water Act and to issue directions under Section 33A of the Water Act and under Section 15 of the Air Act to issue direction under Section 31A of the Air Act. The petitioner's contention is that this delegated power of the Chairman is exercisable only in emergent situation and when there is an urgent need which cannot brook any delay. On a reading of the order in PB.Ms.No.9 dated 11.03.1994 one may get an impression that what weighed in the mind of the Board to decide to delegate its powers to the Chairman was to tackle emergent situations. Though certain paragraphs of the order refers to emergent contingency the delegation which has been done is under Section 12(3-B) of the Water Act and Section 15 of the Air Act, is absolute, the said provision does not distinguish between a delegation for

emergent purposes and the delegation for all purposes. The Board while exercising power under Section 12(3-B) may make general order or a special order subject to conditions and limitations. However, on a reading of the order dated 11.03.1994, it is clear that the delegation is a general order and it is neither conditional nor any limitation has been imposed. Therefore, the learned Advocate General is right in his submission that the delegation made by the Board to its Chairman by invoking power under Section 12(3-B) is an absolute delegation though the Board proceedings sets out certain background facts . Therefore, we do not agree with the submission of the learned senior counsel for the petitioner that the Chairman can exercise his powers under Section 33A/Section 31A only under emergent situation. That apart, the delegation has been made in favour of the Chairman as could be seen is a general delegation and has been in vogue ever since 1994. Therefore, the argument put forth by the petitioner stands rejected.

361.The Board by order dated 09.04.2018, impugned in W.P.No.5772 of 2019, rejected the application for grant of renewal of consent to operate. In the said order, it has been pointed out that the petitioner has not complied with five conditions imposed in the previous renewal order. One of the reasons set out is on account of the petitioner not removing the copper slag dumped/stored along with the river Uppar and patta land, thereby obstructing the water course. Further, the petitioner had not constructed any physical barrier between river Uppar and slag land fill area of patta land so as to prevent the slag from reaching the river. The contentions advanced on behalf of the petitioner are two fold. Firstly that the copper slag is non hazardous and to substantiate the said contention, the petitioner refers to the slag taken by the CPCB, TNPCB and MoEF. It is submitted that the TNPCB permits sale of copper slag to private parties and pursuant to which the petitioner had entered into an agreement with a private party and sold the slag which is well within the knowledge of TNPCB. It is submitted that the slag purchased by the

private party is stored in his patta land over which the petitioner has no control, that is why the District Administration and the TNPCB took action against the private party who purchased the slag. In spite of this being the factual position and the slag is stored in a land which is not owned by the petitioner but by the private party/purchaser, the petitioner took steps to erect a physical barrier. It is submitted that the slag is an inert material, it is non hazardous and the petitioner had not violated condition No.11 of the consent order dated 07.09.2017. The place where the slag has been stored by the private party is about 10kms away from the factory and the petitioner cannot be said to have violated the condition imposed in the consent order.

362.The learned senior counsel referred to the memorandum of understanding and sale agreement dated 25.09.2010 to emphasize the obligation of the buyer. It is further submitted that the District Collector issued notice dated 14.07.2016 alleging that there has been indiscriminate

dumping of copper slag obstructing the free flow of water in the Odai and posing threat to the human life and property and the petitioner was directed to clear the dumped copper slag from the said lands immediately. The petitioner sent a reply dated 26.07.2016 stating that the buyer was solely responsible to spread the copper slag in such a way that it must not obstruct free flow of water. After reiterating their stand, the petitioner stated that since they have sold and supplied the copper slag on ex-work basis to the buyer, they have pursued the matter with the buyer for satisfactorily addressing the concern. Further, it was pointed out that the TNPCB and the CPCB have permitted to use the copper slag in the land fill and no further approval is required., however, as a responsible corporate, the petitioner will provide the details of copper slag disposed every month to the TNPCB. With this stand, the petitioner requested that the show cause notice be withdrawn. It is submitted that though the private party did not remove the slag, the TNPCB granted consent, therefore, the non-renewal of consent vide impugned order dated

09.04.2018 cannot be for such reason or for default committed by the purchaser.

363.The first question which needs to be considered is whether copper slag is a pollutant, is slag hazardous. To get an answer to this question one has to necessarily refer to certain scientific material and publications of repute. In fact the submission of TNPCB before the NGT and before the Hon'ble Supreme Court earlier is that the slag is hazardous. The petitioner contended that TNPCB cannot refer to old reports and the stand taken by them is wrong, more particularly, when the HWM Rules has excluded slag from the category of hazardous waste.

364.The research papers which were referred to and placed before the Court [Volume R1B Page 339] states that slags are generally deposited on dumps and considered to be unreactive materials. Smelter copper sludge

contains significant concentration of several potentially toxic elements including arsenic, lead, cadmium, barium, zinc and copper. These elements can be released into environment under natural weathering condition and cause pollution of soils, surface water and ground water. In a research paper submitted in the Anna University, it has been stated that copper slag contains highly toxic elements like arsenic, barium, cadmium, copper, lead and zinc. Copper slag can release these elements into the environment causing pollution of soils, atmospheric air, surface water and ground water and copper smelter releases copper selenium, they are highly toxic if present over abundant, they contaminate soil in the vicinity of smelter, destroying the vegetation. In a paper published in Stanford News Survey, it has been stated that the glassy material in the slag is the major source of potentially toxic metal release to the environment. In a paper published in the National Metallurgical Laboratory Journal, Jamshedpur, it has been stated that copper as a metal provides limited scope for environmental pollution, but the waste generated by the copper

based industries with various toxic elements can pollute the environment. The granulated slag/slag after copper flotation are dumped near the smelters. However, the hazardous constituent in these slags, particularly, selenium, mercury, silver, arsenic, lead and copper may enter in the water stream due to weathering action and rain water. In a paper, which was published by the National Institute of Environmental Health Sciences regarding the other copper industries in the Country, namely, Hindustan Copper, KCC, Rajasthan, Birla Copper, Gujarat SWIL Limited it has been stated that in the solubility test it was found that the sludge [Acid plant sludge] and dusts leaks out copper, lead, zinc and cadmium in significant concentration and these sludges and dusts are therefore considered potentially hazardous. The petitioner would contend that there is uncertainty in the scientific opinion and therefore the stand taken by the CPCB that the slag is non-hazardous and is permissible to be used for laying roads, levelling, filling up of pits, etc should be taken note of and the same cannot be a reason for non-renewal of consent to operate. In

the earlier round of litigation, which travelled up to the Hon'ble Supreme Court, on appeal by the petitioner, in its judgment dated 02.04.2013, the well recognized principles of judicial review were set out, which we have noted earlier. One among the three grounds on which the High Court could review the decision of the authority is on the ground that the decision was so unreasonable so as to suffer from Wednsbury unreasonableness. To be noted that the petitioner had sold about 3.5 lakh tonnes of slag, which was stored in a private patta land. The huge quantity which was stored had obstructed the flow of Uppar river and during rainy season, the Thoothukudi town was inundated. The scientific opinion shows that if huge quantity or abundant quantities are dumped, it would definitely cause pollution. The scientific opinion also shows that copper slag contains highly toxic elements. Therefore, to state that the CPCB/TNPCB has permitted certain usages of the slag can hardly be a reason to exonerate the petitioner. To be noted that from 2011 to December 2017 the petitioner has generated 3915901MT of copper slag and

they are stated to have disposed of 7437327 MT which includes the old stock. It has been reported that copper slag has been dumped in ten places outside the premises and the quantity so dumped is 537765 MT. These sites are in Thoothukudi District. In such factual scenario, it has to be seen whether the petitioner has any responsibility on the slag upon sale of the same to third party. To get an answer, we refer to the Memorandum of Understanding and Sale Agreement dated 25.09.2010 entered into by the petitioner with one Mr.A.Paul. Clause 4 of the Memorandum of Understanding deals with usage of copper slag in which the buyer confirms to the petitioner that he will use the copper slag for land filling and not for any other purpose, if he does so, he has to get written permission from the seller (petitioner). Further, the buyer undertook to the petitioner that he will not sell or dispose of the slag to any other third party without the petitioner's previous permission in writing. The buyer was required to ensure compliance of the following instructions for the land filling:-

(a) Proper and uniform spreading of copper slag up to the height of 5 feet across the entire filling area;

(b) The copper slag should be spread in such a way that it must not obstruct the free flow of storm water, either partially or completely;

(c) No copper slag should be put on any water carrying or holding body including, and not limited to, Nallah/Odai;

(d) The copper slag must be filled and spread in such a manner so as to contain the entire copper slag within the periphery of the filling area. The copper slag area shall be contained within the landfill area by means of a compacted shoulder made of local soil or moorum etc;

(e) After completing the filling of slag up to desired height, a layer of 10-20 cm of moorum will be uniformly spread over the slag area on a daily basis;

(f) The area shall be put to use for any useful applications within 3 months of filling and not left exposed as such;

(g) The slag is spread only at the designated areas indicated in the topo sketch attached with this MoU and also in the original patta land of the buyer; and

(h) The buyer shall also provide a 'No Objection Certificate' from the land owner(s) stating clearly that the owner(s) of the land do not have any objection in issuing the material for the purpose and scope stated in this MoU.

365.Reading of the above conditions will clearly show that the petitioner as the seller cannot disown responsibility. There is a duty cast upon them to ensure that the terms and conditions of the Memorandum of Understanding are scrupulously followed. The petitioner continues to have control over the material and in particular with regard to the manner of usage. Thus, if there is violation of the condition, the petitioner is liable to be proceeded against. Therefore to state that the liability of the petitioner ceases upon sale on ex-works basis is an argument which deserves to be rejected and stands rejected. In the instant case, it is evidently clear that though the sale

took place in 2010 all that the purchaser did was to dump the huge quantity of slag in his private patta land did nothing to utilize the same in terms of the MoU and the petitioner woke up only after the District Collector issued show cause notice on 14.07.2016. The petitioner failed to enforce the terms of the MoU for six years for reasons best suited. The facts will clearly show that neither the TNPCB nor the District Administration took effective steps to abate the nuisance rather the slackness in the approach of TNPCB and the District Administration had lead to the flooding of Thoothukudi town on account of the obstruction of the river course. The District Administration cannot plead ignorance because the quantity of slag dumped is virtually a small hillock and visible to any passer-by. Therefore, this Court can safely conclude that the officials of the District Administration turned a blind eye to the illegality probably unable to do anything considering the magnitude of the petitioner. The officials of the TNPCB at the relevant time are also equally culpable. What needs to be done to these officers is a matter which requires

serious consideration and to serve as a deterrent to the serving officers of the Board. Further more importantly, was there any political or official pressure on the Officials/District Administration to go slow, which may also be required to be probed to fix responsibility. It is hight time, the Government took action against those responsible at the earliest.

366.The District Collector, Thoothukudi filed a report before the Hon'ble Supreme Court in S.L.P.(C) Nos.28116-23/2010 during 2011, on the ground situation regarding the functioning of the petitioner pursuant to an inspection conducted in the petitioner's unit on 16.08.2011 along with the District Environmental Engineer, TNPCB, Health Authorities, Authorities from the Department of Geology, Ground water and Revenue Officials. During the inspection, the industry was in operation. The report sets out several observations of which, we note the observations made during the inspection of surrounding villages and interaction with the local public. The

report states that after inspection of the petitioner's unit, an inspection of the peripheral villages of Meelavittan, Therkkuveerapandiyapuram and Sankaraperi was undertaken. The channel, adjoining the southern boundary of the petitioner's unit, was inspected as also the area around the factory and inspection in the surrounding villages to verify the effect on agriculture and animal husbandry. The team interacted with the villagers of Meelavittan in the Panchayat Village Office, which included senior citizens and women, who have expressed their views on issues of environmental pollution by the petitioner. Certain people have complained about increased discharge of gaseous emissions during early hours of the day, i.e., around 04.00 am to 06.00 am during which, they experienced irritation and mild breathing discomfort and women complained about itching while using the ground water from the borewells of the village. The report records that the problems have started after commencement of industrial activity in the area particularly, after starting of the petitioner's unit. Further, the villagers have complained that

cattle rearing in the village has been affected due to pollution of rain water mixing with the waste water of the petitioner during rainy season and the cattle die after consuming the polluted water, which become greenish in colour once it get mixed with waste water of the petitioner's unit. Further, the public have stated that the pollution of rain water not only affects the health and growth of the cattle, but also the ground water. The villagers have showed a water body, where an open well and a borewell are situated. The villagers stated that the village has been using the water for drinking purposes from these wells till the year 2002, but after the establishment of the petitioner, the ground water of the tank and the borewells situated there have become unusable.

367.We have referred to this report to highlight that people have voiced their opinion, which has been recorded by the District Collector and filed as a report before the Hon'ble Supreme Court. The petitioner cannot

discredit the views of the villagers by contending that they were tutored to say so. Thus, this report definitely is a material, which should be reckoned to hold that the continued operation of the petitioner has affected not only the quality of the air in the area, but as well as the ground water. The above conclusion, which we had arrived at based on public opinion, should be given due credence because, the defaults committed by the petitioner have been continuously indicated in various reports more particularly, of NEERI. The 1999 report of NEERI, which was submitted after an inspection was conducted on 17.11.1998, has pointed out the inadequacies in the Effluent Treatment Plant (ETP) and stated that the treated effluent quality does not confirm to the standards stipulated by the TNPCB and it was over all the ETP. The same position continued till May, 2011. In May, 2011 report, apart from pointing out inadequacies in the effluent treatment, it was observed that the capacity of the evaporation system is inadequate to handle the total quantity of rejects generated daily resulting in non-optimal capacity utilisation of the RO

system and therefore, the RO system is operated at sub-optimal capacity. In the inspection conducted by TNPCB during March, 2017, it was pointed out that the petitioner has to maintain logbooks for ETPs and has to maintain separate logbooks for each ETP. The petitioner, in their reply dated 23.03.2017, stated that they are maintaining shift wise logbooks for ETPs in electronic form. The other defect, which was pointed out during the inspection such as pin hole leakage in the pipe carrying the treated effluent from the ETP to RO, was stated to be repaired immediately. The overflow of treated effluent, which was detected during inspection, was admitted by the petitioner, but would state that the overflow was immediately corrected. It is not clear as to how much was the overflow, was there any data available with TNPCB. The inspecting team found that the RO Plant No.3 was not in operation. The petitioner admitted the same and stated that they are in the initial stages of commissioning RO-3, which will be completed by the end of March, 2017.

368.With regard to the copper slag, which was found dumped near the Uppar Odai, the petitioner stated that TNPCB and CPCB have permitted the use of copper slag for filling up low lying area and relevant approvals have been given by CPCB and TNPCB and they have entered into an agreement with Mr.A.Paul in 2010 for supply of copper slag on ex-work basis for developing his low lying patta land in Pudukottai for construction of a container yard. The petitioner would state that they supplied copper slag in the year 2010-2011 and the land owner has carried out the required land filling and levelling activities and compacted the same with gravel and enclosed photographs to support their stand. However, it appears that the mountain of slag still continues to remain, it has affected the free flow of water and caused damage to the public.

369.We have referred to the inspection report and the reply given by the petitioner by way of an illustration to show that the petitioner had been

non-compliant continuously and each inspection had brought out various issues and the petitioner would accept the same and state that remedial measures have been taken. The question is as regards the impact that the non-compliance has had on the environment.

370.The TNPCB by order dated 07.09.2017 granted renewal of consent under Section 25 of the Water Act valid for the period ending 31.03.2018. The consent was subject to the provisions of the Act, the Rules and the orders made thereunder and the terms and conditions incorporated under the special and general condition stipulated in the consent order issued earlier and subject to the special conditions annexed to the order dated 07.09.2017. The renewal of consent was valid for operating the facility for the manufacture of products/by-products, namely, copper annode, copper cathode [from annode produced] and phosphoric acid. The quantity of copper annode authorized was 1200 TPD, copper cathode was 875 TPD and phosphoric acid was 800 TPD. The by-products details mentioned were sulphuric acid 4200

TPD and hydroflurosilicic acid 25 TPD. The immediate product detail from refinery was mentioned as annode slime of 1.75 TPD. The renewal of consent was also valid for operating the outlets for discharge of sewage/trade effluent, namely, sewage of 100 KLD and trade effluent of 4080.0 KLD. The additional conditions would be relevant. In condition No.11, it was mentioned that the unit shall have storage of solid waste of slag within the stipulated 10 hectares of land with a restricted stacking height of 12 meters throughout the storage area for adherence with a safe load bearing capacity of 25 MT per square meter of the underlying soil/land in that area. Condition No.13 stipulates that the unit shall maintain the generation and disposal ratio as 1:1 in respect of gypsum and copper slag and at any point of time available stock over the deadlock in the yard shall not be more than 15 days generation. Condition No.27 states that the Unit shall remove the heaped and dumped copper slag on the banks of river Uppar and patta land in Pudukottai village. Condition No.28 states that the Unit has to take action to construct physical

barrier between the river Uppar and slag land fill area patta land so as to prevent slag from reaching river Uppar. A cumulative reading of the additional conditions mentioned above will show that the petitioner had indiscriminately dumped copper slag outside the Unit and in certain patta lands. Further, there appears to be excess storage of solid waste slag within the Unit thereby compelling TNPCB to stipulate as to the area where the slag has to be stored, the stacking height throughout the storage area. Further mention of the disposal ratio of 1:1 of gypsum and copper slag will also go to show that there was excess stock of production of more than 15 days necessitating a condition to be imposed on the petitioner. Further, responsibility was fixed on the petitioner for indiscriminately dumping copper slag near a water course and in patta land and the petitioner was directed to construct a physical barrier between the river and the slag land fill so as to prevent the slag from reaching the river. The petitioner argues that these are new conditions and therefore the same cannot be taken as a ground for closing

the petitioner Unit. This argument cannot be accepted for the reason that the petitioner had violated the conditions stipulated earlier which had compelled the TNPCB to issue such additional conditions. We have noted that the petitioner's control over the slag continues though it is shown to be sold to a private party. Therefore, the petitioner cannot disown its responsibility in the safe disposal of slag and the fact that huge quantity of slag was dumped indiscriminately adjoining a river will go to show that the petitioner is a chronic defaulter. The plea raised by the petitioner that it has been stored in a patta land by the purchaser and the petitioner cannot be held responsible as the slag was sold on ex-factory basis is an argument which needs to be rejected. The slag can be sold subject to stringent conditions and facts clearly demonstrate that the purchaser did nothing with the slag though he is said to have purchased it for land filling and had kept in an area for several years. To be noted that in the consent order dated 22.05.1995 while granting consent for establishment under Section 25 of the Water Act, the condition was that the

petitioner shall dispose of the solid waste generated from the plant like slag for sand blasting, for land filling and road building activities then and there to avoid accumulation of solid waste within the premises. In the proceedings of the District Collector dated 24.09.2016 which was issued when there was flooding in the Uppar river, a meeting was convened presided over by the District Collector and attended by the revenue officials as well as the top executives of the petitioner. In the said proceedings, it has been mentioned that near the Pudukottai Bridge in the Uppar river the copper slag has been dumped and notice under Section 133 Cr.P.C. has been issued by the Sub-Collector, Thoothukudi and legal proceedings have been initiated and final orders has been passed with direction to remove the copper slag as advised by the Revenue Divisional Officer, Thoothukudi. Further it was noted that the District Collector has sent notice dated 14.07.2016 to the petitioner stating that if the pattadar does not remove the copper slag to prevent flooding, the same to be removed by the Executive Engineer of the Water Resources Department

apart from desilting the river. Further the petitioner was also directed to co-operate. It was argued that obstruction caused on account of the slag to the Uppa river is not pollution and therefore, the same cannot be a ground to refuse renewal of consent to operate. This argument has to be outrightly rejected for the simple reason that if slag has been indiscriminately dumped either within the factory premises or in other places in Thoothukudi District, the petitioner will be responsible and it would tantamount to violation of consent conditions. In other words, slag could not have been dumped in such huge quantities and allowed to lie over for nearly a decade, which goes to show that slag was not put to use for any beneficial purpose as stipulated in the consent conditions. Therefore, obstruction of the river amounts to violation of a consent condition and therefore, the petitioner is liable to be proceeded with. Apart from that, by obstructing the flow of water in a river or stream resulting in flooding and causing other consequences is also a form of pollution. Therefore, there is no substance in such contention advanced by the petitioner.

371.We are surprised to note as to why the District Collector in the year 2016 directed the Water Resources Organization of the Public Works Department to remove the slag when the petitioner was fully responsible. In all probabilities the petitioner would have been able to convince the officials that they have sold the slag and the purchaser has left it in the patta land. Unfortunately, the District Administration did not note the Memorandum of Understanding between the petitioner and the purchaser, held the petitioner responsible and they cannot divest themselves of the transaction like any other sale of goods. Surprisingly though the Assistant Engineer, TNPCB, Thoothukudi was a participant in the meeting, this vital fact was not placed before the District Collector in the meeting so as to fix responsibility on the petitioner. What emerges from these facts is that slag which is a waste generated during the manufacturing process is required to be stored and disposed of in a specified manner. The end usage of the slag cannot be a factor to consider whether the petitioner had violated the consent condition or

not. The end use is totally a different subject. In other words, the order of consent permits production of certain products, recognizes certain by-products, one of which is slag and directs the slag to be stored in a particular manner and disposed of in a particular ratio. The mention in the consent order stating that the gypsum and copper slag shall be disposed of for sustainable application such as slag blasting, road building activities, cement industries and other relevant area of application with approval from concerned agencies. The disposal for such sustainable application should be with the approval from the concerned agencies. It is not disputed that the purchaser/pattadar, one Leelavathy, wife of Thangavel had kept the material stored in her patta land and this has obstructed the flow of water in the river and when notice was issued under Section 133 Cr.P.C., she agreed to immediately remove the copper slag and put a concrete bund to demarcate the boundary. The undertaking given by Leelavathy and subsequently by the petitioner who later on constructed the wall was not to remove the entire quantity of the dumped

slag but that portion of the slag which obstructed the river. Therefore, the petitioner has to be held responsible for obstructing the river course for which separate proceedings need to be initiated and the damage caused due to the floods should be recoverable from the petitioner. The second aspect which flows from this is that the slag continued to remain dumped in the said land which is in violation of the consent condition. We have noted that the purchaser, one Mr.Paul appears to be a name lender. Therefore the petitioner cannot contend that because the slag was permitted to be disposed of, it is inert. That would not be the right test to determine the quality, the leachability and the hazardous nature of the substance. The question is did the TNPCB verify whether the petitioner had disposed of the slag for sustainable development. The facts show that the TNPCB did not examine this aspect because had it been done, there cannot be enormous mountain of slag dumped in and around Thoothukudi District. Therefore, viewed from any angle it has to be held that the petitioner has violated the consent condition and the default

was chronic, the petitioner totally disregarded the condition which was imposed even in the year 1995 while granting consent to establish and therefore, no further indulgence needs to be given to the petitioner and rightly the respondents have taken a decision to close and permanently seal the petitioner's Unit.

372.The petitioner submitted a report to the MoEF on 03.01.2007 seeking ratification of 900 MTPD to 1200 MTPD copper production capacity, de-bottlenecking project. In the description of raw material under the head "composition of copper concentrate", while giving its chemical composition, it was mentioned to contain mercury below deductible level. In paragraph 2.6 of the submissions, which deals with forces of pollution, a table containing the details of inputs and pollution outputs in copper smelter process has been given and in the column "other wastes", mercury has been mentioned both during the process of copper smelting and copper conversion. From the

pictorial diagram of gas cleaning plant, it is seen that there is no mercury removal tower mentioned. An Environmental Impact Assessment report was prepared by M/s.Vimta Labs Limited for the petitioner for their proposed copper smelter plant-II. In table 1.2, in the details of production capacity, mercury is shown as one of the products. In the flow diagram of continuous copper rod plant process, a mercury removal tower has been proposed. The report states that the mercury in the smelter and converter gases will be present in elemental form as mercury-vapour in the downstream of the wet electrostatic precipitator and this can be removed from the gas by means of Aqueous Mercury-II-Chloride solution. The concern of the 9th respondent is that there is no explanation as to what happened to the mercury, which was generated in the process. It is stated that mercury moves with air and water and, it can be transported thousands of miles in the atmosphere. It is stated that while submitting the application for renewal of HWM authorisation, the presence of mercury was not mentioned. Referring to the Guidance on Best

Available Techniques and Best Environmental Practices, published by the United Nations Environment, 2016 while explaining the process of smelting, it is stated that because of high temperature, the mercury will be volatilized and thus, be present in the exhaust gas and in the exhaust gas, mercury will be absorbed on particulate matter or present a soluble mercury compound and will also be present as elemental mercury. The oxidised species of mercury can normally be removed by using scrubbers and wet electrostatic precipitators. Particulate bound oxidised mercury can be removed by bag house filters. Elemental mercury, however passes all such standard gas cleaning equipment and therefore, secondary mercury removal stage may be needed to reduce the mercury to acceptable concentration, if it is present in the ore. The reason elemental mercury cannot be removed from the ambient temperature gas stream by scrubbing with water alone is its low solubility in water. It is also stated that mercury may also be present in the waste water produced by these processes and will require proper storage or management.

The sludge containing mercury should be managed in a manner consistent with the relevant articles of the convention in an environmentally sound manner.

373.According to the 9th respondent, between 2004 and 2018, the petitioner should have generated a minimum quantity of 25.91 tonnes of mercury and they have gone scot free when the Hindustan Unilever Plant in Kodaikanal was shutdown for discharging 7.95 kgs of mercury. This aspect of the matter is of serious concern, which should have been examined by TNPCB, which appears to have not been done.

374.The petitioner would submit that TCLP procedure is used to evacuate leachability potential of a waste and it is a legally accepted procedure under the USEPA and the HWM Rules to characterise a waste as either hazardous or non-hazardous whereas, TNPCB has analysed the total

constituent in copper slag instead of TCLP analysis that shall be followed mandatorily. The learned Senior Counsel for the petitioner elaborately explained the difference between the TCLP and total constituents analysis by referring to the procedure. It is further contended that M/s.Vimta Labs had carried out the TCLP test in 2017. The Chennai Testing Laboratory had conducted TCLP test of 11 slag sites. Third party water leachate analysis report was carried out at various copper slag landfill sites showing leachability of heavy metals present in copper slag in water leachate. Thus, it is the submission that the report of soil samples around slag dumps conducted by M/s.SGS on behalf of TNPCB without following the rules and conducting a total constituent analysis cannot be relied on. The TNPCB is the regulator and we have to presume that the regulator knows what is best, but the petitioner has been right through projecting that they are adopting better standards. If such is their stand, then what they apparently want to do is to regulate the regulator, which is not feasible both factually and legally. Therefore, if

according to the petitioner whatever tests done by the regulator are wholly erroneous or on the other hand, if the procedures adopted by them or the procedures that need to be followed as they are as per global specifications, then nothing prevented the petitioner from approaching the regulator for a special set of condition or exemption. On the other hand, what we found was ever since the petitioner commenced production, every order of consent or direction issued by the regulator contained the very same directions, which if cumulatively considered, would show that there has been continued non-compliance. Therefore, we cannot accept the stand taken by the petitioner to disregard the reports submitted by TNPCB based on a study conducted by M/s.SGS.

375.It is admitted that there are only seven continuous AAQ monitoring stations, they are located in the entrance of the petitioner, AIR station, east of gypsum pond, petitioner's colony, SIPCOT office, west of

gypsum pond and T.V.Puram village. As per the Expert Committee's report of 2013, monitoring stations are required to be established throughout the city. Out of the seven continuous AAQ monitoring stations, six are within and near the petitioner's unit and the only station outside is in T.V.Puram Village. From the documents filed, it is shown that they were connected only on 19.12.2014 and 09.07.2015. So far as the monitoring of CO and NOx is concerned, it was connected only on 12.06.2017 as also for PM_{10} and $PM_{2.5}$. Therefore, the 9th respondent is right in contending that prior to the said dates, no data was available with the Care Air Centre. Another issue, which has been brought to our notice is that from 17.11.2017 to 20.11.2017, the value of SO_2 remained as 0.3 ug/m^3. Thus, the 9th respondent would contend that either the meter has been tampered or it is a wrong calibration. Similarly, there are other occasions, where the values remained static for close to 8 hours and in the consolidated details, which have been filed, the reading of 0.3 has been repeated for 1348 times. It is the common knowledge that AAQ will never

remained static, as there are several factors, which affect the quality of the air. Similarly, during 2015 and 2016, data has remained static. The larger question is as to what the regulator did in the matter. This is a very serious issue, as the AAQ had not been monitored as it is required to be done.

376.The learned counsel appearing for the 9th respondent drew out attention to the report submitted by M/s.Vimta Labs for Environmental Impact Assessment and the values given by the petitioner and the report of M/s.Vimta Labs shows that the data will not remain static between morning and night and it will vary. It is not clear as to why the regulator did not take any stringent action on this aspect of the matter. Had TNPCB noted that the values remained static for several hours, they should have alerted the station or made an inspection to ascertain as to whether the monitors were functioning properly, was there any technical glitch, or was there any other factor which led to such abnormal display. Therefore, to rely upon such data from the AAQ

monitoring systems situated within the factory premises and in the near vicinity would be inadvisable and we can also go to the extent of drawing adverse inference against the petitioner. It is commented by the 9th respondent that the monitoring station at T.V.Puram is not located in the predominant wind direction, villages of Meelavittan, Pandarampatti, Silvarpuram and other areas of Thoothukudi town, where the public have complained about pollution, do not have any monitoring mechanism. If such is the admitted factual position, then it has to be held that the monitoring mechanism has not been adequate and the results which are reflected from the existing seven systems will give a distorted picture. The analysis of the data available in the Care Air Centre for the years 2015 to 2018 shows that the values have remained static for varying period of time and certain readings were shown to be unrealistic, which will go to show that the air quality in the area was not monitored. In the notes on submission submitted by the 9th respondent, annexures have been given showing the analysis of the CAAQ monitoring station data for the years

2015-16, 2016-17 and 2017-18. On perusal of the analysis for the year 2017-18, it is seen that the number of unvarying 15 minute readings for 8 hours or more is 7337 for NOx for PM_{10} it is 7115, for SO2 it is 10692, for $PM_{2.5}$ it is 7.49. These are the data in the SIPCOT monitoring system. Thus, we conclude by saying that the regulator did not effectively monitor the AAQ in the area.

377.NEERI, in their environmental audit report of March, 2005 have specifically mentioned that the ground water does not meet the drinking water standards and also mentioned about the presence of arsenic above the stipulated limit and the levels of cadmium, chromium, copper and led were also found to exceed the drinking water standard in some wells. In Chapter-VII of the report, which deals with 'conclusions and recommendations', it has been clearly pointed out that water in the wells are unfit for drinking, high level of heavy metals have been found, the concentration of total dissolve

solids and sulphates exceed the limits stipulated by TNPCB for treated effluent, the occurrence of heavy metals in the soil was attributed, fugitive emission and solid waste dumped etc. Though this was the factual position, the petitioner seeks to escape from the rigour by contending that there was no such charge against the petitioner. As pointed out earlier, the regulator failed to do their job and on account of their default, the petitioner cannot be exonerated.

378.In the conception note on ZLD and thermal power plant details, with regard to the petitioner, it has been pointed out that they have provided ZLD system only for the treatment of process effluent whereas, their main culprit of ground water pollutant being the leachate from the open dump such as gypsum pond, copper slag and leachate from SLF are not subjected to ZLD system including RO system. It has been stated that apart from heavy metals, which are pollutants generated by the petitioner, which are heavy metals,

organic pollutants are also generated from the manufacturing process and the sludge, which is generated from the ZLD system should also be considered as a pollutant and all the parameters are alarmingly present in the ground water collected in and around the petitioner's unit. Therefore, the petitioner cannot seek to exonerate themselves by contending that they cannot be held responsible for other pollutants, which are present except their marker pollutant.

379.The next aspect is with regard to the removal of "slag" from the category of hazardous waste under the HWM Rules, would it alter its character from being a hazardous substance. The petitioner refers to the report of the National Institute of Oceanography which states that copper slag can be used as reclamation material. The petitioner also refers to the NEERI Report, the stand of the TNPCB stating that it is not hazardous, non-leachable and not affecting the ground water based on the stand taken by the CPCB. There is

also reference to certain test reports. Thus, we need to first consider the effect of the note in Schedule I of the HWM Rules, 2016. It has been stated therein that high volume low effect waste such as fly ash, phosphogypsum, red mud, slag from pyrometallurgical operations, etc. are excluded from the category of hazardous waste. Separate guidelines on the management of these waste shall be issued by the CPCB. The argument of the petitioner is that slag having been excluded from the category of hazardous waste, it can no longer be treated as hazardous. The HWM Rules have been framed in exercise of powers under Sections, 6, 8 and 25 of the EP Act. Rule 3(17) defines 'hazardous waste' to mean any waste which by reason of characteristics such as physical, chemical, biological, reactive, toxic, flammable, explosive or corrosive causes danger or is likely to cause danger to health or environment whether alone or in contact with other waste or substance and shall include waste specified under column 3 of Schedule I. Assuming for the sake of argument that the petitioner is right, mere exclusion of slag from Schedule I

will not take away its character from the definition of hazardous waste under Rule 3(17) unless and until it is established that none of the characteristics mentioned in this Rule stand attracted. Further Section 2(e) under the EP Act defines 'hazardous substance' which means any substance by reason of its chemical or physico chemical properties or handling is liable to cause harm to human beings or other living creatures, plants, micro organisms, property or the environment. "Handling" has been defined under Section 2(d) which includes storage, offering for sale, usage, etc. Therefore, the argument that the slag has been removed from the category of hazardous waste in Schedule I can in no manner advance the case of the petitioner. Furthermore, the removal from Schedule I is conditional as it states separate guidelines will be issued by the CPCB. Therefore, any certification by the regulator be it CPCB or TNPCB, it can be construed only for an ideal situation. Indiscriminate dumping of extremely huge quantity of slag for nearly ten years can at no stretch of imagination be condoned by referring the opinions of the regulator

or the opinion of certain National Institutes or scientific opinion especially, when there are contra view expressed in various papers which have been published under the auspicious of reputed organisations . All these opinions and materials are rendered on idealistic set ups but cannot cover extraordinary situation like the case on hand. Even "nectar in excessive quantities would turn into "poison". Therefore, the arguments of the petitioner by making reference to opinion of the regulator or by other third party can in no manner save the situation caused by the petitioner which is unprecedented and definitely not an ideal set up. Therefore, all arguments in this regard stand rejected.

380. In the impugned order dated 09.04.2018, it was pointed out that an authorization under the HWM Rules issued to the petitioner Unit on 10.07.2008 expired on 09.07.2013 and even after expiry, the Unit continued to generate and dispose the hazardous waste without valid authorization under

the Rules, the application for renewal of the authorization was returned for want of additional details and the petitioner had not resubmitted the same. It is the submission of the learned senior counsel for the petitioner that in terms of Rule 6(1) of the HWM Rules, HW authorization is not a pre-condition for obtaining consent to establish or consent to operate. It is further submitted that when the impugned order dated 09.04.2018 was passed, the application for renewal of the authorization was pending and the petitioner has now filed a writ petition for issuance of a writ of Mandamus to direct the respondent to renew the authorization. Therefore, it is submitted that non-renewal of the HW authorization, cannot be a reason for refusing to renew the consent to operate.

381.The learned senior counsel referred to the relevant dates to show as to when the application was submitted for renewal and what are the compliances effected by the petitioner, etc. with a view to substantiate their

contention that non-renewal of HW authorization cannot be a ground to refuse to renew the consent to operate. The learned senior counsel referred to inspection report of the TNPCB for consideration of the renewal of the HW authorization and the report of the inspection dated 28.02.2018 and submitted that the renewal of the authorization was recommended subject to sixteen conditions. Therefore, it is submitted that the reason assigned in paragraph 3 of the impugned order dated 09.04.2018 is wrong. To examine the correctness of the contentions put forth, we need to have a broad over view of the HWM Rules. The 2016 Rules superseded the 2008 Rules and the authorization initially granted to the petitioner on 10.07.2008 was under the earlier Rules. Admittedly, the authorization expired on 09.07.2013. The petitioner's case is that on 25.06.2013, well before the expiry of the authorization the petitioner had filed an application for renewal on 25.06.2013 and on the same day, the annual return in Form 4 was submitted to the TNPCB. Between November 2013 and May 2014, the petitioner is stated to have sent reminder letters

seeking renewal. On 28.05.2014, the renewal application was resubmitted with additional details as per the ISO auditors' observations. The petitioner would state that from June 2014, they have been periodically sending reminder letters to the TNPCB for renewal of the authorization, simultaneously they were submitting their monthly returns. On 05.07.2016, the petitioner submitted an authorization renewal application through the on-line portal to the TNPCB as per the 2008 Rules. On 01.09.2016, the TNPCB has informed the petitioner that there is some issue in editing the renewal application filed under the 2008 Rules and it may take some time to renew the same and returned the application and after the industry requests for deletion of the old application, the same will be deleted and the industry to apply under the 2016 Rules. It appears that the said direction was complied with by the petitioner and fresh application was submitted under the 2016 Rules thereafter. The TNPCB rejected the application on 27.08.2017 and 24.11.2017 for not uploading the agreements with the authorized recyclers for handling hazardous

waste and renewal hazardous waste authorization waste stream and quantity is not tallying with old authorization. The petitioner submitted a representation on 18.12.2017 followed by resubmitting the renewal application on 20.12.2017. On 25.01.2018 additional particulars were called for and according to the petitioner, the application was resubmitted on 08.02.2018. The TNPCB by order dated 16.04.2018 rejected the application on several grounds. On 17.04.2018, the application was resubmitted which was again rejected on 05.06.2018 on several grounds. On 18.07.2018, the application was resubmitted which was rejected on 26.09.2018 and once again the petitioner is stated to have resubmitted its application on 22.12.2018. Therefore, the petitioner would contend that when the impugned order refusing to renew the consent to operate dated 09.04.2018 was passed, the application for renewal of authorization was pending.

382.The question would be as to whether the authorization under the Rules is a formality and can it have any impact on the petitioner to continue its

production activity though obtaining an authorization may not a condition precedent to obtain consent to operate. Rule 3(3) of the 2016 Rules defines 'authorization' to mean permission for generation, handling, collection, etc., of hazardous waste granted under Rule 6(2). Rule 3(10) defines 'disposal' to mean any operation which does not lead to reuse, recycling, recovery, etc. and disposal in secured land fill. As seen earlier, Rule 3(17) defines 'hazardous waste' which includes waste in column No.3 of Schedule I to the Rules apart from other things. Rule 4 cast a responsibility on the petitioner for management of hazardous and other waste. The petitioner is bound to follow the steps of prevention, minimization, reuse, recycling, recovery, utilization including co-processing and safe disposal. Rule 4(2) mandates the petitioner to be responsible for safe and environmentally sound management of hazardous and other waste. Rule 5 deals with the responsibility of the State Government for environmentally sound management of hazardous and other waste., Sub-rules provide for what are the infrastructure facilities which have

to be provided by the Industries Department of the State, the steps to be taken by the Labour Department of the State and overall responsibility of the State to prepare integrated plant for effective implementation of the provisions of the Rules and submit the annual return to MoEF. Rule 6 deals with grant of authorization for managing hazardous and other waste. In terms of Sub-rule (1) of Rule 6, every occupier of facility who is engaged in handling, generating, etc. of hazardous waste and other waste like the petitioner shall be required to make an application in Form 1 to the TNPCB and obtain authorization within a period of 60 days from the date of publication of the Rules, along with the application the petitioner has to enclose the consent to establish, consent to operate issued by the TNPCB and in case of renewal of authorization, the procedure to be followed stipulated is under Rule 6(1)(c). In terms of Rule 6(2), the TNPCB is required to consider the application after making such enquiry and on being satisfied that the applicant possess appropriate facility, after ensuring technical capabilities and equipments,

complying with standard operating procedure or guidelines specified by CPCB from time to time and through site inspection, grant within a period of 120 days, authorization in Form 2 which shall be valid for a period of five years subject to the conditions laid therein. Proviso to Rule 6(2) deals with renewal of authorization and there is a duty on TNPCB to satisfy itself that there has been no violation of the conditions specified in the earlier authorization and after recording the same in the inspection report to proceed to grant renewal. Sub-rule (3) of Rule 6 mandates that the authorization granted by TNPCB under sub-rule (2) shall be accompanied by a copy of field inspection report signed by the Board indicating that adequate facilities are in place. Sub-rule (4) of Rule 6 gives power to the TNPCB to refuse authorization after giving reasonable opportunity of being heard to the applicant; Sub-rule (5) speaks about the annual returns; Sub-rule (6) about the register to be maintained by the TNPCB, the actual user is required to maintain a pass book issued by the TNPCB as mandated under Rule 6(7) and in terms of sub-rule (8), the handing

over of the waste shall be only after making entry in the pass book of the actual user. Rule 7 gives power to suspend or cancel authorization; Rule 8 deals with storage of hazardous and other waste; Rule 9 regarding the utilization of hazardous and other waste and Rule 10 speaks about the standard operating procedure or guidelines for actual users. Rule 16 deals with treatment, storage and disposal facility for hazardous and other waste. In terms of sub-(1) of Rule 16, it is a joint responsibility of the State Government, the occupier, operator of the facility or in association of occupier who will be jointly or severally responsible for identification of the sites for establishing facility for treatment, storage and disposal of hazardous and other waste in the State. Rule 19 deals with the manifest system which is a movement document for hazardous and other waste to be used within the Country. Thus the HWM Rules imposes an obligation not only on the petitioner but more onerous obligation on TNPCB and State Government. The petitioner cannot take umbrage by contending that their application for

renewal was kept pending by the authorities and in spite of reminders, no orders were passed. Yet another submission was made that there are seven other red category industries in the same industrial complex who do not have any authorization.

383.The settled legal principle is that there cannot be any equality in an illegality. The fact that authorization was not renewed is a very serious matter. Unfortunately, neither the officials of the TNPCB nor the State Government took note of it. As a result of which, the petitioner continued to handle and dispose of hazardous and other waste as per their whims and fancies. According to them, they have done the disposal strictly in accordance with the Rules. The question would be as to who will certify for the same. The petitioner claims that they have been filing periodic statutory returns in Form 3. The dates of submission have been given. It is not clear as to what TNPCB did with those returns. The Court can safely conclude that

considering the large number of red category industries in the State, there is every likelihood that the returns are not processed or processed belatedly. We are justified in coming to such conclusion, as there was nothing placed on record by TNPCB to show that returns submitted by the petitioner were verified for its correctness. In all probabilities, the returns if submitted in physical form will be filed in physical form. If it is submitted online, probably it is downloaded and filed. There appears to be no analysis of these returns, no examination as to whether the petitioner complied with the condition. Thus slackness on the part of the officials of the TNPCB who are in-charge of ensuring compliance of HWM Rules have failed to discharge their duty. The question is whether the magnitude of the petitioner made them to do so. For the first time, the TNPCB woke from deep slumber when the application was rejected on 27.08.2017 and subsequently on 24.11.2017. From the details placed by the petitioner in their typed set of document Volume 2C, we find that this is the first time there was a rejection by the TNPCB. This was

followed by calling for additional particulars on 25.01.2018 followed by rejection dated 16.04.2018, 05.06.2018 and 26.09.2018. It is not clear as to whether the Department which takes care of implementation of HWM Rules is independent of the department of TNPCB which deals with grant of consent and renewal of consent to operate. Even assuming there are two Departments, they are bound to act in coordination. Thus, considering the scheme of the Rules, the purpose for which it was framed under the EP Act, obtaining authorization under the Rules is not a formality but it is a mandatory requirement as could be seen from the plain language of Rule 6(1). Thus, if the application submitted by the petitioner for renewal of authorization has not been granted, it is deemed that the application has been rejected because the Rule does not contemplate a deemed renewal. This is amply clear from the procedure stipulated under Rule 6(2) and (3). An inspection is a pre-requisite for grant of authorization and a copy of the inspection report has to be appended to the authorization. Therefore, the argument of the petitioner that

their application was pending could be taken as a defence is a wrong understanding of the legal position. TNPCB is also to be blamed because they were probably under the impression that it is something like a trade license issued by the municipality forgetting the sensitivity and seriousness of issuance of such license. The renewal application submitted by the petitioner under the 2008 Rules was kept pending and as long as the authorities did not initiate any action against the petitioner, they were least concerned and are stated to have been submitting their returns as if dropping it in a post box. In 2016, it appears that the TNPCB wanted the petitioner to withdraw the 2008 application and resubmit an online application under the 2016 Rules. We have noted the dates on which the petitioner had submitted their applications for renewal of the authorisation. The respondent Board has furnished the online status of the petitioner's applications for renewal and as to why the application was returned from time to time. Some of the observations made during scrutiny are very relevant viz., on 27.08.2017 while returning the application,

the petitioner was directed to furnish the agreement made with authorised recycler for handling hazardous waste for waste category numbers 3.1, 5.1, 5.2, 7.4, 7.5 and 33.1; secondly, it was pointed out that the waste stream and quantity for which authorisation was obtained on 10.07.2008 is not tally with the present allegation. The petitioner had resubmitted the application and on 03.11.2017, the same was returned calling for additional particulars/clarifications viz., that the petitioner should clarify the details of hazardous waste mentioned in serial no.9 (category no.5.1), serial no.20 (category no.5.1), serial no.12 (category no.17.1), serial no.32 (category no.17.1) and serial no.15 (category no.33.1) and expired chemicals. From the "note of history", it is seen that for the very same reason, the application stood returned several times. The application was returned on 07.03.2018 calling for particulars among other things with regard to use of spent oil for authorised recycler for recycling and for reuse in smelting operations. The petitioner was directed to specifically mention the process where it is recycled etc.

384.On 17.03.2018, an elaborate remark was made by the Environmental Engineer wherein among other things, the petitioner was directed to clarify the reasons for disposing part of the wastes to on site landfill instead of disposing to recyclers. The petitioner was directed to disclose the capacity of the active landfill and its adequacy etc. Thus, the application submitted by the petitioner for renewal of its authorisation was considered by the authority though belatedly, with due application of mind and every time the application was returned, reasons have been set out as to why the application is returned and on each such return, the petitioner appears to have furnished certain information which was either inadequate or further information was required to be furnished upon disclosure of the information called for. Therefore, the petitioner cannot take advantage of the fact that their application for renewal of authorisation was pending and therefore, they were justified in continuing with their manufacturing process.

385.The question is whether the petitioner could have been permitted to handle and dispose of hazardous and other waste after the expiry of the authorization on 09.07.2013 without being monitored. The answer to this question should be a definite 'No'. The petitioner would state that now they have filed a writ of Mandamus to renew the authorization. It is not clear as to why they did not resort to the same procedure in the year 2013, probably circumstances suited them. The petitioner may be partially right that adverse inferences cannot be drawn against them because they have been filed their returns and periodically addressing the authorities requesting them to renew the authorization. Unfortunately, the authorization is not a license in the normal sense. As pointed out earlier, the petitioner has no fundamental right to establish and operate a polluting industry. The very establishment is based on a consent granted by the TNPCB subject to condition. Even much prior to that, environmental clearance was required to be granted. Therefore, the petitioner cannot state that as long as their application for renewal of

authorization was pending, they can continue to handle and dispose of hazardous and other waste. In fact, stringent action has to be initiated against the officials of the TNPCB who were in-charge at the relevant point of time equally the superior officers and others at the helm of affairs of the Board. All of them were silent spectators to the illegality. We are not concerned about other industries which appear to be in a similar state. It is not clear as to why the State Government has abdicated its statutory responsibility cast under the Rules. The matter is a very serious issue and the petitioner cannot escape by contending that non-renewal of authorization can have no impact on the consent to operate. The basic fallacy in such argument is because if an industry operates and produces the final product and in that process generates waste which are of various categories and so far as the petitioner is concerned, substantial waste generated are hazardous. Therefore, proper handling and disposal of the hazardous waste is paramount. Thus, if the authorization has not been granted for handling and disposal of the hazardous and other waste,

then it goes without saying that consent to operate should cease. Or else a polluting industry based upon the consent to operate will continue to operate, generate hazardous waste, handle and dispose of them without authorization under the HWM Rules which would mean that handling and disposal goes unmonitored. This position if allowed would be a death knell. The order passed by the TNPCB refusing to renew the consent to operate on the ground that the HW authorization was not in force is valid. It is true that the TNPCB did not take any action but that cannot be a license to the petitioner to pollute. Therefore, the said ground on which consent to operate was rejected is held valid and accordingly sustained.

386.In the impugned order dated 09.04.2018, two other grounds have been mentioned, viz., the ground water analysis report taken from the bore wells within the Unit premises as well as surrounding areas have not been furnished to ascertain the impact on ground water quality. It is further stated

that as per the renewal condition the petitioner should have analysed the parameters of heavy metals such as arsenic in the ambient air through Board's laboratory as was done for other parameters such as NOx, PM10 and SO_2. It is further stated that as the Board's laboratory does not have this facility, the petitioner should have engaged the services of MoEF and CC/NABL accredited laboratories and furnished report to the Board. The petitioner was informed that they have not complied with the same and as such there is no authenticated reporting on the presence of the arsenic in the ambient air. The other ground on which renewal was rejected was that during inspection on 22.02.2018, the petitioner had been directed to construct a gypsum pond as per CPCB guidelines and they have not complied with the same till 31.03.2018.

387. First, let us take up the issue relating to ground water analysis. The argument on behalf of the petitioner is that for the first time in April 2018 an allegation is made with regard to the ground water pollution and there was

no such allegation earlier. It is submitted that there is no material to say that the ground water quality had worsened and there is no material to say that the petitioner is the cause for any ground water pollution. There are 67 other industries in the industrial complex and in spite of direction issued by the NGT no source apportionment study was done by the TNPCB and therefore to state that to be a reason for rejection of the renewal of consent to operate is not sustainable. The submission of the learned senior counsel was that this issue is being raised for the first time, it has become necessary to counter the allegations raised by the TNPCB in their counter affidavit because they are all new ground and in the first place, it should not be permitted to be canvassed.

388.According to the TNPCB, the order of consent mandates that the petitioner should obtain sample of emission and get them analysed by the TNPCB laboratory every month for the parameters indicated and furnish report to the Board by the 10th of the succeeding month. Further the orders of

consent stated that the same will be revoked in case the ground water in the vicinity is affected due to seepage of effluent from storage sump. Further the renewal of consent is not just contingent on furnishing of ground water reports but also ensuring that there is full compliance with ground water norms and no pollution has occurred. The respondent stated that the petitioner has not produced data to substantiate the fact nor made any averment that it has not caused ground water pollution.

389.The respondent would further contend that by not providing reports, the petitioner attempted to conceal the pollution caused by them as they have caused ground water pollution. The argument of the learned senior counsel for the petitioner is that the same is a new ground and the petitioner cannot be called upon to prove the negative. However, the respondent referred to the annexures to the counter affidavit as to how the TDS levels have been computed. The TNPCB would further contend that the consent conditions are

not merely technical but constitute essential aspect of environmental governance and superintendence – namely of constant self monitoring by the polluter itself (petitioner). It is further stated that the TNPCB has independently commissioned the collection of samples and testing at the cost of the petitioner. However, this is in addition to and not substitute of the consent condition. The TNPCB further submits that the reports show that water quality in and around the petitioner's Unit has demonstrably worsened over time with TDS and heavy metal having increased manifold since 1996 and have reduced after the petitioner has remained shut down for over an year.

390.It is submitted that the report of analysis of monitoring wells taken from nearby villages during November 2017 to April 2018 shows high concentration of TDS, chlorides, sulphates, calcium, iron apart from total hardness. Further, it is submitted that the gypsum pond situated in an area of about 40 acres within the petitioner's premises which stores 4 lakh tonnes of

dead stock of gypsum and generally about 1 lakh tonnes per month of gypsum is generated and only some quantity is disposed. The gypsum is stored in the ponds in heaps to height of 15 to 20 feet and because of the excess height over the side walls they overflow and leachate due to storm water which may flow to adjacent areas and whenever wide spread rain occurs, the leachate may reach the surrounding areas and cause ground water pollution. It is further stated that though the petitioner claims to be a zero liquid discharge unit, the ground water contamination from the industry is due to heavy volume of gypsum, copper slag dumped in the open and from the secured land fill where the hazardous waste are disposed. The ground water samples collected from the monitoring wells around the gypsum pond indicate the increasing trend of ground water becoming highly toxic. The report of analysis of the monitoring well located around the gypsum pond during 2015-2018 conclusively demonstrate that the desirable/permissible limits were breached continuously.

391.It is further submitted that the Unit has provided five SLF, out of which four have been capped and the fifth is under operation. It would be relevant to note that a quantity of 7,17,032 DMT (Dry Metric Ton) of hazardous waste is lying dumped in the SLF. The analysis of water samples collected from monitoring wells located around SLF from 2015 to 2018 shows the value exceeds at most instances. The report of analysis of water samples collected from the monitoring wells around the slag yard from 2015 to 2018 shows that the parameters have exceeded multiple times. The leachate from copper slag open storage also contribute the increase in fluoride level and TDS in the ground water in surrounding villages. The above is the stand taken by the TNPCB. The petitioner's response is on the following lines. Firstly, this was never a ground raised earlier and for the first time, such allegation is made. Secondly, the petitioner cannot be held responsible as it is a ZLD Unit. Assuming the ground water standards have fallen, the petitioner cannot be penalized because no source apportionment study was made though there was

a direction to the said effect by the NGT. The petitioner has referred to the various reports and information secured under the Right to Information Act to contend that the samples are within the permissible limits.

392.Further, it is contended that even before the Hon'ble Supreme Court in the year 2013 the same levels were shown, however, the petitioner was permitted to reopen. In our considered view that can hardly be a test to examine the correctness of the stand taken with regard to the ground water sample. Fall in ground water standards is a slow process especially when it is stated to have been caused on account of leaching. Therefore, due credence should be given to the report of analysis of water samples drawn from the monitoring wells. The petitioner cannot and should not cast a shadow of suspicion on all tests being undertaken by the Board. As pointed out earlier, the onus is on the petitioner to show that they have not contributed to the ground water deterioration for which they will have to substantiate with the

steps taken by them and they cannot state that they have been called upon to prove the negative. This is so because the petitioner had no right to establish a polluting industry, but for the order of consent granted with conditions, the petitioner could not have establish the industry. Therefore, it is for the petitioner to establish that they have not contributed to the fall in ground water standards in the villages surrounding the petitioner Unit.

393.The petitioner referred to the hydro-geological study conducted during 2006-2007 by the National Geophysical Research Institute, wherein while drawing the conclusion with regard to the ground water modelling with respect to Thoothukudi, it was stated that the combination of factors such as industrial plant area having thick cover of clay soil and calcretic clay formation and low velocity of ground water flow indicates there is a remote chance of contaminations of ground water source sin the downstream through movement of ground water. The possible mechanism of contamination of

ground water in the downstream area of the complex may be due to seepage of domestic effluents discharged through surface stream. By referring to the analysis report by TNPCB, it is submitted that the marker pollutants of the petitioner are within the permissible limit. The reasons for higher TDS and other metal contents in the ground water as submitted by the TNPCB before the NGT in Appeal No.87/2018 was referred to and it is submitted that the TNPCB pointed out TDS variation in the upstream and downstream of the petitioner industry without considering the hydro-geology of the study area; TNPCB has been collecting this base line ground water analysis since 1996 even before the commencement of the petitioner's operation which has not been furnished as statistical trend for better comparison of ground water quality in upstream and downstream villages; gypsum is stored in a lined pond, TNPCB failed to compare its ground water analysis report with TNPCB base line report around gypsum pond in comparison with prevalent hydro-geology; SLF is constructed as per CPCB guidelines and the leachate is

recycled back to TPP for treatment, the ground water analysis report around SLF was not compared with TNPCB base line analysis report in comparison with prevalent hydro-geology; TNPCB is relying upon preponderance of probability rather than scientific hydro geology study; TNPCB base line analysis in and around sterlite copper revealed high levels of sulphate, calcium, hardness and fluoride level. Similarly, TCS base line ground water analysis in 1994 reported high fluoride content, i.e. 1.4 to 7 mg/l; gypsum is insoluble in water, hence calcium and sulphate increase is attributed to sea water intrusion and due to land extent of salt pans, TCS base line fluoride in the region is between 1.4 and 7 mg/l; TNPCB analysis report revealed that stream of sterlite has reported presence of lead and TNPCB has conveniently omitted the same for their interpretation; TNPCB has the facility to analyse arsenic in the ground water and the same procedure is adopted for analysing arsenic in ambient air and the same shall be clarified by CPCB; the concentration of various chemical constituents in ground water depends on the

solubility of minerals present, residing time and the movement of dissolved carbon dioxide; in some coastal areas, intensive pumping of sea water for salt production has caused salt water intrusion into ground water and in most of the salt pan at Thoothukudi, ground water is pumped and processed in the salt pan for salt manufacturing. Therefore, the petitioner would contend that the reasons given by TNPCB for rejecting the renewal of consent is untenable. The learned senior counsel made elaborate reference to the flow charts to demonstrate the analysis reports prepared by TNPCB in various areas in and around the petitioner's Unit and submitted that the petitioner is not the reason for increase in the TDS levels. The TDS level in the State of Tamil Nadu were also referred to, to show that the TDS in Thoothukudi was always high.

394.The learned Senior Counsel drew support from the report submitted by two Scientists of the Central Ground Water Board, South Eastern Coastal Region, Chennai in July 2018, i.e. after the petitioner Unit was sealed. We have elaborately discussed about this report and we have given our

reasons as to why the report is to be scrapped. Therefore the petitioner cannot rely upon the said report. The learned senior counsel referred to the report prepared by the Chennai testing laboratory on the ground water quality at Thoothukudi to demonstrate that leaching of secondary salts and anthropogenic impact fertilizer used for agricultural activities apart from sea water intrusion. In response to the document produced by TNPCB, the petitioner referred to the sea water composition in which calcium sulphate is 12600 ppm and the TDS is 350000 ppm and since there are as many as seven salts in the sea water, it accounts for total dissolve solids of sea water and nearby ground water resources. Further, reference was made to the background document for development of WHO guidelines for drinking water and it was explained that TDS is the term used to describe the inorganic salts and small amounts of organic matter present in solution in water. The principal constituents are usually are calcium, magnesium, sodium, potassium cations and carbonate, hydrocarbonate, chloride, sulphate and nitrate. After

referring to various details of the phase equilibrium studies, it is stated that solubility of sodium chloride [salt] is higher when compared to that of gypsum. The sea water TDS contains large amount of soluble calcium and sulphate as compared to soluble calcium and sulphate present in phospogypsum generated from the petitioner's Unit. Therefore, the petitioner would state that the high TDS levels are not attributable to them but to the sea water intrusion. The petitioner blames TNPCB in attempting to selectively submit the data, thus preventing this Court from making a value decision. After referring to the ground water analysis report of the TNPCB, it is submitted that all the levels are below detectable limit and in particular, arsenic has not been detected at any of the Village bore wells in upstream or in the piezometric well location and downstream villages for over 22 years. With regard to the petitioner's marker pollutant fluoride, it is submitted that as per NGRI report, the entire region is likely to show that higher levels of chloride, sulphate and TDS and the fluoride presence is a direct linkage and the same is

seen in the present case irrespective of that upstream villages or downstream villages when compared to piezometers of sterlite copper. With regard to the marker pollutant zinc, it is submitted that all samples taken are well below the prescribed standards. The higher TDS level is attributable to the intrusion of sea water. With regard to the chloride, once again the petitioner refers to NGRI report which states that the entire region is likely to show higher level, as also in the case of sulphate and total hardness. Thus, it is the submission of the petitioner that the TNPCB is deliberately making attempts to forego compliance, which were accepted by their Joint Chief Environmental Engineer through inspection. The respondent TNPCB suppresses the material before us to show that the quantity of ground water collected from eight locations in and around the petitioner, namely, Meelavittan, Silverpuram, Pandarampatti, Madathur [entrance], Madathur [opposite temple], South Veerapandiyapuram Kayaloorani and A.Kumarareddiarpuram shows very high values of TDS, chloride, sulphate and total hardness on account of operation of the petitioner.

395.The ground water analysis has been undertaken by the TNPCB after the closure up to February 2019. The data collected has been furnished in a tabulated form and it has been compared with the water quality data before the order of closure from which, it is seen that the TDS is gradually getting reduced almost in all Villages but still it does not satisfy the drinking water standards. Chloride is gradually getting reduced in Meelavittan and Silverpuram Village but still it does not satisfy the drinking water standards. Similarly, sulphate and total hardness are also getting gradually reduced but yet to meet the drinking water standards. By way of illustration, we refer to the chart showing the comparison of year wise maximum value of parameters with base line data during 1994 and the NEERI report of 2011. The standard is 500-200 mg/l. The base line data collected in 1994 is 3120. In 2011 as per NEERI report, it was 3212 and thereafter it has gradually increased every year from 2012 onwards i.e. 8664, 7104, 9785, 10064, 15004, 13732, 14729, 15636, 10835 and stood reduced from November 2018 to 8508, 7800, 7552

and 5740 in February 2019. The petitioner wants us to discredit this data which we declined to do. The facts and figures placed before us has shown that there has been substantial increase in TDS levels and other chemical levels and the finger points to the petitioner and we are convinced to say so based on the data and the attempt of the petitioner to pick holes in the reports of the TNPCB cannot be accepted. The petitioner needs to be reminded that they operate based on consent granted by the TNPCB and they shall stand or fall by the assessment of TNPCB. To our surprise, the petitioner did not contest any of these issues earlier when matters cropped up and probably the petitioner was able to manage things. We have also perused the graphs showing the ROA of the monitoring wells located in the eight villages mentioned above. In the graphs, the base line data as of 1994, drinking water standards [permissible limit], drinking water standards [desirable limit] and year wise maximum value has been furnished and we find that the water quality does not meet the drinking water standards. The TNPCB has also

furnished the chart mentioning comparison of year wise maximum value of parameters with base line data collected during 1994 and NEERI reports of 1998, 1999, 2005 and 2011. The report is a clear indicator to show that there has been steady and steep increase in TDS, chloride, sulphate and total hardness and there is a decline in the levels after closure of the petitioner. The petitioner's contention is that no arsenic has been detected from the piezometric wells and certain data was referred to support such submission. Schedule II of the HW Rules prescribes the concentration limit of arsenic at 50 mg/kg. The soil samples were collected in five places during October 2018 and has been analysed by M/s.SGS Limited, an NABL accredited lab, and we find that the arsenic level has exceeded the permissible limit in all the five places and the highest being near the copper slag in the patta land opposite to BPCL Petrol Bunk where the arsenic level is 771.4 mg/kg as compared to the prescribed limit of 50mg/kg. Further the report states that the slag samples collected in twelve locations contain arsenic in the range of 135 mg/kg to

369.3 mg/kg and it also contains lead in the range of 421.7 mg/kg to 881.7 mg/kg. With regard to the gypsum, the report states that though the industry has provided ZLD, it had stored heaps of gypsum in the gypsum pond in an area about 40 acres and about 4 lakh tonnes of gypsum is stored in the gypsum pond and generally about 1 lakh tonne of gypsum is generated every month and it is stored in the pond above ground with a height of 15 to 20 feet and the heaps are above the side walls and due to excess height over the side wall, the leachate due to storm water may flow to the adjacent areas. The leachate water has been analysed to have high PH in the range of 2, which is acidic in nature. The ground water has been analysed and reported that all the parameters analysed in the ground water around the gypsum pond exceed the drinking water standards and the increase has been due to the leachate from the area reaching the ground. The TNPCB has furnished colour photographs of the gypsum pond and one gets an impression as if it is an area which has had heavy snow fall but it was explained to us that it is not snow but it is

gypsum. The petitioner would want us to reject the report of M/s.SGS Limited because it is based on total constituent analysis and not TCLP extract. We cannot permit the petitioner to raise such a stand because the credibility of the agency which did the study cannot be easily disputed because it is an accredited laboratory. The fact remains that there is sufficient material to show that the ground water pollution is on account of the petitioner's operation. Therefore, we are not inclined to accept the submission of the petitioner that the respondent Board is attempting to selectively submit the data. The petitioner also would state that no show cause notice was issued to the petitioner by the Board for the allegation now being brought before the Court. We expressed our displeasure with regard to the manner in which the officials of the TNPCB had functioning earlier and also given reasons as to what would have been the reason for the same and also noted the fact that the infrastructure with TNPCB was thoroughly inadequate considering the magnitude of the petitioner. We are inclined to accept the stand taken by the

TNPCB to hold that the increase in the levels of TDS, chloride, sulphate and total hardness are all attributable to the petitioner's operation and therefore the order of closure cannot be stated to be on account of speculation.

396.It is reiterated by the learned Senior Counsel for the petitioner that three questions to be answered by the respondents to justify the closure of the industry, they being, (i) has the petitioner industry caused pollution? (ii) is the petitioner industry in a continuous sense causing pollution? and (iii) is the alleged pollution cannot be remedied? Emphasising the submissions made earlier that there is no allegation that the petitioner has been causing pollution or continuing to cause pollution, it was submitted, assuming that there is an allegation of pollution, the theory of sustainable development having undergone a change, the respondents are bound to examine as to whether, remedial measures can be adopted. The reason for closure of the petitioner was not on the ground that they caused pollution or continuing to cause

pollution or the alleged situation was not remediable, but it is on account of public reaction. It is further submitted that an order of closure cannot be passed on the ground that the petitioner may cause pollution and that appears to be the stand of TNPCB in their counter affidavit.

397.The learned Senior Counsel elaborately referred to the counter affidavit filed by TNPCB and submitted that there is no material to state that the ground water quality had worsened on account of the petitioner, more importantly, as there are 67 other industries in the industrial complex and no source apportionment study was done. It is further submitted that the Hon'ble Supreme Court had recorded that the petitioner had complied with thirty directions and this finding of fact cannot be revisited, the comments and observations, which have been referred to in the counter affidavit, are of the year 2013 and these matters were considered and the Supreme Court had passed final orders permitting the petitioner to reopen. Therefore, it is

submitted that substantial portion of the counter affidavit of TNPCB has to be rejected as worthless. After referring to various paragraphs in the counter affidavit, more particularly, from paragraphs 29 to 40, it is submitted that for the first time when renewal of consent to operate was granted on 07.09.2017, a direction was issued to remove the slag. The correspondence between the petitioner and the Board will clearly show that the petitioner is not shifting the blame on the purchaser/land owner, but as a responsible corporate, they took immediate action.

398.It is submitted that in page 37 of the counter affidavit filed by TNPCB, a tabulated statement has been furnished, substantial portion thereof is factually incorrect. In sub-para (vii) at page 38 of the counter affidavit, details pertaining to the last application prior to closure under the HWM Rules have been referred to without referring to the internal correspondence and it is wrong to contend that the petitioner is wilfully refusing to give complete

details. In page 42 of the counter affidavit, the Board states that there is significant chance of pollution to the ground water through sulphates, phosphates, chlorides, fluorides, if the phosphogypsum is not properly managed.

399.It has been further stated that the fluoride and TDS levels around gypsum pond were found to be elevated during the operation of the plant and also in the month of May, 2018, but gypsum was still stored in the pond. This averment has been made without furnishing the baseline figures, the parameters which existed prior to 1996, that is, prior to the petitioner industry coming into being and if the baseline figures had been taken note of, it would be clear that the petitioner is not the cause. It is submitted that once again in paragraph 60 of the counter affidavit, the respondent has referred to various reports of the Committee, which are all prior to 2013, and the same cannot be referred to, as after the decision of the Hon'ble Supreme Court, all

issues are done and dusted. Further, it is submitted that as per the report of NEERI of 2011, there is no charge against the petitioner of increase in level of their marker pollutants and in this regard, referred to paragraph 8.7 of the report at page 53.

400.With regard to TDS level, after referring to the Ground Water Year Book of Tamil Nadu and Union Territory of Puducherry, it is submitted that the TDS level in the State of Tamil Nadu is high and in Thoothukudi also, the TDS level is high and within Thoothukudi District, the TDS level in the SIPCOT industrial complex is the lowest. It was pointed out that the solubility of sodium chloride (salt) is higher when compared to that of gypsum. The seawater TDS contains much amount of soluble calcium and sulphate as compared to the soluble calcium and sulphate present in phosphogypsum generated from the petitioner unit. The unit has constructed Secured Land Fill (SLF) as per CPCB guidelines as approved by TNPCB, the leachate from the

SLF is collected in leachate sump and pumped for further treatment in the ETP and RO plant. Thus, it is submitted that in coastal areas, seawater intrusion due to low hydrostatic aquifer results in higher TDS.

401.Reliance was placed on a report on Short Term Investigation of Ground Water Quality in and around SIPCOT industrial complex conducted by two Scientists under the aegis of the Central Ground Water Board South Eastern Coastal Region, Chennai. The respondents, State and the Board have serious objections to the said report. We shall deal with this aspect a little later.

402.In the earlier part of this order, we considered as to whether, the petitioner can contend that the events which took place prior to 2013 cannot be looked into, in the light of the decision of the Hon'ble Supreme Court. We did not agree with such submissions and apart from reasons assigned by us earlier,

it is to be noted that the conditions imposed in the order of consent is a continuing condition. According to the petitioner, the conditions if not mentioned in the latest order, but was a condition in the previous order, would be deemed to be compliance of such condition. In other words, the petitioner would contend that if a condition had been imposed in the order of consent, and in the order of renewal of consent such condition has not been mentioned, it is deemed that the petitioner has satisfied such condition.

403.The above contention is a thorough misreading of the object of imposing conditions while granting orders of consent to establish or consent to operate. The conditions continue to exist and are to be considered cumulatively, as but for the order of consent, the petitioner could not have established the industry. If at the inception, conditions had been imposed to enable the petitioner to operate, it goes without saying that till the petitioner is permitted to operate by renewal of consent subsequently, the conditions,

which were imposed at first instance, must continue to hold the field and require scrupulous compliance. Therefore, to state that each order of renewal of consent is in effect, a separate order by itself without reference to the earlier order, is a wrong understanding of the scope of an order of consent.

404.If the argument of the petitioner is to be accepted, then the conditions imposed for establishment or for operation would become meaningless. This is precisely the reason as to why the application for renewal of consent was rejected, viz., on the ground that five conditions imposed earlier were not complied with. The condition imposed on the petitioner while granting consent to establish and subsequently consent to operate is a "permanent baggage" which the petitioner has to carry right through the journey of its existence. At any point of time, the Board is entitled to examine as to full and effective compliance of all those conditions. At this juncture, we wish to reiterate that the conditions imposed while granting an

order of consent have to be complied with individually and cumulatively. No Court or Tribunal can modify or relax the rigour of any such condition imposed in the order of consent. The petitioner cannot challenge conditions imposed in the consent orders and all conditions are non-negotiable.

405.The respondent Board has contended that despite fine of Rs.100 Crores having been imposed on the petitioner, it has no deterrent effect on it and they refused to change their practices. Even after the decision of the Hon'ble Supreme Court, there have been instances which are matters of concern. On 23.03.2013, several complaints were received from the public complaining about throat irritation, breathing problem, severe cough, nausea etc., due to emission from the petitioner's unit. On inspection by the Board, show cause notice was issued, as the SO2 emission suddenly short up from 20 ug/m3 to 62 ug/m3 at about 06.00 am, the air pollution control measure was not operated and the emission monitor was not connected to the Care Air

Centre of TNPCB, Chennai. The SO2 which was discharged at 2947.03 ug/m3 was substantially higher than the prescribed standard of 1250 ug/m3. The show cause notice dated 24.03.2013 referred to an inspection by the officials of the Board conducted on 23.03.2013 in which, a stand taken by the petitioner was noted stating that on 21.03.2013, around 03.20 am, the smelter was shut down to attend a puncture in furnace roof cooling jacket tube and the smelter was again put into service from 23.03.2013 at 03.30 am.

406.Further, the petitioner stated that sulphuric acid plant bed was maintained at required temperature using furnace oil and the emission was routed through tail gas scrubber and at around 04.00 am, copper concentrate at the rate of 26.77 tonnes/hour was fed as a trial for few months, noting that the value suddenly short up from 20 ug/m3 to 62 ug/m3 at around 06.00 am and the value was reduced to 10 ug/m3 around 6.35 am and at that time, wind direction was from North-west to South-east, that is, towards Thoothukudi

town with a wind speed of at 224 km/hour. Noting that the online monitoring data was not connected, the SO2 emission monitor was not connected, it was stated that the air pollution control measures were not properly operated and thereby, the petitioner violated the conditions issued to them under Section 21 of the Act and they are liable for being punished under Section 37 read with Section 31A of the Act. The petitioner was granted three days' time to submit their reply. In their reply dated 27.03.2013, the petitioner stated that during the period of calibration between 09.00 am to 11.15 am on 23.03.2013, the SO2 emission monitor has recorded the values in the range of 401 PPM to 1123 PPM, which is similar to the values experienced between 02.00 am to 02.45 am on 23.03.2013, the calibration period which confirms that the effluents are only calibre gas value fed to the analyser and not the actual emission value. The TNPCB was not satisfied with the reply and by order dated 29.03.2013, the plant was closed.

407.It was stated in the order that the petitioner did not give any prior intimation about this shut down and start up of the smelter, they did not report to the Care Air Centre about calibration of the analyser in the maintenance mode. It was mentioned that there are clear logged on-line details monitoring data registry at the Care Air Centre confirming the exceedance of emission standards of SO2 from SAP-I. It was further stated that the Ambient Air Concentration in the area should have been in the order of at least 5 PPM, which is equivalent to 13000 ug/m3 to cause the symptoms experienced which is well about the stipulated National Ambient Air Quality limit of 80 ug/m3.

408.The Board drew such inference, as there was no ambient air quality monitoring station in the complainant area. The AAQ Monitor available in the factory is stated to have not recorded higher values, but this was not relevant because, the monitor in the factory is not in the line of stock

emission. Eye irritation and throat suffocation were experienced by the public about 5 kms away from the plant and the Board concluded that the AAQ thresholds were definitely breeched. The chronic health concerns due to SO_2 exposures were also taken note of, people with asthma would experience greater breathing difficulty and the healthy adults will also experience bronchospasm and the children will receive a larger doze, as they have larger lung services area to body weight ratio. The petitioner, thus, had operated the plant without observing due precautions leading to dangerly highlights in level of SO_2 emission. The respondent Board rejected the explanation given by the petitioner that there was a calibration exercise and in this regard, referred to an e-mail sent by the Care Air Monitoring Centre regarding the exceedance of stack parameters in SAP-I. Though the mail was sent on 23.03.2013 at 08.33 pm, the petitioner did not respond, nor gave any explanation and only on 27/28.03.2013, an explanation was given stating that there was a calibration exercise.

409.Further, it has been pointed out by the respondent Board in their counter affidavit that on 84 other occasions between October, 2012 till the closure in 2013, the emission exceeded the prescribed standards and this can hardly be due to calibration exercise. The petitioner challenged the said order before the NGT and an order of stay was granted and subsequently, the appeal was allowed setting aside the order of closure, which order of the NGT has been set aside by the Hon'ble Supreme Court with direction to file writ petitions before this Court. On account of the order of stay granted by NGT, the respondent Board could not shut down the petitioner's plant.

410.It may be true that the Tribunal had granted an order of stay of the order of the Board directing shut down of the plant. Order of stay by the Tribunal cannot be equated to a consent to operate. This, in the opinion of this Court, is so because the petitioner is a polluting industry and without an order of consent, they could have neither established, nor operated the unit.

Therefore, even though the Tribunal had granted an order of stay of the shutdown, it goes without saying that unless and until the petitioner satisfies the parameters and obtains consent to operate, they cannot commence production. In other words, an order of stay by the Tribunal cannot be a substitute to an order of consent issued by the regulator. Unfortunately, the respondent Board missed this vital point and probably due to fear of being dragged to other judicial forum, they remained a silent spectator. This conduct of the respondent Board is nothing new, as we have seen earlier that though the HW authorisation had expired and had not been renewed, the respondent took no action to direct the petitioner to cease operations. Thus, the respondent Board clearly misunderstood the scope of the order of stay granted by the Tribunal.

411.During March, 2017, TNPCB conducted an inspection pursuant to which, show cause notice dated 14.03.2017 was issued stating that the

clarifiers were found in choked condition, there was a pin whole leakage in pipe carrying treated effluent, there was overflow of treated effluent during inspection, treatment units were not in operation for days altogether and 3.52 lack metric tone of copper slag was found dumped along the river Uppar. Further, taking note of the particulars furnished to the Central Excise Department, the Board stated that the petitioner has indulged in excess production than the consented quantity of 870 tonnes/day without permission/consent. In the ETP-I, the reaction tank, flocculation, air accent tank, secondary clarifiers were not in operation. Thus, the petitioner was directed to show cause as to why action should not be initiated for violation of the consent conditions. A separate show cause notice dated 14.03.2017, was issued under the Air Act for dust emission from the copper revert screening section, dust/smoke/fumes emission from the converter room section without going to the scrubber, dust emanated and spreading from rock phosphate unload, dust found deposited on trees and plants on the Southern side of the

area, fugitive dust spreading from gypsum storage area, rock phosphate handling area and from the roads near sulphuric acid plant area and nose irritation was observed near FDGS area which is due to the spreading of SO_2 gas escaped from the scrubber.

412.The petitioner submitted their reply dated 23.03.2017 which appears to be a reply only for the show cause notice issued under the Water Act. Thereafter, the respondent Board issued order dated 07.09.2017 granting renewal of consent to operate. In the said renewal of consent order dated 07.09.2017, there are only two proceedings which have been referred to and one is the Board proceedings dated 13.04.2016, which is the earlier order of renewal of consent valid up to 31.03.2017. The second proceeding is an inspection report of the Joint Chief Environmental Engineer, Madurai, dated 06.09.2017. There is no reference to the show cause notice dated 14.03.2017, nor nothing has been placed before us by the Board to show that the reply

given by the petitioner dated 23.03.2017 to the show cause notice issued under the Water Act dated 14.03.2017 was examined for its correctness and as to how the Board was satisfied that no action need be initiated against the petitioner.

413.In paragraph 37 of the counter affidavit, sworn to by the Principal Secretary of TNPCB, an averment has been made stating that the show cause notice was replied by the petitioner and was subsequently closed on the assurance that all issues were being addressed. To say the least, it is an irresponsible statement made by a regulator. A show cause notice proposing stringent action for violating Section 25 of the Water Act and Section 24 of the Air Act warranting punishment under Section 44 read with Section 45A of the Water Act and Section 37 of the Air Act should be taken to a logical end. The respondent Board, as a regulator, cannot go by assurances given by the petitioner. The averment in paragraph 37 of the counter affidavit clearly

shows as to how the Board has been functioning all these years. This one statement would be sufficient to draw adverse inference against the respondent Board. It is not clear as to what assurance was given by the petitioner and we find no justification for the Principal Secretary to now state in the counter affidavit that the assurance proved to be a pipe dream, as issues continue to prevail right up to closure. These facts would be sufficient to take disciplinary action against the officials of the Board and simultaneously prosecute them for endangering the lives of the public.

414.We are thoroughly dis-satisfied with the manner in which the Board had dealt with the show cause notices dated 14.03.2017. As mentioned earlier, there were two show cause notices dated 14.03.2017. In the typed set of papers, the petitioner has enclosed reply for one of the show cause notices under the Water Act. The Board has failed to disclose as to how the explanation offered by the petitioner was acceptable. Assuming the petitioner

had given an explanation, which was found to be satisfactory by the Board, then it should have been followed by an order with conditions. Nothing appears to have been done, but order of consent is issued on 07.09.2014, which is a standard format with no reference to any of the earlier show cause notices issued to the petitioner. Thus, we can safely conclude that the officials of the Board were reckless in their attitude.

415.In the renewal of consent dated 07.09.2017, which was valid till 31.03.2018, in addition to the terms and conditions incorporated under the special and general conditions stipulated in the consent order issued earlier, 32 special conditions were imposed. Condition No.11 therein states that the unit shall have storage of solid waste of slag within the stipulated 10 hectares of land with a restricted stacking height of 12 meters throughout storage area for adherence with the safe load bearing capacity of 25 mt/sm. The unit was directed to maintain the generation and disposal ratio as 1:1 in respect of

gypsum and copper slag and at any point of time, the available stock over the dead log in the yard shall not be more than the 15 days generation. Condition No.23 states that the renewal of consent is subject to the outcome of Special Leave to Appeal (C) Nos.28116 – 28123 of 2010 pending before the Hon'ble Supreme Court. The petitioner was directed to remove the heaped and dumped copper slag on the banks of river Uppar and patta land in Pudukottai Village.

416.The unit has to take action to construct physical barrier between river Uppar and slag land fill area of patta land so as to prevent slag from reaching river Uppar. The unit was directed to restrict the production within consented quantity and not to go for any excess production without obtaining consent to operate from the Board. The unit was directed to continue to provide protected water supply to Meelaittan Village as part of corporate social responsibility. The renewal of consent order dated 07.09.2017 under

the Air Act while reiterating the conditions imposed in the consent order issued earlier, imposed 18 additional conditions. Condition No.12 therein states that the unit shall ensure the CAAQMS provided for the parameters of Nox, PM10, PM2.5 are connected with Care Air Centre of TNPCB, Chennai and provide proper data at all times. By proceedings dated 11.09.2017, further directions were issued under Section 33A of the Water Act and Section 31A of the Air Act. These directions were pursuant to the inspections conducted on 25.07.2017 and 05.08.2017. One among the directions was to provide separate flow meter at inlet and outlet of each ETP. The unit has to remove the heaped and dumped copper slag on the banks of river Uppar and patta land in Pudukottai Vilalge. The need for construction of physical barrier between the river and the patta land was again reiterated. These directions were to be complied with by the petitioner before 31.12.2017.

417.The above facts will clearly disclose that the conditions imposed remained on paper. No effective action was taken by TNPCB though

while issuing directions, it was mentioned that failure to comply will lead to issue of further directions for closure and stoppage of power supply. On 31.01.2018, the petitioner applied for renewal of consents to operate for a period of 5 years from 01.04.2018 to 31.03.2023 through online portal. Along with the physical application, the petitioner enclosed a tabulated statement which according to them was the compliance status of consent conditions. The application was examined by the Board and it is stated that physical verification was carried out in the presence of the representative of the petitioner, Thiru C.Subbiah, AGM. However, the petitioner would contend that there was no such representative and in this regard, referred to a copy of the report dated 27.02.2018 to state that one of the copies does not mention the name of the representative while the other shows the name of Thiru.C.Subbiah, AGM.

418.The fact remains that an inspection was conducted by the Board to satisfy itself as to whether the stand taken by the petitioner was correct.

Under the column "actions to be taken by the petitioner", the inspection report stated that they have to construct a gypsum pond as per the guidelines of CPCB, they have to provide physical barrier where the copper slag is stored in patta land near river Uppar. The petitioner has to improve the road sweeping operations with machines so as to avoid fugitive dust emission. The unit has to arrange additional land for the future hazardous waste landfill and the unit has to ensure that no trade effluent/sewage from the premises nearer to the hazardous waste storage area, if any, is discharged on land or water sources directly or indirectly. In the recommendations, it has been stated that the renewal of consent to operate may be considered taking into consideration 22 conditions under the Water Act and 18 conditions under the Air Act.

419.To be noted that the conditions which were recommended in the inspection report are, in fact the conditions which were imposed while granting renewal of consent vide order dated 07.09.2017. Thus, we can safely

hold that the inspection report has been mechanically prepared and as has been the practice, the same conditions are being continuously imposed at the time of every renewal in addition to conditions being imposed whenever inspection is conducted. Therefore, we have no hesitation to hold that the inspection report needs to be scrapped. The purpose of conducting an inspection is to ensure that the unit faithfully complies with the conditions imposed in the earlier consent order and special conditions which were imposed from time to time. Without verifying and putting stringent conditions on the petitioner stating that unless and until all the earlier conditions were complied with they cannot operate, the Board has mechanically considered the application and recommended for renewal of consent reiterating the earlier conditions and the special conditions, which were being imposed on the petitioner from 2017 and even earlier. Thus, it is evidently clear that there has been supine indifference on the part of the petitioner in compliance with the conditions. The so-called compliance report has not been examined for its

correctness by the Board in its entirety. Had a genuine and concerted effort taken by the inspecting team, the report would have been fully against the petitioner.

420.The first and foremost duty cast on the inspecting team is to go back to the conditions and special conditions which have been imposed on the petitioner from 2013 and even if one of the conditions has not been complied with, the question of recommending for renewal of consent does not arise. As pointed out earlier, the conditions imposed on the petitioner are to be complied with individually and cumulatively. The conditions are non-negotiable. The inspecting team cannot extend time for compliance or once again recommend the same conditions which were not complied with by the petitioner for several years.

421.By way of illustration, if we see the conditions which were imposed from 2013, all of them directed the petitioner to construct the

physical barrier to prevent the huge stock of slag dumped in private patta land, to prevent it from obstructing the flow of the river. This will clearly illustrate that the petitioner did nothing about it. Though a plea is raised before us saying that the responsibility rests with the owner, such a plea is not tenable, as is evident from the conditions imposed in the memorandum of understanding between the petitioner and the purchaser. That apart, the memorandum of understanding shows about 1.5 lakh metric tonnes of slag to have been sold whereas, the slag which is lying dumped is about 3.52 lack metric tonnes along the river Uppar. This will clearly demonstrate that the purchaser is not a genuine purchaser, who is alleged to have purchased the slags for land filling, probably, a name lender. When the District Administration woke up from their deep slumber and issued notice to the land owner, he raised a frivolous plea with regard to the extent of the property, etc., he wanted a survey to be conducted which had been conducted and it was confirmed that the slag was dumped in the patta land. Thus, the non-

compliance of this condition is fatal to the petitioner. We say so because, the opinion of CPCB/TNPCB that slag is non-hazardous, non-leachable can be safely used for varied purposes are all based on data which is collected on an idealistic situation. Neither the CPCB, nor TNPCB can take a stand before us that 3.52 lakh metric tonnes of slag heaped in a place left to the fury of nature for several years can have no impact on the environment. Technical report says that dumping in abundance is hazardous. Therefore, the petitioner cannot wriggle out by stating that TNPCB and CPCB had approved the usage of slag for varied purposes and therefore, it has to be treated as non-hazardous.

422. According to the petitioner, slag is non-hazardous waste, such submission also to be rejected. Assuming such submission to be right, such huge quantity of slag dumped in a particular area and left to lie there for several years would undoubtedly be a hazardous substance as defined under the EP Act. On 18.05.2018 and 19.05.2018, inspection was conducted in

which, it was found that the petitioner was carrying out activities to resume its production and operation without having any consent and having undertook not to do so. The petitioner would state that they were entitled to have ingress and egress into the factory at that relevant point of time and the allegation that they were about to resume production is false.

423.We do not propose to disbelieve the stand taken by the regulator, as such stand has been made with some sense of responsibility, though such responsibility was not shown by the officials of the Board earlier. Thus, the stand taken by the Board should be given due credence and no doubt can be raised on the same and it has to be held that the petitioner was undertaking activities to resume production more so when the petitioner has not made any allegation of *mala fide* against any particular officer(s) of TNPCB or the District Administration. This has led to the order of closure dated 23.05.2018 followed by the decision of the Government endorsing the

order of closure passed by the TNPCB and directing sealing the unit and closing the plant permanently.

424.With regard to the ground water analyse reports, the conditions imposed in the consent order mandate the petitioner to get the samples of emission collected and analysed by the TNPCB Laboratory every month and furnish report to the Board by 10th of the succeeding month. Right from the inception, that is, from 1996, the petitioner was clearly informed that the consent will be revoked, if there is any pollution to the ground water on account of seepage. The Board has taken a specific stand that the petitioner has not produced data to show that they have not caused ground water pollution. The petitioner is bound by the condition to do so and it is incorrect to state that the petitioner is being called upon to prove the negative. The updated ground water monitoring report submitted after the closure order dated 23.05.2018 shows that ground water was analysed continuously even

after closure of the unit and compared with year wise maximum value of parameters with baseline collected during 1994 and up to February, 2019. The data, which has been filed as an annexure to the counter affidavit of the Board shows that even after closure, the TDS level does not satisfy drinking water standards. Though the chloride levels are getting reduced in Meelavittan and Silverpuram Villages, it is yet to satisfy the drinking water standards. Same is the position with regard to the sulphates and total hardness.

425.The petitioner seeks to discredit the testing done by the Board stating that the procedure is incorrect and drinking water standards should not be adopted. Such a plea cannot be raised by the petitioner, as even in the rapid EIA, those were the standards which were adopted and therefore, the petitioner is estopped from raising such a contention. In any event, when water samples are drawn from borewells and public wells, obviously the standard which has to be fulfilled is drinking water standards and not any other standard.

Interestingly, the reports submitted by NEERI show that the petitioner had not complied with the conditions imposed in the orders of consent. NEERI had submitted reports in 1998, 1999, 2005, 2011, 2013 and 2018. In 2005, there is a report of the Supreme Court appointed Monitoring Committee on hazardous waste and in 2012, there is a joint inspection report of TNPCB and CPCB pursuant to directions of the Hon'ble Supreme Court. Each of these reports, if carefully seen, would clearly show that there has been non-compliance of conditions. In fact, the Hon'ble Supreme Court in the 2013 judgment, took note of the report of NEERI of 2005, recorded that the petitioner has caused pollution and the report did show that the emission and effluent discharge affected the environment. However, the Hon'ble Supreme Court pointed out that the report does not warrant a conclusion that the petitioner could not possibly take remedial steps. Therefore, the petitioner never stood exonerated by the Hon'ble Supreme Court as mentioned earlier, gave liberty to the Board to issue directions to the petitioner including direction for closure of the plant.

426.The direction contained in paragraph 50 of the judgment has to be read in conjunction with the observations made by the Hon'ble Supreme Court in the various other paragraphs, where there is a categorical finding of pollution affecting the environment. The Monitoring Committee appointed by Hon'ble Supreme Court to inspect all units in the country generating hazardous wastes reported that there is a mountain of arsenic bearing slag as also phosphogypsum. Phosphogypsum if not contained properly, occasionally becomes airborne and may cause severe respiratory disease. The Committee was concerned with the issue relating to the disposal of arsenic containing slag, which was found dumped in the factory premises in the range of several thousands of tonnes. Further, the Committee also found that the petitioner industry is emitting SO_2 far in excess of the permissible standard. The existing waste management practices of the petitioner are not in compliance with the environmental standards and the solid hazardous waste generated also required to be properly managed particularly, in terms of available space and

infrastructure, and it would be inadvisable to consider the petitioner's application for expansion. In March, 2005, there was an environmental audit of the petitioner, which was conducted by NEERI on the directions of TNPCB. This report also shows that the ground water samples did not meet the drinking water standards. The report of NEERI of 2011 also notes fugitive emission on account of raw material storage and handling of gypsum.

427.It may be true that when an inspecting agency submits a report, it would definitely report compliance effected by the petitioner. At the same time, it will also point out the deficiencies. What we are concerned now is not with that portion of the reports which were found to be favourable to the petitioner, but that portion of the report which found fault with the petitioner. It may be true that in certain reports, there would be recommendations in favour of the petitioner. Any such recommendation would not bind the regulator, nor this Court.

428.In the preceding paragraphs, the Court took serious note of the inaction on the part of the TNPCB to act in the manner they were required to act. Thus, the Court would be well justified in assessing the conduct of the petitioner cumulatively, consider the various reports which clearly hold that the petitioner was not fully compliant. If such be the factual position, the TNPCB or the State cannot be found fault for taking a precautionary decision. In fact, the decision, in our understanding is not precautionary, but a decision taken belatedly after the damage was done and it is rather doubtful as to whether the damage caused to the environment by the petitioner's continued operation violating the conditions of consent is remediable. The compensation of Rs.100 Crores paid by the petitioner cannot erase all defaults committed by the petitioner from the time it commenced production. The petitioner was granted consent to establish on 22.05.1995 and on 14.10.1996, the petitioner was granted approval to commence production of 391 tonnes of copper per day. In November, 1996, writ petitions were filed before this Court.

Eversince then, the public interest litigants, individuals and others have been relentlessly pursuing the case.

429.To be noted that the writ petitions were filed before this Court in November, 1996 even prior to the petitioner commencing production on 01.01.1997. Within six months of commencing production, the petitioner was visited with an order of closure dated 06.07.1997. A committee was appointed to investigate the gas leakage. Within a month, the petitioner was permitted to reopen, that is, in August, 1997. In August, 1998, the Division Bench directed NEERI to submit a report. The findings were clearly against the petitioner and this report was objected by the petitioner, and also the Government of Tamil Nadu and Government of India. Based on the report, the Division Bench directed closure in November, 1998. This order was revoked in December, 1998 permitting reopening on experimental basis for a period of about two months till February, 1999. Though the report ultimately recommends that the

petitioner be allowed to continue its operations, it was based on an undertaking given by the petitioner that comprehensive EIRA shall be conducted which addresses all environmental issues. The report states, the analysis of water samples from all nine bore wells and one dug well reveal that the water is not portable, as TDS, As, Al, total hardness, sulphates, Se, Pb, Cd and Mg levels exceed those stipulated in the drinking water standards issued by the BLS.

430.Further, it was stated that it is mandatory for the petitioner to conduct tracer studies as part of comprehensive EIRA study. Therefore, the ground water pollution is not a new issue, but was confirmed even as early as in the year 1999, hardly within two years of the petitioner commencing production. In 2004, the petitioner obtained No Objection Certificate from the Government of Tamil Nadu for increase of its production capacity from 391 TPD to 900 TPD. While the application was pending, the Supreme Court Monitoring Committee visited all red category industries in India including the

petitioner's unit and submitted a report on 21.09.2004. The petitioner had mentioned about the findings of the Monitoring Committee and it is pertinent to reiterate that the Committee specifically stated that environmental clearance for the proposed expansion should not be granted by MoEF. However, on the very next date, i.e., on 22.09.2004, environmental clearance was granted by MoEF. This followed with a consent to operate for the increased capacity in April, 2005. However, the expansion took place even before grant of environmental clearance. Immediately thereafter, in September, 2005, the petitioner applied for further increase in production capacity from 900 TPD to 1200 TPD by a process of de-bottle necking.

431.The stand taken by the petitioner as well as by the regulator and MoEF is that separate environmental clearance is not required for increase of production capacity by process of de-bottle necking. However our attention was not drawn to any such statutory Notification. TNPCB granted consent to

operate to the de-bottle necking increased capacity on 15.11.2006. In industrial parlance, the petitioner as well as the regulator may assess the process of de-bottle necking to be a scientific process by which, the equipments are put to optimum use and production is increased. However, as a Court examining an environmental matter, is not fully convinced as to why there is no requirement for an environmental clearance before grant of permission to increase the production capacity for a hazardous and inherently dangerous industry. This is so because by increase of production, there is undoubtedly going to be increase in the generation of hazardous and other wastes, which has an impact on environment. Therefore, it is high time, the MoEF initiate a thought process on these lines because, the correct test would be what is the ultimate quantity of material produced by the industry. Interestingly, on 09.08.2007, *ex post facto* clearance was granted under the EIA notification, 2006 by ratifying the EC obtained for de-bottlenecking. Diluting the requirement of prior EC would be a death knell.

432.Environmental Clearance was granted for further expansion from 1200 TPD to 2400 TPD without any public hearing and in 2010, the Division Bench allowed the writ petitions and directed closure of the petitioner by order dated 28.09.2010, which order was stayed by the Hon'ble Supreme Court on 01.10.2010. The chain of events will clearly reveal that the petitioner has been a chronic defaulter, taking advantage of the slackness on the part of the regulator they have been carrying thus far.

433.The learned Senior Counsel for the petitioner placed reliance on a report prepared by Central Ground Water Board, South Eastern Coastal Region (SECR), Chennai in July, 2018, that is, after the order of closure. It is submitted that the State Government challenged the said report by filing a writ petition before this Court and the same was dismissed. The report was extensively referred to by the learned Senior Counsel to substantiate the submission that the petitioner is not the cause of the pollution indicated.

434.Before we go into the veracity of the report, two important facts have to be noted. The report states that it is a report on short term investigation of ground water quality in and around SIPCOT industrial area. In the executive summary of the report, it has been stated that in accordance with the direction of the Regional Director of South Eastern Coastal Region, Chennai, a hydro-chemical study was carried out to assess ground water quality in and around SIPCOT industrial area, Thoothukudi, wherein the petitioner is one of the industries.

435.Firstly, it is not clear as to the jurisdiction of the Regional Director, SECR, Chennai, to direct for a hydro-chemical study to be conducted in an industrial complex and areas adjoining to it without the express written consent of the concerned authorities. Secondly, the timing of the report in July, 2018 is very crucial because by then, the petitioner had been closed down. In paragraph 2.2 of the report, it is stated that the investigation team

could not enter into the premises of the petitioner for collection of samples from inside and outside of the industry because District Authorities have sealed the petitioner's plant following Government orders to close down the plant permanently. Thus, the inspecting team and the Regional Director, SECR was fully aware of the Government order which was in vogue, sealing and permanently closing down the plant. In such situation, we find that the intention of the Regional Director to have directed a study to be conducted appears to be with certain ulterior motive. However, since the said authority is not a party to the litigation, the Court would not be justified in making any observations adverse to a person, who is not heard.

436.Considering the complexity of the situation, the fall out of the order of closure and the challenge made by the petitioner to the orders of closure, it did not augur well on the part of a Central Government Organisation to embark upon a study with regard to the ground water quality

in the area without obtaining permission from the State Government, without notifying the TNPCB or the District Administration. The study undertaken was not a general study, but with specific reference to the petitioner. This is clear from reading the executive summary of the report. Considering all these facts, we are of the definite view that the said report of July, 2018 submitted by two scientists directed to investigate ground water quality by the Regional Director, SECR of Central Ground Water Board deserves to be scrapped and consequently, the petitioner can make no reference to the said report.

437.An argument was placed stating that the Government was unsuccessful in setting aside the report, as the writ petition filed by them was dismissed. The copy of the order was not placed for our consideration.

438.Be that as it may, the report having been relied on before us, we are entitled to consider the effect of the report and dismissal of a writ petition

filed by the Government challenging the report is not an embargo for this Court to consider the sanctity and validity of the report. In fact, the Government had issued a press release on 08.09.2018, stating that the direction to conduct an assessment of the quality of ground water in the area lacked bona fide and it is inappropriate at the given time. After referring to the fact that the investigating team could not enter into the factory premises and noting that in the last line of the report, it has been indicated that the petitioner is not the only cause for the pollution was held to be totally unwarranted conclusion, absolutely vague and not supported by empirical data. Further, the report does not appear to be made on any scientific basis and it is not known as to how the two scientists who had submitted the report have made such a vague and unsubstantiated statement in the report. Therefore, it was stated that the State of Tamil Nadu strongly feels that the report is motivated and has been prepared only to prejudice the Government of Tamil Nadu and TNPCB, as cases are pending in various judicial forum.

439.Further, it was mentioned the law and order situation in an around Thoothukudi has returned to normalcy and such an unscientific report is likely to aggravate the law and order situation and therefore, the Government rejected the report and requested the Central Government Organisation to immediately withdraw the entire report, as the competent statutory authority of the State Government has already conducted a detailed analysis on which a decision has been taken by the Government and the matter is sub judice.

440.Nothing has been placed before us to show that the Department of the Central Government had issued any rebuttal to the said press release meaning thereby they themselves do not stand by their own report. This is one more reason to discard the said report of July, 2018.

441.Elaborate reference was made to the report of NEERI of May, 2011, which was submitted to the Hon'ble Supreme Court. In the judgment of

the Hon'ble Supreme Court in paragraph 42, the report of NEERI of 2005 was extracted, which showed that on account of the petitioner's operations, environment stood affected. On 22.02.2011, the Hon'ble Supreme Court directed joint inspection by NEERI, CPCB and TNPCB. This report was submitted before the Hon'ble Supreme Court and the TNPCB was directed to file a synopsis specifying the deficiencies, with reference to the NEERI report and suggesting control measures that should be taken by the petitioner so that the Court can consider the directions to be issued for remedial measures, which can be monitored by the TNPCB. TNPCB appears to have not placed on record as to the past conduct of the petitioner which travelled up to an order of closure. It is also not clear as to whether the TNPCB rightly understood the scope and effect of the conditions imposed in a consent order.

442.We have held that the consent conditions which are imposed at the time of establishment and at the time of commencement of operations shall continue to enure and that is precisely the reason, when renewal of consent is

granted, it is mentioned that not only the conditions imposed in the renewal order should be complied with, but also the general and special conditions imposed in the earlier consent order. Thus, the aspects of environmental pollution which were subject matter of consideration after the report of NEERI of 2005 cannot be put in a water tight compartment. There are various activities done by the petitioner in its manufacturing process and different kinds of wastes are generated and it is not a simple operation whereby, the conditions can be very specific. This is more so because, the petitioner deals with hazardous substances and it is a chemical industry and each activity has a reaction. Therefore, it would be incorrect on the part of the petitioner to contend that 30 conditions were imposed by the TNPCB and all thirty has been complied with and the Hon'ble Supreme Court was satisfied and everything has been done and dusted. This contention of the petitioner is a thorough misreading of the scope of the conditions imposed in the order of consent.

443.Further, any test report can be a reflection of the state of affairs at a given point of time. There is no guarantee that situation will not worsen after a report. In all probabilities for pollution to set in, it may take time and nature by itself is very tolerant and will not explode spontaneously except when incidents like leakage of gas or fire or any other industrial calamity arise. Ground water pollution, air pollution and other forms of pollution are gradual. The effect of the pollution caused by the petitioner since 1997 is seen today in the soil of Thoothukudi and therefore, the petitioner cannot hinge on to certain observations made in the report of NEERI of May, 2011. Added to it, the petitioner has been permitted to draw water from River Thamirabarani. How much water has been drawn has not been furnished. On the one hand, the petitioner have been drawing river water for its activities and on the other, polluting the ground water. TNPCB/State Government did not state that the petitioner has been permitted to draw water from the river and the fact came to

light when the petitioner stated that they are contemplating of establishing a de-salination plant to avoid drawing of water from the River.

444.The Court also considered as to what had happened after 2013 till the date of closure and has recorded in the preceding paragraphs as to how there has been environmental degradation on account of the petitioner's operations. One more aspect, which we had noted was that the Hon'ble Supreme Court interfered with the judgment of the Division Bench of this Court primarily for the reason that the Court exceeded its jurisdiction while exercising power of judicial review. After rendering such a finding, the Hon'ble Supreme Court found that the petitioner had caused extensive environmental pollution, however, thought fit to grant one more opportunity to the petitioner because in the assessment of the Hon'ble Supreme Court, the situation was a remediable, that apart, owing to efflux of time between 2005 and 2011. The Hon'ble Supreme Court directed a joint inspection to be done

and issued directions to the TNPCB to point out the deficiencies. After issuing such directions and recording the conclusion of the joint inspection report by the regulator stating that 29 of the 30 directions have been complied with and only one more direction has to be complied with which was also removed when the judgment was pronounced. Accordingly, the order of closure passed by the Division Bench was set aside. Yet the Hon'ble Supreme Court held that the judgment will not stand in the way of the TNPCB issuing directions to the petitioner including direction for closure of the plant. This observation would not have been necessary, if the Hon'ble Supreme Court had been satisfied that "all is well" with the petitioner. It did not find the explanation of the petitioner to be satisfactory. Fine of Rs.100 Crores was imposed and payment of the said fine to not to be considered as exonerating the petitioner of the damage done. This is clear from the observations made by the Hon'ble Supreme Court in paragraph 50 of the judgment giving liberty to TNPCB to close down the industry. Therefore, selective reading of the

report of NEERI of 2011 and contending that the same was accepted by the Hon'ble Supreme Court and nothing further can be done on those issues, is an argument which cannot be accepted.

445.In the impugned order dated 09.04.2018, while refusing to renew the consent to operate, it had been stated that the petitioner has not complied with five of the conditions imposed in the previous renewal of consent order. An argument was advanced on behalf of the petitioner that the Court needs to confine itself to see as to whether the five conditions which are stated to have not been complied with are true and if one or more is true whether, it should ultimately result in an order of closure/permanent closure. In other words, it was contended that if an order of consent contains thirty conditions, and while renewing the said order, another set of twenty conditions are imposed, it is deemed that the petitioner has complied with all the thirty conditions originally imposed.

446.We did not agree with the said submission by mentioning that every order of renewal of consent to operate refers to the earlier conditions, which have been imposed either general or special condition and each such renewal order contains fresh conditions. We noted with disapproval the manner in which, TNPCB mechanically reiterated the very same conditions while granting renewal without taking action on the petitioner for non compliance. We have also held that the conditions imposed in the order granting consent to establish and subsequently consent to operate and renewal of consents have to be individually and cumulatively complied with and it is a continuing action as long as the petitioner is permitted to operate.

447.We now consider as to whether the green belt requirement has been complied with by the petitioner. The TNPCB contends that they have not complied with. The public interest litigants, who were impleaded, also

state that the green belt requirement has not been complied with. The petitioner's contention is that the same has been complied with and precisely for such reason, there is no such condition was imposed while granting renewal orders and this issue was noted by the Hon'ble Supreme Court in the 2013 judgment and the matter cannot be reopened.

448. We had seen that the original extent of green belt, which had to be provided as per the orders of TNPCB, is 250m as against the recommendation of MoEF of 500m. However, TNPCB reduced it to 25m. In paragraph 39.2 of the 2013 judgment, the Hon'ble Supreme Court pointed out that the Division Bench of this Court has not recorded any finding that there has been any breach of the mandatory provisions of the Air Act or the Rules by the TNPCB by reducing the green belt to 25m, further, the High Court has not recorded any finding that, by reducing the width of the green belt around the battery limit of the industry of the petitioner from 250m to 25m, it will not

be possible to mitigate the effects of the fugitive emissions as per the plan and it is for the TNPCB to take decision; that the petitioner's plant was within a pre-existing industrial estate, the petitioner could have been singled out to require such huge green belt.

449.Ms.R.Vaigai, learned Senior Counsel appearing for the 9th respondent is right in her submission that the Hon'ble Supreme Court while considering the arguments with regard to the reduction of the green belt requirement from 250m to 25m, left it to the decision of the TNPCB more particularly, because no material was placed by TNPCB that, by reduction of the extent of green belt, it will not mitigate the fugitive emission from the plant. Thus, in our considered view, the regulator, TNPCB failed to place material before the Hon'ble Supreme Court. This is so because, it is the TNPCB which initially prescribed 250m and on representation from the petitioner, reduced it to 25m and it would be an uphill task for them to justify

their action and there may be several pit falls in the bureaucratic ladder, if any such attempt was made by TNPCB. However, in the counter affidavit filed by the TNPCB before this Court, they state that the 2011 report of NEERI states that the area of plantation within the industry is estimated as 13.1 Ha as against the total area of 102.5 Ha. However, based on plantation assessment, the area of green belt developed and under-development was only 12.39 Ha and 0.71 Ha respectively, thus, making the area under green belt coverage as only 10.8% including the area under-development. Further, the report states that in some places, the area of the green belt is less than 25m and more than 10m and in some areas, it is less than 10m . Further, in the periphery near the rock phosphate storage area, gypsum storage area, rain water harvesting pond and near secured land fill area, there is literally no green belt available even till date. Further, it has been stated that the situation remains the same even now and the petitioner remains non-complaint with the consent conditions.

450.By order dated 22.05.1995, consent to establish was granted under the Air Act with a specific condition that the petitioner shall have adequate space for development of green belt for a width of 25m or width contemplated under Environmental Management Plan, whichever is greater around the battery limit of the industry. In the order dated 14.10.1996 granting consent to operate under the Air Act, the petitioner was directed to plant minimum of three varieties of trees at the density of not less than 1000 trees per acre of land and the plantation is stipulated over and above the bulk plantation of trees in that area and maintain them. In the order dated 14.10.1996 while granting consent to operate under the Water Act, some conditions were imposed as special conditions. These conditions were once again mentioned in the order dated 19.04.2005 granting consent to operate under the Air Act. While issuing the consent to operate order dated 19.04.2005 under Water Act, the petitioner was directed to develop green belt of adequate width and density for a minimum width of 25m, which is

reiterating the condition imposed while granting consent to establish vide order dated 22.05.1995. In addition to the same, it was stipulated that minimum of 25% of the area shall be developed as green belt with local species in consultation with the District Forest Officer. In 2012, while granting consent to operate, vide order dated 05.10.2012, it was specifically mentioned that the unit shall maintain green belt in the earmarked 26 hectares of land within the industry premises to a width of 25m and covering the areas of smelter plant, salt yard, gypsum pond and secured land fill with native species and suitable species in new areas to act barrier for controlling secondary fugitive emission. Further condition was imposed that the petitioner shall maintain the green belt to an extent of 25% of the total area as given by the petitioner under the documents furnished for obtaining consent to establish for the expansion from 900 TPD to 1200 TPD. In the consent to establish order dated 15.11.2006, the condition to plant 1000 trees per acre, as mentioned in the 1996 order, was reiterated. Thus, a perusal of all these orders

would clearly reveal that the petitioner was non-complaint of the condition regarding maintenance of adequate width of green belt. Had the petitioner complied with the condition imposed in the consent to establish order dated 22.05.1995 and consent to operate order dated 14.10.1996, the question of reiterating the same in the subsequent orders would not have arisen. Mere non-mentioning of the same at the present circumstances cannot be taken as if the petitioner has complied with the condition. The condition regarding green belt area is of utmost importance and cannot be brushed aside because, it allows toxic dust and fugitive emission to spread in the area.

451.The petitioner would contend firstly by stating that this is a new allegation brought-forth by TNPCB likely at the behest of the private respondents and the matter was raised before the Hon'ble Supreme Court and NEERI was directed to make an independent assessment after which, 30 recommendations have been given and with regard to the green belt, it was

stated that the unit was earmarked and developed 26 hectares of land within the industry premises to the width of 25m as green belt. The petitioner would state that they have developed an additional green belt of 15.86 hectares of 25m width within the industry premises, which was verified by NEERI in 2012. Further, as per the condition imposed by TNPCB on 02.03.2012, the petitioner has developed additional green belt to an extent of 12.5 hectares, which has been verified by the Joint Inspection Team during September, 2012. Further, the condition, which was imposed while granting consent to establish for expansion of 900 TPD to 1200 TPD, has also been complied with. Ultimately, the petitioner would contend that the Hon'ble Supreme Court in its final judgment dated 02.04.2013 has held that the green belt of the petitioner unit to be adequate and it attained finality.

452.If the contention raised by the petitioner is to be accepted and there has been prompt compliance of the condition imposed in the consent to

establish order dated 22.05.1995, in all probabilities, no further conditions would have been imposed. The fact remains till 2011, the petitioner did not have adequate green belt area and they were deficient. When they were faced with orders of closure and they were operating on order of stay, on inspection being done, time appears to have been granted to develop green belt area. Therefore, from the materials, which have been placed before this Court, what is evident is, from 1995 to 2011, the petitioner did not comply with the condition fully and faithfully. When inspection was conducted, inadequacy was pointed out, which according to the petitioner has been complied with.

453.The regulator, TNPCB states on oath that the petitioner is non-complaint of the said condition even as on date. Development of a green belt is not the only requirement, but what is required is maintenance and upkeep of the green belt. Had there been adequate maintenance and upkeep, there could have been no necessity for the TNPCB to issue direction in the year 2006 and

2012 to plant 1000 trees per acre of land. These conditions will go to show that such dense green belt was required around the battery limit of the unit and the requirement will not be taken to have been complied, if green cover is established in selected spots and spaces in the premises of the petitioner. This is precisely so because, while granting consent to establish the condition was that the petitioner shall have adequate space for development of green belt for a minimum width of 25m or width contemplated under the Environmental Management Plan, whichever is greater around the battery limit of the industry. Therefore, development of green belt in the adjoining township can be of little avail. The petitioner has been reiterating in all its pleadings and written arguments as well as in the oral submission of the learned Senior Counsel that the issue has been heard and stood settled after the 2013 judgment of the Hon'ble Supreme Court.

454.We have pointed out that the fact situation is otherwise and the condition being a continuing condition, mere non-mentioning of the said

requirement in the subsequent orders of renewal of consent to operate will not obliterate the requirement, nor it can be taken that the petitioner has deemed to have complied with the requirement. The petitioner cannot contend that a new argument is put forth. The entire issue as to whether the petitioner industry should be permitted to continue or not is writ large before this Court by way of writ petitions filing under two categories. One set of cases challenging the Government Order to close and permanently seal the petitioner. The other set of writ petitions is in effect appeals against the decision of the regulator. Therefore, as an appellate authority, this Court is not denuded of jurisdiction to cumulatively examine the compliance status of the petitioner. Merely because the regulator, viz., the original authority did not mention, the same cannot be a ground to restrict the powers of appellate authority in looking into issues which are essential, which might have lost sight of by the original authority.

455.The European Court of Human Rights while considering the application filed against the Russian Federation filed by a Russian national alleging that the operation of a steel plant is in close proximity to her home endangered her health and well being. The background facts being, the steel plant was established about 300 kms North-East of Moscow. The applicant moved to a flat approximately 450m from the steel plant. The flat was provided by the plant to the applicant's husband under tenancy agreement. The plant was the largest iron smelter in Russia and employed about 60,000 people. In order to delimit the area in which the pollution caused by steel production might be excessive, the authorities established a buffer zone around the premises called the "sanitary security zone" (akin to green belt). This zone was first delimited in 1965, it covered a 5,000m wide area around the site of the plant. However, many people still lived within the plant's sanitary security zone. The applicant with her family and other residents of the flats brought a Court action seeking re-settlement outside the zone, they claimed that the

concentration of toxic elements and the noise levels in the sanitary security zone exceeded the maximum permissible limits by Russian Legislation. The applicant contended that the emission levels of 13 hazardous substances, such as nitrogen dioxide, hydrogen sulphide, sulphur dioxide, ammonia etc., were monitored by the authorities and the data collected by the State Monitoring Authorities were not publicly available. The applicant claimed that the concentration of toxic substances in the air near her home constantly exceeded and continues to exceed the safe level established by the relevant legislation.

456.The Government submitted a report stating that pollution in the vicinity of the applicant's home was not necessarily higher than in other districts of the town and gave certain facts and figures to support their claim. They also contended that over a period of time, that is, from 1999 to 2003, certain improvement in the quality of air was registered under the steel's plant "pollution plume" in the residential area of the town.

457.The Court while dealing with the sanitary security zone, noted that the legislature placed a mandatory duty for every polluting undertaking to create sanitary security zone around its premises – a buffer area separating sources of pollution from the residential area of the city. Under the sanitary regulation of the said country, the sanitary security zone around the steel plant of such magnitude was 2000m. It was pointed out that the existence of a sanitary security zone is a condition *sine qua non* for the operation of an environmentally hazardous undertaking otherwise, it must be closed down or significantly re-structured. It was further pointed out that the main purpose of the sanitary security zone is to separate residential areas from the sources of pollution and thus to minimise the negative effects thereof on the neighbouring population. It was further pointed out that it would only be possible for the steel plant to operate in conformity with the domestic environmental standards, if the sanitary security zone continued to exist and served its purpose.

458.The Government submitted that the pollution levels attributable to metalargical industry were the same are not higher in the other districts than those registered near the applicant's home. While considering the said argument, the Court pointed out that it proves that the steel plant has failed to comply with the domestic environmental norms and suggests that a wider sanitary security zone should perhaps have been required. The Court found that the State had authorised the operation of a polluting plant in the middle of a densely populated town. Since the toxic emission from the plant exceeded the safe limits established by the domestic legislation and might endanger the health of those living nearby, the State established through legislation that a set-in area around the plant should be free of any dwelling. However, these legislative measures were not implemented in practice. Further, it was pointed out that although the polluting plant operated in breach of environmental standards, there is no indication that the State designed or applied effective

measures, which would take into account thes interest of the local population, affected by pollution, which would be capable of reducing the industrial pollution to acceptable level. Accordingly, it held that the respondent-State has failed to strike a fair balance between the interest of the community and the applicant's effective enjoyment of her right to respect for her home and her private life and accordingly, Article 8 (*pari materia* to Article 21 of the Constitution of India) of the convention was violated. This decision clearly demonstrates as to the need to maintain a sanitary security zone, which is known as the green belt area as per the CPCB norms.

459.We remind ourselves that we are examining an environmental matter and the confines of an appellate authority or an appellate court, which are normally defined, cannot be superimposed in the exercises of the appellate power of this Court in an environmental matter. Therefore, the theory of *res judicata* or *constructive res judicata* are all theories, which should be held to

be alien to the facts of the present case, not only because it is an environmental matter, but it is a case where consent conditions hold the field as long as the petitioner is in existence.

460.Thus, we have no hesitation to hold that there has been no faithful compliance of the green belt requirements and attempting to foreclose any discussion on the topic by referring to the 2013 judgment of the Hon'ble Supreme Court is an argument, which is not acceptable and the regulator, being clear in its mind, at last, has been able to point out that the petitioner remains non-complaint even as on date. Development of a green cover in an adjoining township cannot enure to the advantage of the petitioner. The petitioner has conveniently brushed aside the crucial aspect of the condition, viz., the green belt should be along the battery limits of the industry, which would mean that the petitioner industry should be situated in the midst of a mini forest. This is so because if the required width of 25m had been

maintained along the battery limit of the entire unit with 1000 trees per acre, it will definitely have the appearance of a forest cover.

461.With regard to the reduction of the green belt requirement from 250m to 25m, though the issue was raised earlier, the Hon'ble Supreme Court declined to interfere on the said aspect primarily for two reasons. Firstly, there was no material placed that, by reduction of the width, it will fail to mitigate fugitive emission. Secondly, this matter was to be decided by TNPCB and when the petitioner is situated in an industrial complex, they cannot be discriminated.

462.Before us, TNPCB has not placed any material to justify their action in reducing the width from 250m to 25m. In the counter affidavit filed by TNPCB, it has been stated that there are 60 industries in the industrial complex out of which, 51 are functioning and 33 of those units do not generate

any trade effluent. Out of the remaining 18 units, 4 are petitioner's units and out of the remaining 14, 2 units discharge effluents into a solar evaporation plant and therefore, in the opinion of TNPCB, there is no possible seepage into the ground or ambient area. The remaining 12 units include other food units, titanium factory and thermal power plant and the petitioner's four units are the only one which emit substantial amount of SO_2. Further, it has been stated that there is no other industry which emits toxic gases at dangerous levels in the industrial complex and other industries such as refined edible oil plant, see food processing plant, cold storage units, ice plant industries do not emit SO_2. The other polluting industry in the area is M/sVV Titanium private limited, which extracts titanium from limanite ore using sulphuric acid, it is stated by TNPCB that there is no emission of toxic gases from the said industry. Further, it is stated that other industries in the area are medium and small scale industries, where the emission of SO_2 is extremely negligible.

463.Considering these factors, in our considered view, the petitioner has not been discriminated, as they appear to be the biggest in the industrial complex not only because of the number of units they have and area occupied, volume of production, but more importantly, the quantity of emission either it be by way of discharge into the secured land fill or into the treatment plant or disposed to the recycler or let out into the air through the stacks. Therefore, if the TNPCB had genuinely acted in public interest, they would have rolled back the order reducing the green belt requirement to 25m and should have imposed a condition that the increased production capacity should be rolled back or the petitioner should have been directed to cease operation till completion of the requirement. The green belt requirement ought to have been increased while considering the application for enhancement in production capacity.

464.Thus, for all the above reasons, we hold that the petitioner has not complied with the green belt requirement, which is also a good and sufficient reason to not permit the petitioner to continue any further.

465.In a research paper published in the International Journal of Applied Environmental Sciences Volume XIV, Number 5 (2019) on the topic Green belt requirement for New and Expansion Projects for obtaining EC in India, the importance of development of a green belt has been brought out. So far as metalargical industries and other chemical industries are concerned, it is pointed out that the action plan for the green belt development plan is 33% of area, that is, land with not less than 1500 trees per hectare and the green belt shall be around the project boundary.

466.With regard to the conditions relating to green belt given in the EC issued by the statutory authorities, it is stated that for hazardous wastes

treatment storage and disposal facility, the project proponent shall develop green belt with native species at least 10 meter thick green belt in the periphery of hazardous wastes facility, green belt shall cover 33% of the total area. After discussing about the various types of the native species, which should be grown, the paper concludes by stating that development of green belt consisting of three tier along the periphery of the project with native species is most important guideline for any type of industry. The green belt minimises the build-up of pollution level in urban/industrial area by acting as pollution sinks, it will absorb pollutants released from the industrial activity into the atmosphere and helps in effective pollution control. The main advantages of green belt in and around the industry are to control air and noise pollution, trees help in trapping particulate mater, removing carbon dioxide and other pollutants from air and by releasing oxygen thereby, improving the air quality. Green belt reduces the intensity of sound by deflect, refract or by absorb sound and it will function as barrier between industry and waiver roof.

Green belt also helps in soil erosion control through improvement of soil quality and binding soil particles, it also contains water run off and improves ground water infiltration and improves ground water recharge capacity.

467.In India, we do not have a green belt policy or a specific regulation stipulating the norms for green belt, as is available in other countries. However, based on directions issued by the MoEF/CPCB/TNPCB/other authorities, certain guidelines have been laid down. The above decision and the opinion of scientific experts have been referred to, to stress the need of development of an adequate green belt. It may be true that the green belt, which was initially prescribed as 250m, was reduced by TNPCB to 25m. However, when the petitioner was permitted to expand and increase production by the process of de-bottlenecking, the green belt requirement was not increased. The petitioner's argument is that a fresh environmental clearance is not required while increasing production capacity

by the process of de-bottlenecking. We have expressed our reservation on the said contention.

468.The fact remains that upon increase in production, the waste generated in all categories correspondingly increases. Consequence thereof is increase in pollution level. Therefore, it goes without saying that if there is an increase in production, which is approved by the regulator, the conditions, which were stipulated at the time of grant of the consent to operate at the first instant should be reviewed, more particularly, with regard to the green belt requirement. Unfortunately, the official respondents did nothing in this regard.

469.In the guidelines published by the CPCB for development of green belt, the extracts of which were referred to by the learned Senior Counsel for the ninth respondent, it is pointed out that an important aspect of

green belt, which is overlooked, is that the plants constituting green belts are living organisms, with limits to its tolerance towards air pollutants. As a result, crossing the threshold limits in terms of pollution load would lead to injury to plants causing death of tissues and reducing their absorption potentials. Sink efficiency of unhealthy and death tissue and lives is known to be extremely low, thus defeating the very purpose of green belt. It is stated that a green belt is effective as pollution sinks only within the tolerance limits of constituent plants.

470.It was further pointed out that though several oxides of sulphur may be the result of the industrial process, SO_2 is considered to be the most important one. The SO_2 enters plants mainly through the stomatal aperture and more than 95% of the pollutant enters a plant through the route of gaseous exchange. Chemical reactions leading to leaf injury or absorption of sulphur from SO_2 into the metabolic stream have been described. The adverse effect

of SO_2 on chlorophyll pigment leads to reduced productivity. The guidelines also refer to the other pollutants like nitres oxide, carbon dioxide, hydro carbons, other mixtures of pollutants, etc. The guidelines also give a development model by way of a formula. The effectiveness of a green belt is also ascertained mathematically and the procedure is also given in the guidelines. Therefore, the importance of establishing a green belt, developing it as per the norms, maintaining the same, and endeavouring to increase the green cover is a continuous obligation on a polluter.

471.On two occasions, TNPCB has permitted increase of production capacity. However, there was no thought process to correspondingly increase the other requirements one such being, the green belt requirement. Therefore, the argument made on behalf of the petitioner that non-mentioning about the green belt requirement in renewal of consent order is to be taken as deemed to have been complied with is a thorough misreading

of the condition of consent, forgetting that such condition is a continuing condition and regular maintenance upkeep and replacement of the trees is essential. The endeavour should be to surpass the minimum requirement as stipulated in the guidelines. The attitude of the petitioner in this regard is unbecoming of a corporate Mayor.

472.The respondents had contended that the petitioner had misrepresented the extent of land held by them, consequently, the MoEF could not have granted permission to the petitioner for the expanded capacity. Another contention advanced by the ninth respondent is that the petitioner is a large red category hazardous industry and can only be located in an area classified as "special industrial and hazardous use zone". However, they are located in a land partly classified as "general industrial use zone" and "agricultural use zone" under the Master Plan of Thoothukudi and is located in close proximity to residential areas and densely populated areas.

473.The first and foremost objection raised by the learned Senior Counsel for the petitioner is that these grounds do not form part of the pleadings and they are not the grounds on which the impugned orders were passed and consequently, raised objection for the respondents to canvass such points.

474.To be noted that the order refusing to renew the consent to operate though cites five reasons, the said order cannot be read in disjunction, as we have held that condition imposed while granting or renewing consent to operate continue to exist and the orders are clear to the said effect, as they mention about the previous general and special conditions. Further, the impugned Government Order while endorsing the decision of TNPCB has directed permanent closure of the petitioner in public interest. Therefore, the first question, which would fall for consideration is whether the respondents

can support the impugned orders on grounds which are not specified in the impugned order. The Hon'ble Supreme Court in ***Mohinder Singh Gill,*** held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. In ***Commissioner of Police, Bombay vs. Gordhandas Bhanji [AIR 1952 SC 16],*** the Court held that public order, publicly made, in exercise of a statutory authority cannot be construed in the light of explanation subsequently given by the officer making the order of what he meant or of what was in his mind or what he intended to do. In ***All India Railway Recruitment Board,*** the Hon'ble Supreme Court rendered the judgment in ***Mohinder Singh Gill*** inapplicable where larger public interest is involved. It was pointed out that the decision-maker can always rely upon subsequent material to support the decision already taken when larger public interest is involved. The Court referred to the decision in the case of ***Madhyamic Shiksha Mandal, M.P. vs. Abhilash***

Shiksha Prasar Samiti [(1998) 9 SCC 236] wherein, it was held that there was no irregularity in placing reliance on a subsequent report to sustain the cancellation of the examination conducted, where there were serious allegations of mass copying. Accordingly, it was held that the principle laid down in ***Mohinder Singh Gill*** is not applicable where larger public interest is involved and in such situation, additional grounds can be looked into to examine the validity of an order. To the said effect, also is the judgment in ***PRP Exports.***

475.The thin line of difference in the case on hand is as to the material which was placed before this Court in the course of argument and certain material by way of affidavits. To be noted that the Hon'ble Supreme Court while setting aside the order of the NGT, had restored the position of the petitioner to the status during 2013. The various orders, resulting in closure of the industry, were restored and the petitioner given liberty to challenge those

order by way of writ petition before this Court even in respect of orders where statute provides for an appellate remedy. Therefore, the principle, laid down in ***K.Shyam Kumar,*** if applied to the case on hand, the only plausible conclusion and in fact, the correct conclusion that can be arrived at, is to the effect that the Court can look into all facts cumulatively, as it is called upon to decide not only the validity of the orders passed by the regulator, but as well as the order passed by the Government permanently closing down the petitioner. Therefore, the Court is empowered to examine the contention placed by the respondent with regard to the extent of land held by the petitioner and whether they are entitled to site their industry in the land in question.

476.The learned Senior Counsel appearing for the petitioner referred to the decision in the case of ***63 Moons Technologies Limited*** wherein, the Court, after taking note of the decisions in the case of ***Mohindar Singh Gill,***

K.Shyam Kumar and ***Madhyamic Shiksha Mandal*** on facts, found that there is no material subsequent to the passing of the final order of the Central Government in the said case that have impacted the public interest, which needs to be looked at. The facts of the present case are in a different setting and in our considered view, ***63 Moons Technologies Private Ltd.,*** does not render any assistance to the case of the petitioner.

477.The respondents contended that the petitioner had misrepresented that they had total land area of 172.17 Ha when, in fact, they had only 102.68 Ha. In this regard, the respondents had referred to the inspection report of TNPCB dated 11.11.2006, which mentions the land area as 102.68 Ha whereas, in the environmental clearance dated 09.08.2007, the extent of land is shown as 172.17 Ha and therefore, the respondent would state, the land area shown while applying for consent to operate the expanded capacity varies with the areas mentioned in the environmental clearance dated

29.08.2007. The petitioner accepts that they had a total extent of 102.68 Ha, and an additional extent of 36.17 Ha was given on lease by SIPCOT on 16.02.2009. During January, 2007 when the petitioner applied for ratification of EC, a query was raised with regard to the extent of land in possession of the petitioner and the petitioner is stated to have clarified that they are in possession of 102.31 Ha. In this regard, the learned Senior Counsel referred to the letter of the petitioner to the MoEF. It is further stated that even in July, 2006, the petitioner had applied for further expansion of 57.08 Ha and in August, 2008, had applied for 42.34 Ha. Further, the petitioner would state that in October, 2009, lease deed was executed for an extent of 93.37 Ha. On 25.06.2012, the petitioner clarified to MoEF that it had only 102.31 Ha and the remaining land is under the process of acquisition and that this position has not been reflected correctly in the EC. It is further stated that in the report of MoEF dated 12.07.2012, the extent mentioned is 172.17 Ha as well as in the report of the Joint Committee of CPCB and TNPCB appointed by the Hon'ble

Supreme Court. The MoEF by notification dated 16.01.2007, while on the subject of expansion by de-bottlenecking, called for additional information/clarification, which was required during the course of preliminary examination of the proposal for expansion. It was mentioned that the total project area has been mentioned by the petitioner as 86.01, but the existing plant is located in 95.51 Ha as per the records available in the Ministry; the total project area is mentioned as 172.17 Ha and in questionnaire at serial number (xv), and 198 acres in the project report. The petitioner was directed to submit actual figure, as there were discrepancies. While responding to the query, by reply dated 19.01.2007, the petitioner states that the total area of the project is 172.17 Ha in which, 95.51 Ha was existing land under Pre-LTPA scenario; in December, 2009, additional 6.8 Ha have been procured through SIPCOT, hence, 102.31 Ha (95.51 Ha + 6.8 Ha) is existing area in hand and currently, 69.86 Ha are in acquisition process and payment already made to SIPCOT. The additional land is for utilization of future greenery

development, solid waste storage and for other future proposal. The breakup details of the land usage to an extent of 86.01 Ha out of 102.31 Ha were also furnished. Further, the petitioner states that they have enhanced their production activity from 900 MTPD to 1200 MTPD from third week of November, 2006. The above is the explanation offered by the petitioner with regard to the land holding and they would state that there is no misrepresentation.

478.On a perusal of the reply given by the petitioner dated 19.01.2007, we find it to be not a direct answer to the query raised by the MoEF. As mentioned, MoEF by letter dated 16.08.2007 pointed out that there is discrepancy in the total project area and they have mentioned the discrepancy as 86.01 Ha, 95.51 Ha, 172.17 Ha and 190 Ha. The simple question raised by MoEF to the petitioner was to give the actual extent.

479.The response given by the petitioner dated 19.01.2007, would clearly show that it is not a direct answer to the simple query. Once again the petitioner maintains that the total area of the project is 172.17 Ha without plainly disclosing that the extent of land held by them is only 102.31 Ha and they are not in possession of 172.17 Ha. At this juncture, we need to note that when the Committee appointed by the Hon'ble Supreme Court to examine and submit report in respect of all red category industries, the Committee clearly recommended that the petitioner's application for expansion may not be considered for the reason that the existing waste management practices of the petitioner are not in compliance with the environmental standards and the solid hazardous wastes generated also required to be properly managed, particularly in terms of available space and infrastructure, which would be inadvisable to consider expansion of the unit at that stage. The MoEF while granting environmental clearance dated 22.09.2004, for the expanded capacity from 300 TPD to 900 TPD, noted the total area of the project as 95.51 Ha, out of

which 30.65 Ha was earmarked for the proposed expansion. On 09.09.2005, the petitioner submitted an application to TNPCB for grant of consent to establish the expanded production capacity for Smelter Plant No.I from 900 TPD to 1200 TPD stating that the total extent of land required after the de-bottlenecking is 172.17 Ha. Based on this application, TNPCB granted consent to establish. The petitioner filed an application on 02.01.2007 seeking *post facto* environmental clearance for the expanded capacity, that is, from 900 TPD to 1200 TPD and while seeking for such clearance on 09.08.2007, the total project area is mentioned as 172.17 Ha and the green belt of 43 Ha to be developed from the total extent of 172.17 Ha. M/s.Vimta Labs prepared the rapid EIA for the expansion from 900 TPD to 1200 TPD wherein the extent of land is mentioned as 172.17 Ha. When the MoEF granted EC for Smelter Plant No.II on 01.01.2009, the extent of land acquired by the petitioner is stated as 92.5 Ha. In April-May, 2009, TNPCB inspected Smelter Plant No.I and in their report dated 05.05.2009, the total extent of land occupied by the

petitioner is mentioned as 172.17 Ha. The same extent also finds place in the monitoring report dated 12.07.2012 submitted to the MoEF. When TNPCB granted renewal of consent on 12.07.2012, the extent is mentioned as 172.17 Ha while mentioning about the green belt. While on this issue, it is interesting to note that in the inspection report of the TNPCB of the inspection conducted on 11.11.2006, the land use classification has been mentioned as "general industrial". Considering all these facts, we have no hesitation to hold that the petitioner had not disclosed the actual extent of land held by them.

480.The learned Senior Counsel appearing for the ninth respondent would submit that the petitioner had played fraud on the Central Government while obtaining environmental clearance. The petitioner seeks to steer themselves clear of the said allegation by referring to their letter dated 19.01.2007.

481.We have carefully analysed the said letter and we have found it to be not a direct answer to the query raised by MoEF. The fact remains that the petitioner did not hold an extent of 172.17 Ha on the date when environmental clearance was granted, the order granting environmental clearance dated 09.08.2007 mentions total project area as 172.17 Ha, but for the petitioner furnishing this extent to the MoEF, the same would not have been mentioned in the order granting environmental clearance. Therefore, the petitioner failed to disclose the actual extent held by them while they applied for environmental clearance. Furthermore, their application for *post facto* clearance dated 02.01.2007 itself has to be held to be not maintainable, because the *post facto* clearance itself sought for is environmental clearance and there can be no such *post facto* decision being taken in environmental matters. In this regard, it would be beneficial to refer to the recent decision of the Hon'ble Supreme Court in the case of ***Hanuman Laxman Aroskar*.**

Accordingly, we hold that the petitioner failed to disclose the actual extent held by them while applying for grant of clearance for the proposed expansion.

482.The next question would be as to what would be the impact of the failure to disclose the actual extent of land held by the petitioner. In our considered view, this would have far reaching consequences because increased production would mean increased generation of waste, which obviously would require larger extent of land and this would have a chain reaction leading to various other issues some of which are beyond comprehension. Thus, when the petitioner did not have 172.17 Ha for Smelter Plant No.I, the question of granting environmental clearance for the proposed expansion would not arise. This failure to disclose the correct details has led to an order being passed by the MoEF granting environmental clearance on the ground that the petitioner possessed 172.17 Ha. Thus, if the factual position is otherwise, the environmental clearance itself should be construed to be non-est.

483.The TNPCB contended that in addition to the grounds of closure, there are several other violations/non-compliances/instances, where pollution has occurred and caused irrevocable harm to the ecology of Thoothukudi. One such contention is with regard to the cause of pollution due to low stack height. We have seen the definition of "chimney"which in technical parlance is known as the "stack". MoEF prescribed rules on the emission standards for sulphuric acid plants, vide notification in GSR 344(E), dated 07.05.2008, wherein the concentration limit of 1250 mg/Nm^3 was prescribed for emission through the stack in the existing sulphuric acid plants, having capacity more than 300 TPD and in emission load based standards of 2.0 kg of SO_2 per ton of sulphuric acid produced.

484.It is further submitted that the height of the stack emitting SO_2 or acid mist was fixed to be a minimum of 30m or as per the formula

$H=14(Q)^{0.3}$ (whichever is more), where "H is the height of the stack in metre" and "Q is the maximum quantity of SO_2" expected to be emitted through the stack at 110% rated capacity of the plants and calculated as per the norms of gaseous emission. The plants having more than one stream or unit of sulphuric acid at one location, the combined capacity of all the streams or units was to be taken into consideration for determining the stack height and applicability of emission standards.

485.Insofar as the plants having separate stack for gaseous emission for the scrubbing unit are concerned, the height of the sulphuric acid stack was to be equal to the main stack. By applying the MoEF norms, considering emission load based standards of 2.0 kg of SO_2 per ton of sulphuric acid produced (4200 TPD of sulphuric acid and 110% is 4620 TPD); Q=4620x2/24 kgs/hr=385 kgs/hr; stack height $H=14(Q)^{0.3}=14(385)^{0.3}$= 14x5.965 – H=83.51m. If it is taken as one kg of SO_2 per ton of acid produced, the

calculation would be Q=4620x1/24 kgs/hr = 192.5 kgs/hr; stack height $H=14(Q)^{0.3} = 14(192.5)^{0.3} = 14(4.845)$ – H=67.83m.

486.The petitioner has provided twin stack of height 60.38m each instead of single stack of height 84.0m. By providing twin stack, there is no change in the quantum of SO_2 emission. Instead of emitting this quantum of SO_2 (385 kgs/hr) through 84m height stack, it is emitting through 60.38m height stack, as a result, the ground level concentration of SO_2 would be higher than the norms. It is further submitted that the consents, which were granted to the petitioner, were subject to the Act, Rules and the Notifications, and the MoEF having stipulated the stack height, the petitioner was bound to comply with the same and failure to do so would be violation of a consent condition.

487.Further, it is submitted that the copper smelters in various countries have higher stack heights than the petitioner, though their production

capacity is substantially less compared to the consented quantity of the petitioner. Thus, the sum and substance of the objection raised by TNPCB is that the petitioner has provided twin stack of height 60.38m, each, instead of a single stack of height of 84.0m. Their further submission is, by providing twin stack, there is no alteration in the quantum of SO_2 emission, but due to the lower height of the stack, the ground level concentration of SO_2 would be higher than the prescribed norms.

488.The petitioner, while responding to the said contention, would state that the issue regarding stack height was raised for the first time before the NGT in 2018 by an intervenor, and it is only thereafter, the respondent-Board has sought to adopt the same. Further, it is contended that the said ground being, not one of the grounds to refuse to renew the consent to operate, the same cannot be permitted to be raised at this stage, more so when, the respondent-Board had prescribed the same and they cannot now seek to raise

an objection. Without prejudice to the said submission, the petitioner would contend that the petitioner has SO_2 scrubbers/Flue Gas De-sulphurisation System (FGDS) since 2003 and 2012.

489.Further, it is contended that the Board has assumed only the Sulphuric Acid Plant (SAP) system, and has ignored the petitioner's Tail Gas Scrubber (TGS) system attached to the SAP, which works all 24 hours unlike many sulphuric acid plants, which run their TGS only during the plant start up condition. Therefore, the petitioner would contend that the emission in kg/hr is very negligible in the case of the petitioner. That the petitioner has been imposed special and more stringent conditions of emission norm of 1 kg/ton of sulphuric acid and this has been achieved by the petitioner because of the superior technology adopted by them. That the respondent-Board is wrong in assuming that there is no change in the quantum of SO_2 by providing twin stack.

490.In the rejoinder to the counter affidavit filed by TNPCB, the petitioner would contend that the TNPCB revised the standards and imposed a specific condition of SO_2 emission of 1 kg/ton of acid in the year 2005, when the production capacity was permitted to be increased to 900 TPD. In the rejoinder affidavit, a pictorial representation has been made to explain the actual condition of the petitioner's unit, the calculation adopted by the petitioner has been given, and it is stated that they have calculated the stack height using the formulae adopted for power plant stacks.

491.Referring to the report of Vimta Labs of 2007, it is stated that the ground level concentration has never exceeded 45.1 ug/m^3 and the data monitored by the TNPCB and the petitioner's manual/continuous on-line monitors have never exceeded 60 ug/m^3. Therefore, the petitioner would contend that they complied with the stack height prescribed as per the MoEF

standards as well as the consent orders issued by the respondent-Board from time to time, and there is no non-compliance of the consent conditions. The petitioner has referred to the consent to operate orders dated 14.10.1996, 19.04.2005 and 15.11.2006 to support its stand that the height of the stack is mentioned as 60m and there is no violation of consent condition.

492.The 9th respondent has referred to an opinion of a retired Professor of the Indian Institute of Technology to show as to the actual stack height requirement. Reference was also made to the annual wind rose prepared by Vimta Labs and other materials and opinion of experts to substantiate their contention that on account of inadequate height of stack, not in accordance with the stipulation of MoEF, there is high ground level concentration of SO_2 and this is in violation of the notification of the Central Government, this would also be one of the grounds to shut down the petitioner.

493.We deal with the preliminary objection raised by the petitioner at the first instance. Though it may be true that in the impugned order refusing to renew the consent to operate, inadequate stack height is not one of the grounds mentioned therein , the petitioner would admit that this issue was raised by the respondent-Board in 2018 before the NGT. The petitioner would state that it is the intervenor, who raised the point, and thereafter, the TNPCB took up the issue. This can hardly be a reason for this Court to refuse to test the correctness of the submission regarding inadequate stack height. This is so because, as a regulator, TNPCB is entitled to impose conditions. We have held these conditions to be binding, non-negotiable and cannot be questioned by the petitioner. Therefore, if the regulator states that there is an inadequacy on the part of the petitioner, the source from which, the regulator got-inspiration to say so is irrelevant, as the factum whether there is inadequacy or not, is the only issue.

494.As regards the stack height, TNPCB, in no uncertain terms, states that the same is not in accordance with the MoEF norms. The MoEF lays down norms and standards by way of notifications and instructions and the Pollution Control Board, being the delegated authority, is bound to implement the same. Therefore, the petitioner would be wrong in stating that the State-regulator does not have power to alter the norms fixed by MoEF especially when such alteration would be for setting higher standards,and not by lowering the standards prescribed by MoEF.

495.While going through the rejoinder filed by the petitioner to the counter affidavit of the second respondent, we find that for arriving at stack height, the petitioner calculated the same using the formulae adopted for power plant stacks. The order of MoEF dated 16.01.1995, while granting environmental clearance to the petitioner had imposed conditions that at no

time, the emission level should go beyond the stipulated standards; adequate number of ambient air quality monitoring stations should be set up in the downwind direction as well as where maximum ground level concentrations are anticipated specially, covering human settlements for estimation of particulates, fluoride dust, SO_2 etc., in consultation with the State Pollution Control Board; and there should be no change in the stack design without prior approval from the State Pollution Control Board and the Ministry (MoEF). If such is the condition imposed on the petitioner, the question would be whether, the petitioner could have calculated the stack height based on the formulae adopted for power plant stacks.

496.It is the submission of the petitioner that the actual conversion efficiency of the petitioner is in the order of 99.92% levels, which is considered as best in the world and this is achieved by using high efficiency catalysts, which are caesium promoted catalysts that yield better conversion

efficiency. While on this issue, we are not called upon to decide as to the efficiency or efficacy of the pollution control measures installed by the petitioner in the stack or in the TGS. The issue is with regard to stack height. The petitioner contends that they had adopted an advanced technology even as early as in the year 2003 or 2012, when there was no such thought process by MoEF. Nevertheless, if a regulation has been put in place or an instruction or order has been given by the Ministry, it binds the industry. If according to the notification, the stack height has to be more than 80m, a single stack, the petitioner cannot state that they have provided two stacks of more than 60m height each, and this was what the regulator had stated in the consent orders and there is no violation of the conditions. The consent orders have mentioned about the existing facility in the petitioner's plant and TNPCB, unfortunately, did not take up this issue earlier, than 2018. However, if there has been a violation of a notification or instruction issued by MoEF, which binds not only the State-regulator, but also the industry, any order passed by the State-

regulator in derogation or in ignorance of a notification cannot be taken to be an estoppel for the regulator to enforce the condition at a later point of time.

497.The former Professor of the Department of Chemical Engineering, IIT, Madras, has given his opinion wherein, he states that the height of the stack emitting SO_2 or acid mist shall be of minimum 30m or as per the formulae $H=14(Q)^{0.3}$, whichever is more, and by adopting this formulae and taking note of the total capacity of the petitioner with 2 kg/ton acid produced, the stack height would be 83.5m and if emission factor of 1 kg/ton was to be considered for stack height design, it would be 67.8m. The expert concludes by stating that the sulphuric acid plant's stack height of 60m is not in consonance with the CPCB Rules, nor it is adequate if the lower emission rates of 1 kg/ton is considered. Further, the stack height will be inadequate for effective dispersion of SO_2 pollutants and it has to be verified, if this will attribute to excessive ground level concentration of SO_2 in ambient air under

neutral or adversal meteorological conditions. Further, the stack height for furnace at 4 kg/ton acid produced would be 102.8m and height as per 1 kg/ton emission rate would be 67.8m. Thus, the finding is, the furnace stack height is only 60m as against 102.8m as per the CBCB norms and this will contribute to excessive ground level concentration of SO_2 in ambient air. Thus, viewed from any angle, what is abundantly clear is that, there is non-compliance of the stack height norm stipulated by the CPCB.

498.The explanation offered by the petitioner that they are adopting the norms for power plants may not assist the petitioner's case, as they have had no special exemption from the CPCB norms. That apart, assuming TNPCB had failed in its duty in enforcing the norms stipulated by the MoEF/CPCB, that may not be a licence to the petitioner to contend that they satisfied the requirements. It is not clear as to why the TNPCB did not take note of this issue earlier and did so only in the year 2018.

499.Be that as it may, if according to the petitioner they have adopted a state of art technology as early as in the year 2003/2012, when the Government of India did not even think about it, they should have been vigilant enough to get the same as a condition and it will be too late for the petitioner to state that the efficiency level of their equipment is far better than what is in place in other power plants and they have calculated the stack height based upon the formulae for power plants. If the MoEF has issued a statutory notification prescribing a particular method for a sulphuric acid plant, the petitioner is bound to comply with the conditions therein scrupulously and if the statutory notification prescribes a thing to be done in a particular manner, it cannot be done in any other manner. Conspicuously, the rejoinder affidavit nowhere disputes the method of calculation, which has been adopted by TNPCB in their counter affidavit stating that the requirement is more than 80m, but the petitioner seeks to justify their action about the existence of two stacks with a height of little over 60m and it would satisfy the requirement.

500.It is common knowledge that a chimney/stack, the higher it is the ground level dispersion/concentration will be less or in more simpler terms, the emission, which is made through the chimney/stack, disperses at a higher height thereby travelling longer distances resultantly, reducing ground level concentration. The lower the stack, the higher the dispersion within a lesser radius leading to more ground level concentration. Therefore, on the given facts and circumstances, we uphold the objections raised by TNPCB and hold that the petitioner's plant does not have the adequate stack height calculated based on the norms fixed by MoEF/CPCB. Consequently, it has to be held to be a violation, which is deemed to be a violation of the environmental clearance and the consent to establish/operate.

501.TNPCB, in its counter affidavit, has stated that the raw material, copper concentrate, which is transported from the Thoothukudi Port to the

petitioner's factory is being done in open trucks causing great air pollution. It is submitted that this is being done by the petitioner despite consent condition to effect transportation through closed trucks. The petitioner, while denying the said allegation, would contend that the copper concentrates are transported in trucks covered by tarpaulin sheets which are tide to the sides of the trucks. It is further stated that the distance between the Thoothukudi Port and the petitioner's factory is 18 kms and no complaint has been raised by TNPCB in this regard, nor any show cause notice was issued. It is further submitted that all the trucks are monitored by the petitioner through Radio-Frequency Identification (RFID) and Global Positioning System (GPS). The remnants are vacuum cleaned and the petitioner has proposed to purchase trucks with automatic top cover and few of these trucks have been purchased. The petitioner has filed a photograph showing the mobile hopper arrangement at the Thoothukudi Port to handle copper concentrate and the covering of the trucks with tarpaulin in the port complex. The petitioner does not deny the

fact that condition was imposed that the raw material, copper concentrate should be transported in closed trucks.

502.We would be well justified in presuming that the word "closed trucks" would mean and should mean an arrangement, which ensures that the cargo is in complete closed condition. Bulk of the copper concentrate is transported in hired vehicles and it is stated that the copper concentrate is covered with tarpaulin sheets and tied to the sides and since the copper concentrate is of very high value, it would not be in the interest of the petitioner to carry the same in open lorries, as any loss of copper concentrate amounts to monitory loss for the company.

503.Firstly, we wish to point out that concerns about pollution are to be definitely placed in a higher pedestal, then monetary conditions that the petitioner may face. It is common knowledge that municipal garbage, which

is generated, is being transported in tipper lorries, which are mandated to be covered with thick tarpaulin or plastic sheets, so that when the garbage is transported from the Metropolitan City to the dump yard, there should be no littering en-route. However, the fact remains that in major cities including the city of Chennai, majority of the trucks, which transport the garbage, are done in open and there is no cover and even if there is a cover, it is not properly secured. The photograph in page number 207 of Volume VII of the petitioner's paper book shows a young man standing inside an empty lorry with a green tarpaulin sheet lying folded on one side of the lorry. This photograph does not convince us to hold that the petitioner has been transporting the raw material in a safe and secure manner without any spillage along the 18 km route.

504.It is true that TNPCB has used the word “closed trucks”, but it has not specified as to what is the methodology to be adopted. In fact, from

the reply given by the petitioner, we find that they have rightly understood as to what to mean a "closed truck" and that is why they had proposed to purchase trucks with automatic top cover and also stated to have purchased a few trucks with such facility. The object of imposing a condition to transport the raw material by a closed truck is to avoid spillage en-route and the distance is 18 kms from the Thoothukudi Port. Therefore, spillage is bound to occur and when transported at reasonable speed, the fly-off cannot be obviously averted and a tarpaulin cover tied with streams of rope can hardly prevent spillage especially when, the wind speed is more and the situation will be aggravated, when the trucks are also driving in a speed of more than 60 kmph. The petitioner would state that the remnants are vacuum cleaned. We presume that this process is adopted in the port premises and not en-route. If the remnants are removed by vacuum cleaning en-route, it would go to show that the raw material has not been transported as directed by TNPCB. The Madras Port had been handling coal imported from various countries and the vessels

are berthed at the Madras Port. The coal was transported in tipper trucks and we have found that the trucks are covered and the trucks were given exit out of the port premises through a gate opposite to the War Memorial. Invariably, the movement of trucks is permitted late in the evening up to dawn. As a result of movement of these trucks, the entire area would be covered with a thick cover of coal dust and it required heavy equipments to be used to remove the coal dust, as it had caused several accidents, not only it has caused pollution by way of spillage, but also has resulted in fatal accidents. That apart, the heritage building of the Madras High Court was also a victim to the indiscriminate handling of coal in the port premises. This has led to a Public Interest Litigation being filed before this Court and ultimately, the coal handling facility was shifted by the Madras Port Trust to a different location. Therefore, we can perceive and safely conclude that the petitioner did not take adequate precaution while transporting the copper concentrate from the port premises to their factory for a distance of about 18 kms.

505.The impleaded respondents had raised an issue with regard to the quality of the copper concentrate, which had been imported by the petitioner stating that there is high arsenic content in the copper concentrate thereby, causing health hazard to port workers and susceptible to cancer. The respondents alleged that the petitioner is procuring low quality copper concentrate and that is why, it is called "Fools Gold". Further, it is contended that the copper concentrate imported by the petitioner contains various elements including hazardous material and annually, the petitioner imports 11 lack tons of copper concentrate containing 25-100 PPM arsenic.

506.The petitioner would submit that this issue cannot be raised by the respondents and they are estopped from doing so, as it was raised in the earlier round of litigation. Without prejudice to the said contention, it is submitted that the copper concentrate imported by the petitioner is the second

highest grade and operates at lowest arsenic blend compared to the copper concentrate used by the Dahej, Birla Copper.

507.It is further stated that the petitioner is using isasmelt since inception to eliminate emission to the surrounding environment and the technology is used by several developed countries. It is further submitted that the petitioner in their application to MoEF for clearance of their increased production capacity from 900 TPD to 1200 TPD, mentioned the estimated range of arsenic value in copper concentrate in market during that period. The quality of the copper concentrate varies due to natural phenomenal occurring in mines and the respondent's calculation is based on wrong assumption without considering the nature of copper imported by the petitioner.

508.Further, it is submitted that arsenic is fixed in the ETP sludge, which is disposed of in the on-sight SLF, nickel is fixed in the ETP slime

sludge, which is disposed of to authorised recyclers and the mass balance submitted by the petitioner details the quantum of elements and its proportionate fixation in various streams. Rapid EIA report of 1995 was prepared by Tata Consultancy Services at the request of the petitioner. In Chapter V of the said report, which deals with "Environmental Management Plan", it is stated that the petitioner is planning to procure copper concentrates nearly arsenic free with a result that separate treatment of arsenic wastes may not be required, however, provision for treatment of arsenic wastes should be made, if required.

509.Thus, what was projected by the petitioner in the year 1995 was to procure arsenic free copper concentrate, which obviously, the petitioner could not achieve and probably, cannot achieve and that is why, they have stated that they operate at the lowest arsenic blend and claim that the copper concentrate is the second highest grade. Thus, it is highly doubtful as to the

quality of the copper concentrate procured by the petitioner primarily because TNPCB has not shown to have done any analysis or monitoring with regard to the efficacy or otherwise of the raw material procured by the petitioner. In fact, if the TNPCB had taken up an exercise of verifying the quality of the raw material imported by the petitioner, much of the allegations which have cropped up now, would not have arisen. The material placed before us does not sufficiently put forth as to what was the analysis done, when the cargo was off-loaded the vessel at the port premises. Even assuming if samples were drawn, the question is as to whether TNPCB had regularly monitored the raw material imported by the petitioner especially, when they had in their rapid EIA report, accepted to procure arsenic free copper concentrate. Therefore, much has to be said about the lack of proper monitoring on the part of the regulator and ensuring that checks and balances are put in place. As mentioned by us earlier, the TNPCB is under-equipped to deal with industries, which are of the magnitude of the petitioner, which carries on multiple

processes, and several by-products and wastes are generated in the processes which may require monitoring at different stages, at different locations and at different times. We have also mentioned in our assessment that the data collected from the petitioner are through the monitors established by the TNPCB, which are not analysed. Had such an exercise been done, periodical notices would have been issued to the petitioner not only when an incident occurs or is reported. Therefore, the regulator needs to take the blame for not having adequately monitored this aspect of the matter. The projection, which was made by way of the rapid EIA report in the year 1995, is to procure copper concentrate nearly arsenic free and this will result in not requiring a separate treatment of arsenic waste. The petitioner obviously could not achieve it and that is precisely the reason that the arsenic is fixed in the ETP sludge, which is disposed of in the on-sight secured land fill. Therefore, the quality of the copper concentrate is definitely an issue, which is a matter of concern and we shift the blame to the TNPCB.

510.The TNPCB has stated that several committees were appointed to visit and inspect the petitioner's unit and determine environmental compliance and impact. The committee found, the petitioner was not strictly complying with the provisions of the Act, Rules and consent conditions and made their recommendation for compliances and, this assumes significance, as in spite of imposition of consent conditions and regular interventions by the TNPCB, the petitioner has been continuously non-complaint. The 1998 report of NEERI states that the industry should not have been located at the present place; public participation ought to have been held; there is no perceptible green belt in the industry; relaxation of green belt condition is without adequate justification; there is perceptible air pollution around the petitioner's plant; and therefore, all clearances should be revoked and the plant should be closed till proper environmental impact assessment is done. Based on the said report, the High Court directed closure and subsequently permitted the factory

to be temporarily reopened to enable NEERI to monitor the safeguards and submit report. In the report of NEERI, dated 09.02.1999, the undertaking given by the petitioner to improve several waste management parameters and construct new infrastructure that had not been done previously, was placed on record. Because of this undertaking, the petitioner unit was permitted to reopen and the TNPCB granted consents to operate. The Monitoring Committee appointed by the Hon'ble Supreme Court held that the petitioner's application for proposed expansion should not be granted. The report of NEERI of May, 2011 recorded certain adverse findings against the petitioner more particularly, stating about negligible green belt. It is stated that out of the 30 conditions, which the petitioner purported to comply with 29, the compliances and directions on green belt, slag storage and disposal, and ground water collection show that the compliance was to be on going, continuous and the position as on date shows gross non-compliance.

511.The Hon'ble Supreme Court in C.A.No.4763 of 2013, issued directions to TNPCB to suggest additional conditions for reduction of pollution by the petitioner and an affidavit was filed by TNPCB stating that the petitioner should dispose the slag for beneficial purposes, which the petitioner failed to comply and dumped the same obstructing natural river course leading to water and air pollution and also widespread flooding in the area. Thus, if the reports of the various committees are cumulatively read, it demonstrates that during 1998, 1999, 2004, 2005, 2011 and 2012, the petitioner was found non-complaint at every stage. The issues of TDS, hardness, sulphates in the ground water, green belt, SO_2 emission and disposal of gypsum pond etc., continue to cause concern till order of closure.

512.Further, it is stated that in 2018, it was the same pollution and non-compliance as brought out through admission and inspections and independent reporting of ground water parameters, that the TNPCB and the

State acted as duty bound by statute and settled principles of environmental law. Thus, the past conduct of the petitioner is consistent with the conclusion that they have not been complied with the mandatory rules and regulations and has only attempted compliance under threat of judicial orders of closure/intervention and cannot be allowed to run a highly polluting red category industry, when the petitioner is oblivious to ecological sensitivities especially, after having polluted the area substantially over the past 22 years of its operation.

513.The petitioner's response is that there is not a single instance of violation between 2013 and 2018. The inspection reports issued by TNPCB for 2015-2016, 2016-2017 and 2017-2018 does not indicate any adverse comments regarding compliance with the consent conditions. In this regard, the learned Senior Counsel for the petitioner referred to the inspection reports dated 16.03.2016, 06.09.2017 and 22.02.2018 and a list of expenditure

incurred by the petitioner for environmental improvement projects claiming that a sum of Rs.508 crores were spent on environmental improvement projects.

514.The fact that substantial amount of money was spent for environmental improvement projects would go to show that those improvements are required to be done. This directly goes to show that the petitioner is a highly polluting industry and these measures are required to be adopted to enable them to be termed as a "viable unit". Despite these, the petitioner once again came to adverse notice of the respondents. Assessment and monitoring of pollution is a continuous process and bearing this principle in mind, we had observed that the conditions imposed while granting environment clearance, while granting consent to establish and operate, continue to remain in force and they are continuing conditions and not one time compliance condition.

515.By way of illustration, if we take up the green belt requirement, the petitioner cannot be heard to say that it is a one time condition and any such attempt made by the petitioner is liable to be out rightly rejected because, green belt is a natural phenomenal, which involves a process of maintaining a green cover, that too, with specified species of trees and the noteworthy feature is, it should be surrounding the entire battery limit of the unit. TNPCB reports that on the date of closure and even as on date, the green belt requirement has not been complied with. Therefore, when a decision is to be taken as to whether the petitioner should be permitted to continue or not, no error can be attributed to the State or to the regulator to have a cumulative assessment of the petitioner's past conduct.

516.The shocking reality is that for the substantial period of the time from 1995 till 2018, the petitioner was operating without valid consent to

operate. They were operating either on account of orders passed by Courts/Tribunal, or by stating that application for renewal of consent was pending. The first renewal of consent was valid up to 31.03.1998 and it was renewed only on 20.05.1999. In the interregnum period, the matter was pending before the Court and the petitioner still continued to operate contending that they have submitted application for renewal of consent and also remitted the requisite fee. The consent, which was renewed on 20.05.1999, was valid only up to 31.03.2000. The petitioner had operated the plant without an order of consent from 01.04.2000 to 18.04.2005, as an interim order was granted in the year 1999 and the petitioner states that their application for renewal of consent was submitted and requisite fee was paid. Thus, the petitioner has operated for 16 years and 92 days without consent from the TNPCB, it has operated for 10 years, 2 months and 15 days without a HWM authorisation. As mentioned earlier, even if a Court or Tribunal has granted an order of stay of closure, the natural corollary that should follow is

that the unit should obtain an order of consent. An order of stay or injunction granted by a Court or Tribunal can at best protect closure on a permanent basis, but the industry being, a highly polluting industry could not have been established or continued its activities without an order of consent, an order of stay or injunction by a Court or Tribunal, cannot be a substitute to an order of consent to operate granted by a regulator.

517.Between 2006 and 2007 for a period of seven months, the petitioner had no valid order of consent to operate. Subsequently, from 08.05.2007 to 18.01.2009, the petitioner operated without a valid order of consent. The petitioner would state that their application for renewal of consent was submitted and the application for increased capacity of 1200 TPD was under scrutinisation. From September, 2009 to February, 2012, the petitioner did not have a valid order of consent, but continued to operate, as an interim order was granted by the Hon'ble Supreme Court. From October, 2012

till 1st week of March, 2016, the petitioner operated the unit based on orders passed by the NGT and during the said period, they did not have a valid consent to operate, and ultimately, the application for renewal of consent for five years from September, 2018 was rejected by the impugned order. Thus, it is evidently clear that there was no proper monitoring of the industry presumably on account of the orders of Court/Tribunal, TNPCB did nothing in the matter, though it was well open to the regulator to inspect and ascertain as to whether the petitioner can be permitted to continue to operate the unit. The regulator failed to discharge their duties diligently bearing in mind the purpose for which it was constituted, nothing prevented the regulator from approaching the Court by way of an appropriate application appraising the facts and the need to monitor the petitioner.

518.It may be true that the petitioner would have uploaded the relevant data, the ambient air quality monitoring equipments would have recorded the value and if the regulator had found deficiencies, they should

have brought it to the notice of the Hon'ble Court/Tribunal and seek for modification of the interim order or permission to conduct inspection etc. The longest period during which the petitioner operated the unit based on interim order passed by the High Court is for a period of five years from April, 2000 to April, 2005. The second longest spell was between October, 2012 to 1st week of April, 2016, when they were operating based on orders passed by NGT. The third period was from 15.08.2009 till 02.03.2012, when they were operating the unit during the pendency of the matter before the Hon'ble Suprme Court and in view of the interim order granted therein. Apart from the above period, during which the unit was operating without a valid order of consent, there were shorter spells also, viz., from April, 1998 to May, 1999; April, 2006 to 2nd week of November, 2006; and May, 2007 to January, 2009.

519.Thus, in our considered view, the respondents are fully justified in considering the past conduct of the petitioner and cumulatively considering

all the reports of the expert agency from the year 1998 and arriving at a conclusion that the petitioner deserves to be permanently closed. Therefore, we find no error in the decision especially, when the respondent-regulator has been able to establish facts and figures about the long list of non-compliance by the petitioner over the period of 22 years.

520.The 9th respondent referred to the order of consent to operate issue under the Water Act dated 19.04.2005 and has drawn our attention to condition No.18 of the additional main conditions stating that the concentrated copper ore shall be automatically sampled at every eight hours of the day and it shall be automatically analysed for the concentration of heavy metals and other impurities; the report thereon shall be furnished to the Board periodically. Our attention was also drawn to condition No.41 which states that the Unit shall conduct every year a comprehensive environmental audit and submit the report the Board; the audit shall focus on the performance of

the pollution control measures and mass balance for all pollutants and the Unit shall also conduct comprehensive environmental impact assessment study once in five years and furnish the report to the Board. Our attention was also drawn to condition Nos.17 and 18 of the consent for expansion of the operation of the plant granted under the Air Act dated 15.11.2006. Condition No.17 therein states that the Unit shall carry out detailed material, environmental and energy audit through suitable agencies after commencement and stabilization of the trial production of 1200 MTPD of copper anode as recommended by NEERI. Condition No.18 states that the Unit shall comply with the recommendations of the details material, environmental and energy audit to be conducted on commencement and stabilization of trial production of expansion activity. On 14.09.2005, show cause notice was issued to the petitioner alleging that they have failed to comply with the condition No.18 of the consent order dated 19.04.2005 as they failed to automatically analyse the sample copper concentrate for heavy

metals and other impurities. The allegation against the petitioner is that the mass balance provided in the product and in the waste generated as stated by the petitioner in their counter affidavit in W.P(MD).No.16005 of 2018 shows that there is no full accounting of arsenic in the process and huge quantum is unaccounted. Before we examine the contentions raised by the 9th respondent, we need to know as to what is material balance which is also known as mass balance.

521.In a book "Introduction to Environmental Engineering and Science" by Gilbert M.Master, Stanford University and Wendell P.Ela, University of Arizona, Third Edition, it has been stated under the Chapter Material Balance as follows. Everything has to go somewhere, this is the simple way to express one of the most fundamental engineering principles. The law of conservation of mass says that when chemical reactions takes place matter is neither created nor destroyed. The concept of material balance

allows to track materials, for example, pollutants from one place to another with mass balance equations and this is stated to be the most widely used tools in analysing pollutants in the environment. It is further stated that the first step in a mass balance analysis is to define the particular region in space that is to be analysed which is often called the control volume. By picturing an imaginary boundary around the region, one can begin to quantify the flow of materials across the boundary as well as accumulation and reaction of materials within the region. It is further stated that a substance that enters the control volume has four possible fates, namely, it may leave the region unchanged, some of it accumulate within the boundary and some of it may be converted to some other substance. There is also possibility that more substance may be produced. By way of illustration, it is stated that CO may be produced by cigarette smoking within the control volume of a room. Further it is stated that when a chemical reaction is written down, it provides both qualitative and quantitative information. Qualitatively it can be seen which

chemicals are interacting to produce which end products and quantitatively the principle of conservation of mass can be applied to give information about how much of each compound is involved to produce the results shown. The book proceeds to give various illustrations to explain the concept of mass balance - A specific reference to Air Pollution. According to the 9th respondent when concentration of a contaminant in a waste stream is higher than the higher end of the range, that contaminant specified for the stream, it renders the waste stream too contaminated to be disposed of in the permitted/prescribed manner. The 9th respondent once again refers to the averments made by the petitioner in the counter affidavit in W.P.(MD).No.16005 of 2018, wherein they have stated that the total quantum of arsenic in the copper concentrate used for the FY 2017-2018 is 1246 MT. According to the 9th respondent in order to balance this quantum, the petitioner has resorted to inflating the quantum of anode produced; mentioned spent anode in the input side; inflated the quantum of spent anode and falsely

increased the concentration of arsenic in the anode, slag, ETP and scrubber cake. Thus, it is alleged that the petitioner has produced a false figure and misrepresented. It is stated in the common counter affidavit that the quantum of anode produced is 392544 tonnes, in the annual report of the petitioner, the quantum is mentioned as 3280765 tonnes and the excess quantum of anode is 64468 tonnes. The 9th respondent refers to the production details of the petitioner and would state that consistently they produce anode in the range of 0.28-0.30 MT per ton of copper concentrate. The design production as mentioned by the petitioner for 20.17-2018 is 0.35 and as per the annual report it is 0.2871. Therefore, the 9th respondent would state that the averments made by the petitioner in the counter affidavit are false statements. If according to the petitioner what has been stated in the counter is correct, then the petitioner is guilty of falsifying production figures to its shareholders in the United Kingdom and also to the Central Government/GST authorities in India. If on the other hand the figure mentioned in the annual report is correct then the

petitioner is guilty of perjury for having provided false and misleading information to the Court by way of an affidavit. It is further contended that the spent anode should not be mentioned as input as it is a product from the process that is recycled back into the smelter. However, there is no such mention of spent anode in the input side in any other document. It is submitted that the reason for doing so is to artificially increase the quantum of anode so as to budget/allocate more quantum of arsenic than what is actually present. It is further stated that the spent anode according to the table is 64467MT, calculating the production of the petitioner for 52 weeks in a year it is stated that the total anode per year is 22848 multiplied by 50 would be 1142 MT of spend anodes. Therefore, the figure of 64467 tones of spend anode as mentioned in the table is false and to generate such quantity it will take 56 years and cannot be done in a single year, namely, 2017-18. Therefore, it is submitted that for computing mass balance arsenic in copper concentrate is relevant on the input side and the petitioner has resorted to this inflation to

inflate the quantum of copper produce thereby increasing the amount of arsenic apportioned to anodes. Further, it is stated that the petitioner has falsely increased the concentration of arsenic present in the waste stream. Thus, it is the contention of the 9th respondent that in 2017-2018, 721.59 MT of arsenic is unaccounted and this quantum of arsenic has been released into the environment and the claim of the petitioner that they have operated within the four corners of law is false apart from the fact that the petitioner operated without authorization under HWM Rules and without manifest as specified in Rule 19 of the HWM Rules, it will not be possible to locate the hazardous waste generated and disposed of by the petitioner. The response of the petitioner is that their copper smelter is based on pyrometallurgical extraction process. Elements other than copper are very minor in the input in the copper concentrate and are usually in the order of PPM. Non-copper metals from smelter are recovered either by Gas Cleaning Plant [GCP] or in the refinery. It is submitted that all metals are either recovered and sold to authorized

recyclers or fixed in a stabilized form in a secured land fill. In this regard, the petitioner has referred to the details of metal extraction as found in Volume 12 Part 2 - Page 31. It is further submitted that the arsenic content in the copper concentrate is fixed in the ETP sludge which is disposed of in the onsite SLF, Nickel is fixed in the ETP slime which is disposed to authorized recyclers. It is submitted that the calculations cannot be based on the ranges submitted by the petitioner, the application given in the past but should be taken on factuals. It is submitted that the total gross copper anode for FY 2017-18 is 392544 MT; fresh copper anode produced from copper concentrate is 328076 MT as reported in the annual report; the imported copper anode for cold doping in the FY 2017-18 is 64464 MT. Therefore, the total gross anode is 392544 MT and this total gross anode considered for this mass balance is sum of fresh copper anode produced from concentrate route and the imported copper anode. There is no difference in production values as alleged by the 9th respondent. It is submitted that the petitioner has furnished a detailed mass balance for the

entire copper operations which includes copper smelter and copper refineries. It is further stated that the respondent agrees with the entire mass balance analysis produced by the petitioner for all input and output material with regard to the copper production except spent anode and this is because of misleading of the table wherein the nomenclature of the spent anode has been used for the copper anode which is an external input to the copper operations. Further, it is stated that in the 2005 report of NEERI, the copper refinery operations has not been included in its mass balance analysis since copper refinery operation started only in the year 2005. Further it is stated that in-house produced scrap anode are not considered for calculating mass balance as they have already been considered in the first input. It is submitted that 64467 MT of spent anode mentioned are in fact the imported anodes. It is further stated that the 9th respondent calculation are based on wrong assumptions without considering the nature of copper concentrate imported by the petitioner. It is submitted that in the application to MoEF for clearance of the

increased production capacity from 900 TPD to 1200 TPD the petitioner has mentioned the estimated range of arsenic value in the copper concentrate during the relevant period due to deeper mining and scarce availability of resource, the concentrate received during the current period of time varies in concentrations. Therefore it is erroneous for the 9th respondent to refer to the ranges which have been mentioned by the petitioner while filing its application to the MoEF. The learned senior counsel for the petitioner has also drawn the attention of the Court to the overview of the copper concentrate quality and treatment methods adopted by the petitioner. Further with regard to the allegation that the petitioner did not conduct material audit, the petitioner has submitted status of compliance of this consent condition.

522.From the averments set out by the petitioner, it is clear that there is a variation in the amount of arsenic which comes out of the process which according to the petitioner is bound to vary on account of deeper mining

activities for recovery of copper concentrate. It is also clear that the quantum of arsenic which is generated in the process is not what has been mentioned by the petitioner while submitting application before the MoEF. Therefore, what stems out of this submission is that the arsenic which is generated during the process continues to vary. The NEERI in its report of March 2005 states that the petitioner is using copper concentrate which are sourced from various countries and at the time of visit to the industry, the petitioner was using three types of copper concentrate having arsenic content of 156 MG/KG, 350 MG/KG and 628 MG/KG with corresponding copper levels of 39.8%, 46.4% and 35.3%. The report further states that copper concentrate with less arsenic content, i.e. 156 MG/KG are available and it has recommended that the petitioner use such cleaner concentrate which will reduce the level of arsenic in the down stream waste and waste waters. With regard to the arsenic balance, it is stated that 0.008 MT/day of arsenic remains unaccounted which may be attributed to the untapped fugitive emission and the concentration of

arsenic in the treated effluent from the ETP. The report recommends that it is critical to monitor in the treated effluent which is used by the petitioner to achieve zero discharge and the TNPCB is required to stipulate a level of arsenic in the treated effluent to avoid arsenic accumulation in slags, etc. In Table 6.8 in the report, the unaccounted quantity of arsenic has been furnished in a tabular column showing the stream from which it is generated. The petitioner filed an application to the MoEF on 03.01.2007 for ratification of 900 MTPD to 1200 MTPD copper production by de-bottlenecking project and in annexure 4 to the said application, the petitioner has mentioned that in copper concentrate arsenic is present in the range of 25-100 TPM and copper anodes, it is in the range of 200-300 TPM. In the rapid EIA done by Vimta Labs sponsored by the petitioner for expansion of copper anode production from 900 TPD to 1200 TPD, the material balance for arsenic has been furnished in table 2.12(c) and in respect of concentrate the total arsenic for three days cumulatively is 4.42 tonnes. The petitioner has filed a hazardous

waste manifest in Form No.13 dated 02.06.2015, wherein the waste description has been given. The report submitted by NEERI of May 2011 to the Hon'ble Supreme Court gives the raw material composition and production details of the petitioner from 2004-2005 to April 2011 and the source of information is based on CPCB inspection conducted during January 2011. The relevant portion of the annual reports of the petitioner has also been filed. From all the above facts and details placed on either side, what emerges is that there is substantial quantity of arsenic, which comes out of the process and admittedly arsenic is a hazardous waste. How does this hazardous waste get monitored. The procedure is spelt out under the HW Management Rules. Unfortunately, the petitioner's HWM authorization was not renewed and kept pending for several years and ultimately rejected. The consequence of the same is rather disturbing. According to the petitioner they have been filing the returns periodically, they have been writing numerous letters to the TNPCB to renew their authorization but nothing happened and their application kept

pending. The consequence that should flow out of the stalemate in the matter is to infer that the regulator has not examined as to the quantum of arsenic which has been generated in the process. From the materials placed on either side, it is evidently clear that the quantum of arsenic is a fluctuating figure and depends upon the quality of copper concentrate imported by the petitioner. As early as in the year 2005, the NEERI has recommended that the petitioner should use cleaner concentrate. The report also states that a quantity of 0.0008 MT/day of arsenic remains unaccounted. The petitioner would state that they have submitted compliance report, material audit requirement has been complied with and they account for the arsenic input and output in the process and there is no un-accounting. The question is as to who will testify for the correctness of the stand taken by the petitioner. Unfortunately, the organization which has to do the same, namely, the regulator, the TNPCB, appears to have not acted, presumably because the HWM authorization was not renewed. It is rather surprising as to how the TNPCB continued to permit

the petitioner to operate and handle and disposed of hazardous waste without renewal of the authorization. Thus, we can safely conclude that there is every possibility of these hazardous chemicals being not accounted for, thereby causing hazard to the environment. The person to be blamed is the regulator and the regulator alone. In the earlier part of this order, we have mentioned that mere pendency of an application for renewal of authorization cannot be a license to operate. Though a valid authorization may not be a condition precedent for applying a consent to operate once production starts and hazardous waste is generated while the plant is in operation, it goes without saying that handling and disposal of the hazardous waste is required to be done in accordance with the rules and conditions stipulated in the order of authorization. Thus, many issues have gone unnoticed and the regulator for the reasons best known has not followed up the matter with earnestness thereby putting the people of the locality in peril.

523.The next aspect we consider is regarding the Hazardous Waste Management at the petitioner's Unit. In the report submitted by the Monitoring Committee to the Hon'ble Supreme Court during September 2004, it has been stated that the petitioner has not provided adequate infrastructure and facilities for management of waste generated. The inspecting team found arsenic containing slag dumped in the factory premises in the range of several thousands of tonnes and there is a mountain of arsenic bearing slag and also phospo-gypsum. Further it is stated that there are some issues still to be resolved in terms of the hazardous nature of arsenic bearing ETP waste which were earlier contained in an inadequately designed hazardous waste land fill and required disposal as per the CPCB norms. The Committee was of the opinion that without proper assessment of the infrastructure for the management of hazardous waste in compliance with the directions of the Hon'ble Supreme Court, the environmental clearance for the proposed expansion should not be granted by MoEF and if it has been granted, it shall

be revoked. The Committee also directed the TNPCB to make a detailed visit to the plant to ascertain whether the Unit has already proceeded with the expansion of the project without permission from the appropriate authority in which case the TNPCB shall take suitable action under the EIA notification as well as the Water Act, Air Act and HWM Rules. In the report of the NEERI of March 2005 with regard to the land fill No.1, it is stated that from the design details provided by the petitioner for land fill No.1 constructed prior to the year 2001 is not safe and will not secure the waste in an environmental friendly manner in the long run. Further it is stated that the land fill system is likely to pose significant threat of leaching of various constituents from the contained waste and contamination of ground water. Further it is stated that the petitioner has provided only one monitoring well and since the well is not being monitored regularly by the petitioner/TNPCB, the detailed assessment of the performance of the land fill facility was not possible during the visit. The analysis of ground water sample indicated presence of arsenic [0.08

MG/L] and copper [0.09 MG/L] as against the stipulated limit of 0.05 MG/L as per the Indian Drinking Water Standards thereby indicating the possible relief of arsenic from the land fill. Therefore, it was recommended that the entire quantity of waste contained in land fill No.1 along with bottom soil, liner mater and cover soil be removed and disposed of in a safe and secured land fill facility designed and developed as per the criteria given by the CPCB.

524. With regard to the land fill No.1 [Cell No.1], it was found that the same having been constructed before February 2001 though the criteria fixed by the CPCB in February 2001 may not be applicable yet considering the presence of high concentration of arsenic in the waste and possibility of development of cracks and voids in the asphalt line in a long run, it is felt that a 2 cm of asphalt layer may not offer adequate protection for control of release of arsenic and other contaminants. It was stated that though the ground water samples collected showed arsenic levels within the stipulated limit, it was

stated that the possibility of release of arsenic and other heavy metals in future due to deterioration of asphalt liner cannot be ruled out. Similarly, in respect of Cell No.2 of land fill No.2 inadequacy was pointed out. Ultimately, the report concludes that the land fills constructed by the petitioner prior to the year 2001 may not be safe and may not secure the waste in an environmental friendly manner in the long run. With this findings certain recommendations were made which are contained in paragraph 6.3.3 of the report. The petitioner would contend that the MoEF or CPCB did not issue any specific guidelines for the type of liner system to be followed and as per the recommendation of the Supreme Court Monitoring Committee, the waste stored in the lined pond was shifted to secured land fill constructed in the year 2004 as per the CPCB guidelines under the supervision of the respondent Board. It is submitted that the technology used and the methodology adopted by the petitioner for the construction of the secured land fill is on par with German technology and the construction was carried out by M/s.L&T under

the supervision of the National Productivity Council and since the Supreme Court Monitoring Committee directed the respondent Board to reduce the efficacy of the SLF constructed as per the National Productivity Council, TNPCB carried out efficacy of the existing land fill in the year 2006 and it was observed to be confirming with requirements. Further it is reiterated that the design measures adopted by the petitioner are at par with global standards which are followed by all industries in India. The liner system are designed and constructed and installed to prevent mitigation of waste leachate to the adjacent sub-surface soil, ground water or surface water. Further it is submitted that the petitioner Unit has chosen double liner in the construction even though the site do not bear any such condition that mandates the use of double liner system in the secured land fill. It is further submitted that the officials of the TNPCB inspected the secured land fill site during construction. The details of the approvals received for the construction of the secured land fill and capping the secured land fill filed with waste has been done as per the

CPCB guidelines. With regard to the allegation that the petitioner has operated without authorization and have not submitted the manifest for scrubber cake, it is submitted that the petitioner has been in compliance with the consent conditions issued by the TNPCB and has taken efforts disposed the scrubber waste by fixing it with phospo-gypsum produced to cement companies. It is further submitted that the TNPCB recorded compliance status in their inspection report during the process of renewal of HW authorization stating that the scrubber cake is partly sold to beneficial uses. With regard to the presence of arsenic in the soil, the process of disposal to the secured land fill was stated and that the TNPCB has recorded compliance status in this regard. With regard to the enhancement of the quantum of spent catalyst waste, it is submitted that vanadium pentoxide, V_2O_5 is used as a catalyst in the catalytic converter of the sulphuric acid plant to convert SO_2 to SO_3 and to maintain the conversion efficacy the catalyst are partially replaced in a periodical manner. The spent catalyst being hazardous in nature are disposed

in the secured land fill. It is further submitted that during the year 2014 shut down, entire spent catalyst has been replaced with new catalyst which resulted in higher quantity of hazardous waste generation and the petitioner has disclosed the details of the quantity of spent catalyst generated in their HW Annual Return in Form No.4. Further, it is submitted that when the application for renewal of authorization was pending, the petitioner once again reapplied for authorization on 28.04.2015 including additional list of waste and these wastes are generated in a very small quantity during plant maintenance usually kept in stores for giving back to supplier. Over a period of time this got accumulated and hence it was decided to dispose of them in the SLF after obtaining approval from the TNPCB. It is further submitted that when the petitioner applied for renewal of HW authorization in June 2012 there was no change in the list of waste but the quantity of process residue increased from 32850 tonnes per year to 36500 tonnes per year and anticipating the increasing of dust generation from back filters were additional

installed as per the TNPCB direction. With regard to the allegation that all of a sudden in the HW approval application 15 MT of lead scales have been mentioned, it is submitted that lead scale will be generated once a while after expiry of lead anodes in the copper refinery and not generated on regular interval and hence not mentioned in the 2017 application. With regard to the allegation that ETP slime containing Nickel was disposed of to M/s.Suhans Chemicals without they having authorization for handling such waste. It is submitted that the said recycler is authorized for Nickel based residues by the Maharashtra Pollution Control Board and therefore they are authorized to deal with the said waste, thus the petitioner would contend that they have complied with all formalities required by furnishing a comprehensive list of hazardous waste which is never disclosed by other industries and now the petitioner is targeted for doing so. The petitioner adopts the national/international practices while handling hazardous waste such as ETP cake.

525.The above acts as pointed out by the Monitoring Committee and the NEERI coupled with the facts disclosed by the petitioner would show that substantial amount of arsenic bearing slag had been improperly handled by the petitioner and the petitioner had to remove the hazardous waste dumped in the SLF and shift it to a new facility. This according to the petitioner is due compliance of the recommendation made by the Supreme Court Monitoring Committee. However, considering the matter from an environmental perspective, what is required to be seen is the impact on environment caused on account of improperly lined pond/SLF. The fact that the petitioner in the year 2004 rectified the infrastructural deficiency cannot nullify the hazardous effect on environment caused on account of the improper design of the SLF. By removing the hazardous waste which was dumped in the SLF which design was found to be faulty may be a step to ensure that post 2004 there may not be any issues. But the fact remains that it remained dumped in the improperly designed land fill for quite a number of years and it can be easily perceived

about the damage that would have been caused to the environment with particular reference to the ground water contaminant. While applying renewal of HW authorization during May 2014 additional list of wastes were mentioned. The explanation given by the petitioner that these wastes are generated in very small quantity during plant maintenance and they are usually kept in stores for giving back to the supplier is not a convincing explanation. The fact that such additional waste continue to remain in the factory, in store and ultimately disposed of in the SLF would go to show that they were hazardous waste. Similarly lead scales were not mentioned earlier and for the first time included in the renewal application submitted during 2017, the explanation offered is that it is not generated in regular intervals and that is why it was not mentioned in the application. We find this explanation being far from satisfactory. From the details furnished with regard to M/s.Suhans Chemicals, we find that they are not authorized to handle all category of waste generated by the petitioner as admitted by the petitioner themselves that they

are recyclers of Nickel based residues. In any event the authorization given by the Maharashtra Pollution Control Board does not prima facie show that M/s.Suhans Chemical are authorized to recycle the large quantity of waste generated by the petitioner. We make such observation because in the order of consent dated 01.08.2017 granted by the Maharashtra Pollution Control Board to M/s.Suhans Chemicals Private Limited that they are authorized to manufacture Nickel Catalyst with maximum quantity of 240 tonnes per annum, Nickel salt of 48 tonnes per annum and as per the conditions in the said consent order they can accept and process spent catalyst containing Nickel – 610MF per annum as raw material. Thus, we find that the TNPCB had failed to properly monitor the Hazardous Waste Management procedures adopted by the petitioner, which ultimately boils down to the fact that the hazardous waste authorization was not renewed and yet the petitioner continued to carry on production, generate and handle hazardous waste. The fact as to whether the authorization/consent granted to M/s.Suhans Chemicals

was implemented strictly is also a matter which remains unanswered. Obviously the said Company would not be exclusively handling the waste generated by the petitioner alone as there is nothing on record to indicate any such arrangement. Thus, the consented capacity can hardly be stated to have been exclusively used for the waste generated by the petitioner. That apart, the consent order given to M/s.Suhans Chemicals is for Nickel based waste and the question is as to what about the other waste which also form part of the waste generated. Therefore, we find that the explanation offered in this regard is far from satisfactory and not convincing. Once again it is the regulator who has to be held responsible for not carrying out their statutory duty in a proper manner. Thus the abundance of materials available before us convinces us to apply the doctrine as propounded by the Hon'ble Supreme Court that even if there is to be an error in the assessment it would be better to err rather than to give a clean chit to the petitioner as there are several inadequacies which have been pointed out, some of it are claimed to have been

rectified and the issue would be what has happened when the infrastructural defect continued to exist. Therefore, the hazardous waste management procedures adopted by the petitioner are far from being satisfactory.

526.TNPCB issued show cause notice dated 24.03.2013 for contravention of the conditions imposed in the consent order issued under Section 21 of the Air Act. It was stated that during inspection on 23.03.2013, by the officials of the TNPCB, Thoothukudi, the officers of the petitioner reported that on 21.03.2013 around 03.20 am, the smelter was shut down to attend a puncture in furnace roof cooling jacket tube and the smelter was against put into service from 23.03.2013 at 03.30 am. It was stated that during the said time, the sulphuric acid plant bed was maintained at the required temperature using furnace oil and the emission was routed through TGS and around 04.00 am, copper concentrate at the rate of 26.77 ton/hour was fed as a trial for few minutes. The show cause notice further states that on 23.03.2013,

public complaints were received around 07.00 am about eye irritation, throat suffocation in New Colony, Keelashanmughapuram and other areas of Thoothukudi town. It was stated that from the SO_2 trend graphs of ambient air quality, the value shot up suddenly from 20 ug/m^3 to 62 ug/m^3 located in the east direction around 06.00 am. The value was immediately reduced to 10 ug/m^3 around 06.35 am and at that time, the wind direction was from north-west to south-east, that is, towards Thoothukudi town and the wind speed was 1.224 kmph as per the records maintained by the petitioner.

527.Further, it is stated that from the data of the online monitor connected with Care Air Centre of TNPCB, Chennai, it is seen that the SO_2 emission monitor was not connected with Care Air Centre, Chennai during that time. Therefore, it was stated that air pollution control measures were not properly operated and the SO_2 emission monitor was not connected with Care Air Centre, Chennai. Accordingly, the petitioner was informed that they are

violating the condition issued to them under Section 21 of the Air Act, liable for being punished for offences under Section 37 read with Section 31A of the Air Act. The petitioner was directed to show cause within three days as to why penal action should not be taken against them and why an order of closure should not be passed and stoppage of electricity and water supply be not effected.

528.The petitioner by letter dated 25.03.2013, addressed the Care Air Centre, Chennai, in reply to the e-mail dated 23.03.2013, referring to inspection of the Chief Scientific Officer and Member Secretary, TNPCB on 24.03.2013, stated that the values are calibration gas value fed to the analyser and not the actual value. It was stated that the calibration of sulphuric acid plant SO_2 online analyser was carried out on 23.03.2013 between 09.00 am and 11.15 am. The petitioner submitted their reply dated 27.03.2013 stating that during the alleged gas complaint period, the values of sulphuric acid plant

SO_2 on-line analyser as reported at Care Air Centre, Chennai, were found within the prescribed norms of 479 PPM, as the software captures the actual emission values, even though the software was in maintenance mode inadvertently during this period.

529.It was further reiterated that during the relevant time, there was a calibration exercise and the ambient air quality as stated in the show cause notice was in the range of 20 ug/m^3 to 62 ug/m^3 at around 06.00 am, which is within the permissible limit of 80 ug/m^3. Further, the SO_2 emission monitor has recorded values in the range of 401 PPM to 1123 PPM, which is similar to the values experienced between 02.00 am to 02.45 am, the calibration period, which confirms the values are only calibration gas values fed to the analyser and not actual emission values.

530.With regard to the complaints received from the public regarding eye irritation and throat suffocation, the petitioner stated that during

the complaint period, the emission norms were well within the prescribed limits of sulphuric acid plant and hence, there has been no concern whatsoever on environment, health and safety related matters due to their operation. Thus, the petitioner would state that the operation, which was carried out at the relevant time, was a calibration exercise and only span gas was fed in.

531.The second aspect pointed out by the petitioner is that even going by the value mentioned in the show cause notice, that is, 62 ug/m^3, it is within the permissible limit of 80 ug/m^3. The fact that the District Administration issued a public notice asking the public not to panic is sufficient to disbelieve the stand of the public that they had suffered throat irritation, severe cough, breathing problems, nausea, etc.

532.If the incident cannot be disputed, only two aspects need to be seen, viz., whether the petitioner is responsible for such an incident. If the

petitioner is responsible and if admittedly, there was a spike at the relevant time, has it or will it in future pose as a threat to the local public.

533.Reading of the reply to the show cause notice and the averments in the petitioner's rejoinder to the counter affidavit filed by the second respondent, it is seen that there is no specific denial by the petitioner about the said incident, nor the petitioner attempts to state that some other industry is the cause and not themselves. Therefore, the incident cannot be disbelieved and it is held that there was admittedly a spike in the gas, which has caused hardship to the public, which resulted in a panic situation in the area, which has compelled the Revenue Administration to issue a press release. From the press release, it is seen that responsibility was fixed on the petitioner resulting in an order of closure of the industry for a period of five days by exercising power under Section 133 Cr.PC.

534.Having held so, we now have to decide whether the values recorded were as a result of a calibration exercise, or was it actual emission value. We are surprised to see that the calibration reports, prepared by the petitioner, who claims to function with state of art technology, are hand written reports. A bunch of reports have been filed by the petitioner in their typed set and all of them are hand written. When the petitioner points out that the equipments of the Board and other assessment made by them should be done properly, it goes without saying that the petitioner is also under an obligation to ensure that fair and appropriate steps are taken by them. When a dispute arises as to whether it was a calibration exercise or an actual emission, if the petitioner seeks to substantiate their case as a calibration exercise, they should be able to do so with sufficient documents. In such factual scenario, when hand written documents are relied on, it gives room for suspicion. Considering the magnitude of the petitioner's plant, it is hard to believe that the petitioner maintains calibration exercise records as loose sheets and they

are manually prepared. The data, which is recorded has to be electronically recorded and the petitioner should have ensured that no tampering can take place in such electronic record. However, the petitioner places much reliance on hand written calibration exercise reports. We are not convinced to accept such reports more particularly, when the situation is very sensitive and public interest is involved.

535.In the reply to the show cause notice, the petitioner states that they *"understand"* that certain complaints were received from the public regarding eye irritation and throat suffocation. This reply is dated 27.03.2013, and much prior to that, the statement given by the District Collector was reported in the Tamil Dailies on 25.03.2013, and even prior to that, an inspection was conducted by the officials of the Pollution Control Board. Therefore, to feign ignorance of the incident is unbecoming of a corporate of the magnitude, such as the petitioner. Statements have been filed before the

Hon'ble Supreme Court, which were recorded by the Sub Divisional Magistrate and the Revenue Divisional Officer, Thoothukudi and all of them uniformly state about eye irritation, suffocation, etc. suffered by the people. The petitioner cannot attribute any motive to the local public because on one hand, they say several of the local public want their industry to continue operations. That apart, the petitioner cannot attribute motives to the general public spread over the length and breath of Thoothukudi. Therefore, the petitioner cannot wriggle out to state that they have nothing to do with the said incident.

536.Next, we have to consider as to whether the defence raised by the petitioner stating that what was done by them was calibration exercise is a correct and justifiable stand. The candid admission of the petitioner that the software was in a maintenance mode inadvertently is hard to believe especially when, the petitioner has taken a stand that they have adopted a state of art

technology and even their trucks, which transport the raw material are GPS monitored. Therefore, the "story" which they seek to tell about the maintenance mode of the software is unbelievable and to be disbelieved and there is something more than what meets the eye.

537.In the report of the inspecting team, comprising of the Member Secretary, TNPCB; JCEE, Madurai; DEE, Thoothukudi; AEE, Thoothukudi; and CSO, Care Air Centre, who inspected the industry on 24.03.2013, reported that the plant was stopped on 21.03.2013 around 03.20 am, the smelter furnace was shut down for maintenance at the lance cooler failure and after replacement of the furnace cooling jacket, the smelter was started at 03.30 am on 23.03.2013. The copper concentrate was charged at the rate of 26.7 ton/hour from 04.10 am to 04.52 am and from 05.10 am to 10.28 am. Again it was charged at the rate of 42.9 ton/hour from 13.32 hours onwards. It is stated that during the start up operation, there has been a shock load discharge

observed from SAP-I and high values in the range of 1104 PPM to 1123 PPM SO_2 were recorded at the Care Air Centre, Chennai on 22.03.2013. The periods observed were the same as the charging periods from DCS-I at 02.15 hours and other at 09.15 – 11.00 hours. It was stated that SO_2 was observed to be discharged into the ambient air at a concentration level of 2947.03 ug/m^3 and it exceeded the prescribed standard of 1250 ug/m^3 for sulphuric acid plant with capacity of above 300 ton/day. The same was recorded in the software at SAP-I at the industrial site and confirmed during inspection, which resulted in issuance of show cause notice dated 24.03.2013. The petitioner has not challenged the inspection conducted by a team of experts headed by the Member Secretary, TNPCB himself. The learned Senior Counsel appearing for the petitioner referred to various documents and took strenuous efforts to explain as to what is the maintenance mode and how the petitioner is not responsible for any such incident and the plant was only in the calibration stage.

538.The TNPCB has stated that the petitioner has not given any prior information about this shut down and start up of the smelter operation, they have not reported to the Care Air Centre, about the alleged calibration of analyser in the maintenance mode. The stand taken by the petitioner was disbelieved, as there was clear logged on-line continuous monitoring data register at Care Air Centre, Chennai confirming the exceedance of emission standards of SO_2 from SAP-I. Furthermore, adverse inference was drawn because there was no ambient air quality monitoring station in the relevant area. The ambient air quality monitor available in the factory site did not record any higher value and this was held to be not a ground to exonerate the petitioner. The fact that the people residing about 5 kms away from the unit suffered the symptoms was considered to be very relevant because of the wind direction and the wind speed and as to how the plume will subside. TNPCB had relied upon statements given by the public as well as Doctors. The

petitioner seeks to discredit and discard them by alleging that the deponents were tutored or statements obtained to suit the requirement. In our considered view, the petitioner cannot be permitted to take such a stand, which in our view, is wholly untenable and arbitrary. The general public have experienced the symptoms and no sane member of public, that too, professional like Doctors would come forward to utter falsehood. The fact that power under section 133 Cr.P.C., was invoked and the pant was shut down itself would show that the District Revenue Administration had taken note of all parameters and after having properly ascertained as to the cause for the incident, have passed an order of closure.

539.The petitioner, in their rejoinder affidavit, states that only during long shut down of activities, they will intimate the TNPCB and not for intermittent stoppage. With regard to the intimation regarding calibration, the petitioner would refer to the instructions given by the original equipment

manufacturer and seek to explain that the analyser reading with "M Tag" are not true representation of actual reading and it only denotes the calibration gas value fed to the analyser. Thus, the petitioner would candidly admit that intimation regarding a calibration exercise was not given to the TNPCB, rather, they would refer to the instructions given by the equipment manufacturer (OE Supplier) and that TNPCB should be aware of the fact situation. The contention raised by the petitioner is not acceptable for more than one reason. Firstly, the calibration exercise is not an exercise, which is unregulated, as the CPCB has issued instructions in the form of guidelines for Online Continuous Effluent Monitoring Systems (OCEMS). In para 5.4 which deals with "quantification", instrument calibration has been mentioned in para 5.4.1; validation of COD, BOD, TOC and TSS have been mentioned in para 5.4.2. The report in protocol is contained in para 6.0 and data management 6.1. Therefore, the guidelines, which have been framed by the CPCB have to be adhered to and the stand taken by the petitioner that they are in the habit of

sending communication to the Board only during long shut down activity and not during intermittent stoppage appears to be highly unprofessional. Shutting down a plant of such magnitude has been explained to us by the learned Senior Counsel for the petitioner to be a very elaborate and a technical exercise. If that is so, then re-starting such a plant is equally or more serious an exercise. The stoppage of the plant as was admitted by the petitioner was due to puncture in the furnace roof cooling jacket tube. The technical problem, which had occurred, appears to be not a minor problem or otherwise, the petitioner would have had alternate methods to attend such problems without requiring the plant to be shut down. Therefore, we hold that the petitioner should have intimated about the stoppage though according to them, it was only an intermittent stoppage. The 9th respondent referred to an opinion given by a former Professor of Chemical Engineering, IIT, Madras. The learned Senior Counsel for the petitioner objected to the said report on the ground that the Professor was part of the Committee constituted by the

Hon'ble Supreme Court during 2010, when the Special Leave Petition was entertained. If the said Professor was part of an inspecting team constituted by the Hon'ble Supreme Court, the petitioner can hardly question his competence and independence more so when, the petitioner did not object to him being part of the Committee constituted by the Hon'ble Supreme Court. Therefore, we hold that the objection raised by the petitioner on the opinion of the Professor to be not tenable. Sans technical aspects mentioned in the report what strikes our eye is the statement that the symptoms reported are consistent with symptoms triggered by exposure to SO_2. The intensity of symptoms reported from Thoothukudi town correspond to SO_2 levels above acute exposure guideline values (AEGL-I and II) laid down by the United States Environment Protection Agency. The Professor has taken note of the low wind speed, that is, 1.22 kmph and states that it corresponds with the sequence of events and the timing of concept of symptoms reported by the residents of Thoothukudi. The fact that between 05.50 am to 06.05 am, the on-line

ambient air quality monitor registered a sharp spike in the level of SO_2 to more than 60 ug/m^3 cannot be denied by the petitioner. There is no explanation or plausible explanation given by the petitioner for such sudden sharp spike. The readings on two previous dates did not show anything abnormal. It has been pointed out that data from the monitor is not available after 10.15 am and it is stated that this is curious and raises a question as to why the monitor stopped working precisely around the time of the second instance, that is, 09.15 am to 11.15 am that the Care Air Centre recorded SO_2 level in excess of 1123.6 PPM. That apart, the petitioner is the sole large emitter of SO_2 upwind of Thoothukudi town as per the meteorological data available. Thus, the Professor concludes by stating that he is of the opinion that evidences strongly point towards the petitioner, as the source of emissions responsible for the acute exposure effects on 23.03.2013.

540.The petitioner had taken a stand that for calibration, the company had ejected zero gas (0 PPM) and span gas of 1000 PPM calibration.

The calibration report provided records the values as 5 PPM and 6 PPM for zero gas before calibration and as zero after calibration. For 1000 PPM, span gas diluted from 4000 PPM standards, the report records 1004 PPM before calibration and 1000 PPM after calibration. The question which the expert has posed is, if these were the cases, the same numbers ought to have been displayed in the Care Air Centre. The display in the Care Air Centre recorded 1104.2 PPM, 1123.6 PPM and 803.5 PPM more importantly, the levels reflected in the Care Air Centre's display reflects the maximum recordable levels of the device and not the readings during calibration. The upper end of the range measurement is 1123.6 PPM, emissions above that, even if they exceed the level, will not be recorded and the only way to deduce the intensity of the emission is by gauging the nature and extent of symptoms among exposed population.

541.In our considered view, the technical opinion rendered by the Professor, who in fact, was part of the inspecting team constituted by the

Hon'ble Supreme Court should be given due credence. The factual aspect regarding the maximum recordable level of the device as 1123.6 PPM has been mentioned in the opinion, which in our considered view, is a very vital information, not made known to us by TNPCB, nor it has been shown that the opinion is wrong.

542. The petitioner has referred to the monitoring stations of TNPCB in SIPCOT area near AVM Jewellery in Thoothukudi town to show that the values recorded in those stations are much less than the permissible limit. We are not convinced with the said contention for the simple reason that the values recorded in the Care Air Centre are of utmost importance and cannot be brushed aside. More interestingly, while concluding the written submission on this aspect, the petitioner would state that even assuming that there has been emission, the MoEF notification dated 16.11.2009, clarifies that it is only when the levels exceed the prescribed limits for more than two days, measures

to be adopted and the measures mentioned therein are regular or continuous monitoring or further investigation. In our considered view, the MoEF notification dated 16.11.2009 cannot be applied to the present fact situation, where there has been a public out cry, action had to be initiated under Section 133 Cr.P.C., to abate the nuisance. The Revenue Divisional Officer has recorded statements from the public, Professor, Doctors, etc., and to state that the MoEF grants two days time for action to be initiated even if there is an excess, is an argument which has to be out rightly rejected.

543.In the light of the findings and facts recorded by us on the above issue, we disbelieve the stand taken by the petitioner that they were under a calibration exercise and we find that the stand taken by the TNPCB to be just and proper and the professional opinion rendered by the expert also aids and strengthens the decision taken by TNPCB leading to the closure of the petitioner industry.

544.The 9th respondent referred to the report submitted by the Department of Community Medicine, Tirunelveli Medical College in 2008 tilted "Health Status and Epidemiological Study around 5km radius of the petitioner-industry". The study covered a population of 80,725 people and compared the health status in villages around the petitioner-industry with the average health status prevailing in the State and two other locations, where there were no major industries. The report indicated prevalence of brain tumours among males is 1000 times national incidence rate; 12.6% of death due to nervous diseases; 13.9% respiratory diseases were significantly more prevalent in the areas surrounding the factory; incidence of asthmatic bronchitis is 2.8%, more than double the State average of 1.29%; eczematous skin lesions were high (1.38%) in the region; women in the area had more menstrual disorders; disorders of the joint and musculoskeletal system were significantly elevated in the villages around the factory; iron content in the

groundwater in Kumareddiapuram and Therkuveerapandiapuram were 17 and 20 times higher than permissible levels prescribed by the Bureau of Indian Standards (BIS) for drinking water and 2 out of 7 groundwater samples had higher levels of fluoride than the permissible levels.

545.The petitioner's response is that the report, as a whole, does not show any health issues due to the operation of the petitioner's unit. The Community Health Monitoring Reports and the information received by the petitioner under the Right to Information does not show any health issues due to its operations. Further, the petitioner are operating from 1997 with employee strength of more than 4,000 including women technicians and Engineers and if any health issues had arisen, they would be most impacted. The Community Health Monitoring Reports shared with TNPCB from the year 2011 once in every six months and the latest report of February, 2018 were referred to and submitted that there are no major health effects identified

or attributed to the petitioner-industry. The credibility of the health report is being questioned on the ground that it is not a report based on scientifically designed study geared to identify the impacts of the petitioner's factory on the health of surrounding community. On the other hand, the 9th respondent seeks to disregard the data presented by the petitioner, which is gathered from medical camps conducted by the petitioner as part of the company's CSR exercise and no meaningful inference can be drawn from the report given by the petitioner. The petitioner would contend that the data submitted by the 9th respondent is self-serving, unsubstantiated and unreliable and the so-called symptom survey has been conducted by the members of the anti sterlite peoples movement, who are having vested interest and no credence should be given to the said data.

546.In our considered view, the study conducted by the Department of Community Medicine, Tirunelveli Medical College cannot be discredited or

outrightly discarded. The report states that it has covered a population of 80,725 people and the impact of the petitioner-industry has been brought out in the report. No material has been placed before us to show that the petitioner has disputed the report at an earlier point of time and when this has been pointed out before this Court, it is the petitioner's case that the report as a whole does not indicate any health concern due to the operation of the petitioner's unit. The duty to provide a clean and health living atmosphere is the duty of the State, doctrine of public trust cast a duty on the State. Nevertheless, if operation of the industry causes certain health concerns, it is a matter, which should have been taken with utmost seriousness by the appropriate authorities. When two sets of data are pitted against each other, that is, data collected by a Government Medical College and data submitted by the petitioner, the authorities should have made an endeavour to assess the health condition of the people of the locality. The petitioner being, a red category industry, highly polluting industry, had no fundamental right to carry

on its business, but for the consent/permission granted by the MoEF and the TNPCB. Therefore, the burden is on the petitioner to prove that their operations are benign. Unfortunately, the appropriate authorities of the State appear to have not given a serious thought to the health aspect of the general public living in and around the industry. No material was placed before us to show as to how the health monitoring reports submitted once in six months are processed. Whether the TNPCB has a team of medical experts or it referred to the District Medical Hospital etc. Thus, we would be well justified in considering that the periodical reports said to have been submitted by the petitioner once in six months are merely 'filed'.

547.So far as the health of the employees is concerned, there is no data, which is available with the authorities to controvert the stand taken by the petitioner that there are no health issues faced by their employees on account of their operation. Therefore, we conclude that the health concern of

the people in and around the petitioner's factory has not been properly monitored. It may be true that one in six months, the company submits their periodical health reports, but submission of such reports to the authorities is not sufficient, but what is required is cross verification, which appears to have not been done. Thus, a deeper probe into this issue is required and as to what extent, the operation of the petitioner's unit has impacted on the health of the general public in the area in question.

548.Next we proceed to take into consideration the principles of law laid down by the Hon'ble Supreme Court in environmental matter.

549.In ***M.C.Mehta vs. UoI, (1987) 1 SCC 395,*** the Hon'ble Supreme Court while dealing with liability of industries engaged in hazardous or dangerous activities, held that an enterprise, which is engaged in hazardous or inherently dangerous industry, which poses potential threat to the health and

safety of persons working in the factory and residing in the surrounding areas, owes an absolute non-delegable duty to the community to ensure that no harm results to anyone. Such enterprise was held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged, must be conducted with the highest standards of safety and, if any harm results to anyone on account of an accident in the operation of such activity resulting, for example in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident as part of the social cost. It was further held that such liability is not subject to any exceptions, which operates *vis-a-vis* the tortious principle of "strict liability" under the rule in ***Rylands vs. Fletcher, (1868 LR 3 HL330).*** Further, it was held that if the enterprise is permitted to carry on hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads, the

larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in carrying on of the hazardous or inherently dangerous activity by the enterprise.

550.In ***M.C.Mehta vs. UoI, (1987) 4 SCC 463,*** the Hon'ble Supreme Court while dealing with the case of letting out the trade effluent into the river Ganga, pointed out that water is the most important of the elements of nature. River valleys have been the cradles of civilisation from the beginning of the world. Steps have, therefore, to be taken for the purpose of protecting the cleanliness of the stream in the river Ganga, which is in fact, the life sustainer of a larger part of Northern India. It was pointed out that Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. Article 51-A of the Constitution imposes as one of the fundamental duties on every citizen the duty to protect and improve the natural environment including

forests, lakes, rivers and wildlife and to have compassion for living creatures. In the United Nations Conference on Human Environment at Stockhom from 5th to 16th of June, 1972, it was pointed out that to defend and improve the human environment for present and future generation has become an imperative goal for mankind – a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and world-wide economic and social development. While lamenting that the Government as well as the Parliament though have taken a number of steps to control the water pollution, nothing substantial has been achieved, no law or authority can succeed in removing the pollution, unless people cooperate. Ultimately, the Court directed closure of the tanneries, which have failed to take minimum steps required for the primary treatment of industrial effluent and was conscious that closure of tanneries may bring unemployment, loss of revenue, but held that life, health and ecology have greater importance to the people.

551.In ***Vellore Citizens' Welfare Forum,*** the Hon'ble Supreme Court dealt with a Public Interest Litigation under Article 32 of the Constitution, against the pollution which is being caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu. The Hon'ble Supreme Court issued directions to NEERI to send a team of experts to examine the feasibility of setting up of Common Effluent Treatment Plants (CETPs). NEERI submitted a report stating that water samples collected from dug-wells near tannery cluster are unfit for drinking and the water in Palar river downstream from the place where effluent is discharged, is highly polluted. Therefore, the Court directed all the tanneries in five Districts in the State of Tamil Nadu to be closed with immediate effect. The matter was being monitored by the Hon'ble Supreme Court for nearly five years and it was pointed out that despite repeated extensions granted by the Court during the five-year-period and prior to that by the TNPCB, the tanneries in the State of Tamil Nadu have miserably failed

to control the pollution generated by them. The Court took note of the economic consequences and the employment avenues and pointed out that the leather industry in India has become a major foreign exchange earner and Tamil Nadu was the leading exporter of finished leather accounting for approximately 80% of the country's export, that though the leather industry is of vital importance to the country, as it generates foreign exchange and provides employment avenues, it has no right to destroy the ecology, degrade the environment and pose a health hazard. It cannot be permitted to expand or even continue with the production, unless it tackles by itself the problem of pollution created by the said industry (emphasis supplied). It was further pointed out that the traditional concept that development and ecology are opposed to each other is no longer acceptable and "sustainable development" is the answer. Explaining further, it was pointed out that some of the salient principles of "sustainable development", as culled-out from the Brundtland Report and other doctrines are Inter-Generational Equity, Use and

Conservation of Nature Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Cooperate, Eradication of Poverty and Financial Assistance to the developing countries. Explaining the meaning of the "Precautionary Principles" and "Polluter Pays Principles", which are essential features of "sustainable development", in the context of Municipal Law, it was held that environmental measures would mean measures by the State Government and the statutory authorities to anticipate, prevent and attack the causes of environmental degradation; where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation and the onus of proof is on the industrialist to show that his action is environmentally benign.

552.In ***Indian Council for Enviro-Legal Action,*** it was held that once the activity carried on is hazardous or inherently dangerous, the person

carrying on such activity is liable to make good the loss caused by any other person by his activity irrespective of the fact whether, he took reasonable care while carrying on his activity, as the rule is premised upon the very nature of activity carried on. Further, it was pointed out that the "Precautionary Principle" and the "Polluter Pays Principle" have been accepted as part of environmental law of the country. Discussing about the EP Act, it was held that the main purpose of the Act is to create an authority or authorities under Section 3(3) of the Act with adequate powers to control pollution and protect environment. Noting the serious condition in the five Districts in the State of Tamil Nadu, where the tanneries were operating, it was pointed out that if they are permitted to continue, then in the near future all rivers/canals would be polluted, underground waters contaminated, agricultural lands turned barren and the residents of the area exposed to serious diseases. Therefore, the Court directed the Central Government to take immediate action under the provisions of the EP Act. Considering the cases of the industry, which had

setup necessary pollution control device subsequently, it was held that those industries shall be liable to pay for the past pollution generated by them, which has resulted in environmental degradation and suffering to the residents of the area.

553.In ***Kamal Nath***, the Court explained the legal theory developed by the ancient Roman Empire - "Doctrine of Public Trust". The said doctrine was explained by observing that it primarily rests on the principle that certain resources like air, sea, waters and forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The resources being, a gift of nature, they should be made freely available to everyone irrespective of status in life., the said doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public, rather than to permit their use for private ownership or commercial purposes. It was pointed out that protection of

ecological values is among the purposes of public trust, may give rise to an argument that ecology and environment protection is a relevant factor to determine which lands, waters or airs are protected by the public doctrine. It was held that there is no reason as to why the "public trust doctrine" should not be expanded to include all ecosystems operating in our natural resources. Further, our legal system, based on English Common Law, includes the "public trust doctrine" as part of its jurisprudence. The State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. The State as a Trustee is under a legal duty to protect the natural resources. It was held that one who pollutes the environment must pay to reverse the damage caused by its act and "public trust doctrine" was made part of the law of the land.

554.In ***Prof.M.V.Nayudu***, the Hon'ble Supreme Court elaborately discussed the issue pertaining to the uncertain nature of scientific opinions. It

was pointed out that in the environment field, the uncertainty of scientific opinion has created serious problems for the Courts. After referring to certain decisions of the United States Supreme Court, it was held that uncertainty becomes a problem, when scientific knowledge is institutionalized in policy making or used as a basis for decision-making by agencies and Courts. Scientists may refine, modify or discard variables or models, when more information is available; however, agencies and Courts must make choices based on existing scientific knowledge. In addition, agency decision-making evidence is generally presented in a scientific form that cannot be easily tested. Therefore, inadequacies in the record due to uncertainty or insufficient knowledge, may not be properly considered. It was further held that the inadequacies of science result from identification of adverse effects of a hazard and then working backwards to find the causes; secondly, where clinical tests are performed, where toxins are involved; and thirdly, conclusions based on epidemiological studies are flawed by the scientist's

inability to control or even accurately assess past exposure of the subject. It was further pointed out that it is the above uncertainty of science in the environmental context, that has led international conferences to formulate new legal theories and rules of evidence. The Court referred to the "Precautionary Principles" and the new burden of proof in ***Vellore Citizens' Welfare Forum*** case and explained the meaning in more detail so that, Courts and Tribunals or Environmental Authorities can properly apply the said principles in the matters, which come before them. It was held that the "Precautionary Principle" has replaced the assimilative capacity principle and in order to protect environment, the precautionary approach shall be widely applied by States according to their capabilities, where there are threats of serious or irreversible damages, lack of scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation. The Court referred to an Article by Charmian Barton with regard to the cause for emergence of the said principle, wherein, the learned author had stated that

there is nothing to prevent decision-makers from assessing the record and concluding that there is inadequate information on which to reach a determination. If it is not possible to make a decision with "some" confidence, then it makes sense to err on the side of caution and prevent activities that may cause serious or irreversible harm. The "Principle of Precaution" was further explained by stating that it involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty (emphasis supplied). Environmental protection should not only aim at protecting health, property and economic interest, but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger, but also by concern of risk potential (emphasis supplied). While dealing with the issue pertaining to burden of proof, the Hon'ble Supreme Court held that the "Precautionary Principle" suggests that where there is an identifiable risk of serious or irreversible harm, for example widespread toxic

pollution, it may be appropriate to place the burden of proof on the person or the entity proposing the activity, that is, potentially harmful to environment. If insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environment protection. The Court dealt with the duty of the present generation towards posterity: Principle of Inter-Generational Equity: and Rights of the Future against the Present. The Court referred to principles 1 and 2 of the Stockholm declaration wherein, the environment is viewed more as a resource basis for the survival of the present and future generations (emphasis supplied).

555.In ***M.C.Mehta vs. UoI, (2004) 12 SCC 118***, the Hon'ble Supreme Court held that the most vital necessities, viz., air, water and soil, having regard to right to life under Article 21 of the Constitution, the same cannot be permitted to be misused and polluted so as to reduce the quality of life of others. It was pointed out that in such matters, the required standard is

that the risk of harm to the environment or to human health is to be decided in public interest according to "reasonable persons". While considering as to which would take precedence for protection, the Court pointed out that in case of doubt, protection of an environment would have precedence over the economic interest. "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 (emphasis supplied).

556.In ***Intellectuals Forum,*** the Honble Supreme Court considered the aspect where industries invested several crores of rupees for setting up their enterprise. The Court referred to the book "Environmental Activities Handbook", wherein it had been mentioned that the Judges are carried away by the monies spent on projects and that mega projects, that harm the environment, are not condemned. It was pointed out that criticism seems to be

baseless, as in ***Virendra Gaur,*** the Hon'ble Supreme Court insisted on the demolition of structure, which has been constructed on the lands reserved for any purposes and the Court did not allow decision to be frustrated by the action of parties. It was further pointed out that the Hon'ble Supreme Court followed the said decision in several cases issuing directions and ensuring its enforcement by nothing short of demolition or restoration of *status quo* ante. That the fact that crores of rupees has already been spent on development projects, did not convince the Court while being in a zeal to jealously safeguarding the environment and in preventing the abuse of environment by a group of human or authorities of the State or that matter (emphasis supplied).

557.In ***Tirupur Dyeing Factory Owners Association,*** the Hon'ble Supreme Court while dealing with the Public Interest Litigation for preservation of ecology and keeping Noyyal river in Tamil Nadu, free from pollution, took note of the fact that the country earned about Rs.10,000 Crores

in foreign exchange annually as a result of garment export from Tiruppur. The Court noted that the reports of the Monitoring Committee appointed by the High Court assessed the amount paid for removing the sludge from the rivers for treatment of water making it worth for irrigation and human consumption. After referring to the decision in ***Indian Council for Enviro-Legal Action***; ***Vellore Citizens Welfare Forum*** ; ***People's Union for Civil Liberties vs. UoI & Anr. [(1997) 3 SCC 433]; Prof.M.V.Naidu*** ; and ***M.C.Mehta vs. UoI, (2004) 12 SCC 118,*** it was pointed out that the concept of sustainable development covers the development that meets the needs of the person without compromising the ability of the future generation to meet their own needs; it means development that can take place and which can be sustained by nature/ecology with or without mitigation. Therefore, in such matters, the required standard is that the risk of harm to the environment or to human health is to be decided in public interest, according to a "reasonable person's" test (emphasis supplied). With regard to the closure of the industries, the

Court pointed out that in case in spite of stringent conditions, degradation of environment continues and reaches a stage of no return, the Court may consider the closure of industrial activities in areas where there is such a risk (emphasis supplied). The authorities also have to take into consideration the macro effect of wide-scale land and environmental degradation caused by absence of remedial measures. Right to information and community participation for protection of environment and human health is also a right, which flows from Article 21 of the Constitution.

558.In ***Indian Handicrafts Emporium,*** the Court after referring to Articles 48-A and 51-A of the Constitution held that eyes cannot be shut to the statements made under Article 48-A of the Constitution, which enjoins upon the State to protect and improve the environment and to safeguard the forest and wildlife. Further, it was held that what is destructive of environment, forest and wildlife, thus, in contrary, the directive principles of State policy,

which is fundamental to the governance, which is to be given effect to, Article 51-A was referred to. These observations were made in the context of amending the objects and reasons of an enactment and the circumstances in which they have to be brought out.

559.In ***Uday Singh,*** the Hon'ble Supreme Court considered an appeal against an order pertaining to the release of a tractor and trolley seized for being involved in illegal excavation of sand from Chambal River. The Court while dealing with the amendment made by the State of Maharashtra to the Indian Forest Act, 1927, held that the amendments are introduced with the solitary public purpose, after referring to Articles 48-A and 51-A(g) of the Constitution, it held that the legislature is intended to ensure that confiscation is an effective deterrent. The absence of effective deterrence was considered by the legislature to be a deficiency legal regime and the State amendment has sought to overcome that deficiency by imposing stringent deterrents against

activities which threaten the pristine existence of forests in Madhya Pradesh. It was held that as an effective tool for protecting and preserving environment, provisions must be made to the purposive interpretation, as it is only when the interpretation of law keeps pace to the object of the legislature with grave evils, which pose a danger to our natural environment can be suppressed. It was pointed out that the avarice humankind through the ages has resulted in an alarming depletion of the natural environment, the consequences of climate changes are bearing down on every day of our existence; statutory interpretation must remain eternally vigilant to the daily assaults on the environment.

560.In ***In Re: Bhavani River – Sakthi Sugars Ltd. vs. Unknown, (1998) 6 SCC 335,*** the Hon'ble Supreme Court held that the High Court fell in error in disposing of the writ petition merely on the consent of the TNPCB, as matters like this, which involve greater public interest, should not normally be

decided merely on the consent of the Pollution Control Board. Further, the Hon'ble Supreme Court expressed displeasure about the manner in which the TNPCB gave its consent unmindful of grave consequences, which have been amply demonstrated before the Court (emphasis supplied).

561.In ***Sayyed Ratanbhai Sayeed,*** the Court referred to the Latin maxims *"Salus", "Populi", "Suprima"* and *"Lex",* which connotes that health, safety and welfare of the public is *supreme* in law. It was pointed out that the emerging situation is one where private interest is pitted against public interest. The notion of public interest synonymous collective welfare of the people and public institution and is generally informed with the dictates of public trust doctrine – *res communis* that is by everyone in common. That perceptionally health, law and order, peace, security and a clean environment are some of the area of public and collective good where private rates being in conflict there with has to take a back seat. The words of Cicero were quoted - "the good of the people is the chief law".

562.In ***Hanuman Laxman Aroskar,*** the matter concerned the development of a green field International Airport at Mopa in Goa. The Hon'ble Supreme Court pointed out that the fundamental to the outcome of the case is a quest for environmental governance within a rule of law paradigm. Environmental governance is founded on the need to promote environmental sustainability as a crucial enabling factor which ensures the health of our ecosystem. The Hon'ble Supreme Court pointed out that in 2015, the international community adopted the 2030 agenda for sustainable development and its 17 SDGs. It was observed that each of these goals has a vital connection to others; together they provide an agenda for human development; the development in a manner which accords adequate protection to the environment. The United Nations Environment Programmes (UNEP) recognises that the natural environment - forest, soils and wetlands - contribute to the management and regulation of water availability and water quality,

strengthening the resilience of water sheds and compliments investments in physical infrastructure and institutional and regulatory arrangements for water access and disaster preparedness. After noting the statistics on climate change, the Hon'ble Supreme Court pointed out that it is in this back drop, SDG 16 emphasis the need to protect, restore and promote sustainable use and management of terrestrial ecosystems and forests, combat desertification of river lands, prevent land degradation and halt the loss of biodiversity. Terrestrial ecosystems provide a range of ecosystem services including the capture of carbon, maintenance of soil quality, provision of habitat for biodiversity, maintenance of water quality and regulation of water flow and together with control over erosion. It was further pointed out that in our domestic context, environmental governance, that is, founded on the rule of law, emerges from the values of our Constitution. The health of the environment is key to preserving the right to life as a constitutionally recognised value under Article 21 of the Constitution. Proper structures for

environmental decision-making find expression in the guarantee against arbitrary action and affirmative duty of fair treatment under Article 14 of the Constitution (emphasis supplied).

563.The petitioner's contention is that the decision in the cases of ***Vellore Citizens' Welfare Forum, Prof.M.V.Naidu, Kamal Nath*** *and* ***M.C.Mehta*** are all admitted cases of pollution, not to be applied to them, as there is no pollution alleged by the regulator. In ***Vellore Citizens' Welfare Forum,*** the tanneries were given ten years to construct the ETPs and the industries, which had commenced construction, were granted time and the Hon'ble Supreme Court ultimately, did not direct closure. The decision in ***Prof.M.V.Naidu*** deals with the case where a red category industry commenced civil work without NOC. Further, the Precautionary Principle is based on inadequacies of science and inadequate information whereas, the petitioner's operation do not suffer from inadequate information inasmuch as

apart from reports and studies done by premier National Institutes on environmental effects of petitioner's by-products, including the TNPCB. That the petitioner has all along discharged the burden cast on them and therefore, the said decision will not apply to the case of the petitioner. Equally, in the decision in ***Kamal Nath,*** the Court did not shut down the Motel as also in the case of ***M.C.Mehta*** **(1987) SC,** permitted the tanneries which had already set-up the primary treatment plant to continue. It is the submission of the learned Senior Counsel for the petitioner that the "Precautionary Principle" allows the competent public authority to take, on a provisional basis, preventive protective measure on what is as yet an incomplete scientific basis, pending the availability of additional scientific evidence. The competent public authority must weigh its obligation and decide either to wait until the results of more detailed scientific research become available or to act on the basis of the scientific information available. To support such contention, the learned Senior Counsel referred to the decision in the case of ***State of Tamil Nadu vs.***

State of Kerala and Another, (2014) 12 SCC 696; Narmada Bachao Andolan vs. UoI, (2000) 10 SCC 664; and ***Pfizer Animal Health SA vs. Councisl of the European Union, 2002 ECR II-03305.***

564.The decisions which were cited at the Bar, which we have referred to in the preceding paragraphs, spell out as to how the Regulator or the Government should safeguard the environment. No two environmental issues can be alike, even if the polluter or the enterprise carries on the same activity. Pollution can be in different forms, having varied impacts. The location of the enterprise, climatic conditions, effect on ecology can never be similar in all cases. Thus, even if a common bench mark is laid down, it can, at best, be regarded as a broad parameter, specifics are necessarily to be taken note of, which would involve multiple factors. Therefore, we need to apply the broad principles of environmental jurisprudence, which has been evolved by the Hon'ble Supreme Court over four decades and the common thread

which runs in all these decisions is to preserve the environment for the "future-inter- generational equity". If there is uncertainty in scientific opinion, it would be appropriate to err on the side of caution. The theory of sustainable development has been eloquently explained, the development of law on the said aspect and, the ultimate conclusion arrived at in all the decisions is that environmental protection is always at a higher pedestal compared to economic interest.

565.By way of illustration, if we take the aspect regarding the copper slag generated by the petitioner, it is the case of the petitioner that CPCB has certified that the slag is non-hazardous and also stipulated the varied uses to which slag can be put to. The petitioner states that the copper slag has been sold by the petitioner with full knowledge of the TNPCB. Certain articles also have been referred to in support of their contention that the by-product is environmentally safe. On the contrary, scientific papers, articles and reports give a different picture.

566.We have also noted that anything in abundance, could be dangerous. We have also noted that laboratory tests and opinions are rendered on idealistic situations and not in case where several lakh tons of copper slag have been indiscriminately dumped, left to lie open to the fury of nature for nearly a decade. Therefore, there is definitely a scientific uncertainty on the effect of the copper slag as to how the beneficial uses can be undertaken etc. Therefore, we have no hesitation to hold that the respondent-State and the Regulator would be well justified in invoking the "Precautionary Principle" bearing in mind the aspect of sustainable development. In fact, in the 2013 judgment of the Hon'ble Supreme Court, the petitioner has been held to be a polluter, and applying the "Polluter Pays Principle", a sum of Rs.100 crores was directed to be paid. Therefore, the Doctrine of Sustainable Development, Precautionary Principle and the Polluter Pays Principle needs to be applied to the case on hand. If applied, facts speak for themselves, petitioner needs to be closed and permanently sealed.

567.The petitioner would submit that inspection reports and survey conducted in the petitioner's unit pursuant to the petitioner's application for renewal of consent, do not disclose any adverse finding to warrant rejection of consent and immediate closure of the petitioner's unit. The reasons leading to the rejection of the consent and subsequent closure of the petitioner's unit are demonstrably extraneous and in the nature of knee-jerk reaction to the public protests against the petitioner's unit. It is argued that the respondent Board and the State have failed to take into consideration the relevant factors such as recommendations of the inspection and scrutiny reports and have considered wholly irrelevant factors such as situation prevalent in Thoothukudi pursuant to the unfortunate shooting incident, in issuing orders impunged in the present writ petitions.

568.It is submitted that when the petitioner intimated the stock exchange during November, 2017 regarding the expansion project, protests

began during December, 2019 opposing the petitioner's expansion project. In February, 2018, protests started in Kumara Reddy Palayam village against the expansion. During the last week of February, 2018, the Media reported the visit of Mr.Samarendra Das, from United Kingdom Co-founder of "Foil Vedanta", who visited Thoothukudi and started conducting anti-Sterlite movements. During 3rd week of March, 2018, the protests shifted to the existing plant of the petitioner with the Vanigar Sangam (Traders Federation) participating in the protests. The activists called for total shutdown of the Thoothukudi Town and messages were circulated in the social media and pamphlets spreading rumours and misinformation about the petitioner's unit. On 25.03.2018, the petitioner's existing plant was shutdown for its annual maintenance activity. Thereafter, on 09.04.2018, the impugned order of rejection of application to renew the consent to operate came to be passed. It is submitted that the public agitation and protests were primarily directed against the petitioner's expansion project, owing to certain vested interests,

were diverted to the petitioner's existing plant, which had been operating under a valid consent, which expired on 31.03.2018 and the renewal application was pending consideration of the TNPCB.

569.Thus, it is the submission of the petitioner that the impugned orders were passed with a sole aim to divert the national attention from the administrative lapse of the State of Tamil Nadu and the local administration in failing to control the law and order situation with the aim of appeasing the public protests and for political consideration. Therefore, the impugned orders are *ex facie* illegal and have been motivated by improper consideration. In support of such contention, reliance was placed on the decision in ***Harrisons Malayalam Limited.***

570.Before we examine the effect of the public protests on the closure of the petitioner's unit, we need to first consider as to the applicability

of the decision in ***Harrisons Malayalam Limited.*** The Indian company, which was amalgamated with a foreign company, filed a writ petition to enable them to hold and enjoy the lands that devolved on them by virtue of the amalgamation. The question was whether, the foreign company could have continued holding of such lands after India got independence and the challenge was to the eviction proceedings initiated by the State of Kerala *inter alia* alleging fraud, forgery and collusion. The proceedings impugned in those writ petitions were action initiated under the Kerala Land Conservancy Act, 1957 (for brevity "the KLC Act") essentially, the challenge was with regard to the jurisdictional competence of the Special Officer under the said enactment by contending that the petitioner-company therein was in possession of the lands in question on the strength of valid title of grants of licence or lease and based on fixity of tenure under the provisions of the Kerala Land Reforms Act, 1963. The Court found that the Special Officer, who is authorized under the KLC Act, cannot initiate a probe on the allegations raised in the report in

seeking a CBI investigation as also the involvement of the Enforcement Directorate, thereby acting beyond the scope and ambit of the power and authority conferred under the KLC Act. In the penultimate paragraph of the said judgment, the Court referred to the judgment of the Constitution Bench in the case of ***Bishan Das vs. State of Punjab [AIR 1961 SC 1570]*** and drew a parallel by observing that the State willingly succumbed to public outcry without looking at the legal implications.

571.Firstly, the said judgment did not pertain to a polluting red category industry as that of the instant case, nor there is any allegation of any pollution having been caused by the said industry essentially, the challenge in the said proceedings was to an eviction proceedings initiated under the KLC Act and while taking a decision, the Court made an observation as to how the welfare State has to function. Therefore, in our considered view, the said decision cannot be made applicable to the case on hand. The petitioner placed

reliance on the decision of the Hon'ble Supreme Court in ***P.Sivakumar*** in support of their contention that people cannot take law into their hands. In the said decision, the Hon'ble Supreme Court referred to the judgment rendered in ***Destruction of Public and Private Properties In Re vs. State of Andhra Pradesh & Ors. [2009] 5 SCC 212,*** wherein guidelines were issued as to how to effectuate the modalities for preventive action when such destruction of public and private properties are resorted to. After referring to those guidelines, it was pointed out that the fundamental purpose is that there cannot be any agitation which relates to an order passed by the Court and any grieved party is under obligation to take recourse to legal remedies for mitigation of grievances. It was reiterated, neither any "bandh", nor any "agitation" can take place when Court has passed an order. The people cannot become law unto themselves and therefore, it is obligatory on the part of the authorities to prevent such action. In our opinion, this decision cannot render any support to the case of the petitioner. There is nothing on record to indicate that there was

a breach of an order passed by the Court. In fact, it is the petitioner, who had dragged the authorities to Court by filing writ petitions seeking for prohibitory orders and it *prima facie* appears that in tune with the observations made by the Court in one of those writ petitions filed by the petitioner, an order under Section 144 Cr.P.C., was promulgated. It is not disputed before us that the protest was for 100 days. Earlier, there were protests which the petitioner would admit with a caveat that the protesters, protested against their proposed expansion and not the unit which was functioning. We find there is no basis for such a submission taking note of the chequered history of the case ever since 1996. Therefore, the decision in ***P.Sivakumar*** is distinguishable and not applicable to the case of the petitioner.

572.The anti-sterlite people federation represented by Mr.G.Hari Raghavan, the 11th respondent would state that from 1997, incidence of suspicious death of employees of the petitioner has been reported

continuously. There are frequent incidents and there are also few incidents of leakages of hazardous gas from the industry in the year 1997-2013. It is submitted that on 02.01.1997, on account of a cylinder burst, 40 workers were injured. On 03.05.1997, due to an explosion in the copper smelting plant, one person died. On 04.07.1997, 167 persons were convicted on account of gas leak. On 30.08.1997, two person died due to an explosion, who were employees of the petitioner company, viz., one Mr.Perumal and Sankar. On 16.04.1998, six persons died due to fire accident in the industry. Six person were injured in an explosion, which occurred on 19.11.1998. On 21.09.2008, one person died due to wall collapse. One lorry driver was injured on 18.09.2010, when the lorry was carrying, as its components met with an accident. One person died on 31.05.2011 due to electric shock. One person was injured on 13.08.2011 on account of a fire accident due to electrical issues and he lost one of his hands. On 14.11.2014, one Subbiah died falling into the acid tank. On 22.02.2018, one person died in the harbour complex, when the

raw material was off loaded from the vessel to the lorry. One person was injured on 08.03.2018 (Amalan) in the phosphoric acid plant. One person died by name Masanamuthu by falling from the height of about 60ft on 18.03.2013. On 26.03.2013, one employee of the petitioner, who was native of Bihar, had fainted in the industry and he was taken to the AVM hospital, but he was declared dead due to natural cause. It is submitted that though in cases where deaths have occurred due to accidents, criminal cases have been registered as suspicious deaths, the State has not initiated any action.

573.In the preceding paragraphs, we have elaborately noted the factual position and the challenge to the very establishment of the industry commenced in the year 1996, much prior to the industry starting commercial production. Ever since then, apart from local protests and agitations, which were in a small way, much of the time was spent in Courts either at the instance of the public interest litigations or at the instance of the petitioner.

Therefore, we cannot accept the stand taken by the petitioner that the impugned orders are knee-jerk reactions, especially the order of closure. The public cannot be shut out, Amendment Act 47 of 1981 has emphasised the role of the public and recognised public participation. We have also noted that for a substantial period of time, the petitioner had been operating without a valid consent and on the strength of the stay orders granted by the Court/Tribunal. In the 2013 judgment, the Hon'ble Supreme Court had appreciated the efforts of the public interest litigants and NGOs in taking up the cause of environment especially, against an organisation like the petitioner, which is undoubtedly a very large organisation with sufficient resources. The ultimatum was announcing a 100 day protest and the decision of the protesters to lay siege to the office of the District Collector on the 100th day, that is, on 22.0.2013 till the petitioner is closed down, was widely published. In fact, it is the petitioner, who had approached the Madurai Bench of this Court twice for virtually the same relief. It is not for the petitioner to state as to when the

authorities have to invoke their power under Section 144 Cr.P.C. Surprisingly, in the discussions which were had by way of peace committee meetings by the officials, we find that TNPCB was not a party to any of the discussions. Several persons had been detained under the Tamil Nadu Act, 14 of 1982 by way of preventive detention, which orders were quashed by the Madurai Bench. Therefore, we hold that the orders rejecting the application for grant of consent, directing closure, permanent sealing of the petitioner industry cannot be treated as knee-jerk reaction pursuant to the unfortunate shooting incident, but it is a culmination of various issues solely attributable to the petitioner.

574.It is submitted on behalf of the State and the TNPCB that the petitioner has not initiated any voluntary measures to improve environment, they have given least regard to sustainability and improvement measures and only when the respondent Board imposed conditions in the consent order, they are being complied with, that too, after much insistence. That the plant

facilities and technology are not state of art facilities they are inferior in quality and second hand facilities have been used. Further, copper smelters are generally located in third world countries and even in those countries it is not located in areas inhabited by people. The State has taken a stand that the Country can import copper from outside and is not reliant on the petitioner and therefore, the plant can be shut. The impleaded respondent would state that the petitioner Unit is not the only copper smelter operating in the Country, the Government of India has established a plant which can cater to the copper requirement of the Court and it is an integrated copper smelter and it uses mined material from India which is sufficient to meet the requirement. These submissions were made by the State and one of the impleaded respondent with regard to the sustainability, the need for the petitioner to have its presence.

575.The petitioner's contention is that they operate based on a sustainability frame work model developed in line with International Finance Corporation guidelines, they have a practice of sending their employees to

smelters across the world to adopt the best practices. The petitioner would rely upon the key environment improvement initiatives which are adopted by foreign smelters and the implementation standards in so far as the petitioner's Unit is concerned. It is submitted that the best practices followed by the petitioner Unit has been compared with Best Availability Technology [BAT] adopted by European Smelters which covers list of projects and practices implemented in the ears of energy conservation and management, process optimization and control, diffuse emission control, waste recovery and emission/water management. Further it was submitted that the petitioner has initiated studies for environment improvement measures by employing reputed organization and apart from that they have carried out various improvement measures voluntarily since their inception with regard to the air, water and solid based management. The Waste Heat Recovery Boiler Technology installed in the petitioner Unit is the first in the World to be certified under the Clean Development Mechanism of United National Frame Work for Climate

Change and have reduced one lakh tonnes of Carbondioxide emission indirectly. The petitioner has carried out biodiversity study around their Unit through the Forest Research Institute, Dehradun. They have carried out detailed bench marking exercise of their performance with the global copper smelter through a German based agency and the comparison of the emission of the global copper smelter with that of the petitioner Unit would show that the emissions from the petitioner Unit are significantly lower than the global copper smelters. The Sodium Sulphide Technology process adopted in the effluent treatment system helps in reducing 30-35% of hazardous waste quantities. Apart from that, the petitioner carries out extensive corporate social responsibility activities in near by communities in the areas of education, health, child care, women empowerment, etc. All these have lead to the petitioner being recognized by various reputed forums and bodies and awards have been presented to the petitioner. It is submitted that the Mo&EF in their counter affidavit filed during 1997-98 that the petitioner Plant is a

State of Art Technology. The Mount ISA Technology is the most sought technology globally for its efficiency in copper production. The petitioner has also furnished the list of copper refinery operating globally, list of sulphuric acid plant operating globally, the schematic of the gas cleaning plant and the list of installations operating globally with the same technology adopted by the petitioner for gas cleaning. The petitioner has referred to the three copper smelters in India which includes the petitioner, the production level of the other two Units and the details of the reserves of copper ore available in India and to substantiate their stand that to meet the copper demand, the smelters in India are absolutely critical and also referred to the limited reserves of copper ore exploitable for copper production in India. Further it is submitted that it is incorrect that copper smelters are located only in third world countries but are spread across all the Continents in the World except Antartica and in this regard, a summarized list of Country wise was referred to by the learned senior counsel.

576.From the above submissions on either side, what emerges is that the State and the TNPCB have taken a categorical stand that all is not well with the petitioner Unit. Reference to affidavits which were filed in 1997 by Mo&EF supporting the petitioner may not help them. We had noted that in September 2004 the Committee appointed by the Hon'ble Supreme Court visited the petitioner Unit as well as other red category industries in the Country. The Committed makes a specific observation to the effect that the petitioner has not provided adequate infrastructure and facilities for management of the waste generated. The Committee was particularly concerned with the issues relating to disposal of arsenic contained slag which was found dumped in the factory premises in the range of several thousands of tonnes and the Committed noted that there is a maintenance of arsenic bearing slag and also a mountain of phospogypsum. It was pointed out that if phospogypsum is not contained properly, it occasionally becomes airborne and

may cause severe respiratory disorders in the surrounding vulnerable poplulation. Further, the Committed pointed out that there are some issue stills to be resolved in terms of the hazardous nature of arsenic bearing ETP waste which were earlier contained in an inadequately designed hazardous waste land fill and require disposal as per CPCB guidelines. Further the petitioner reported to the Committee during their visit that they are also emitting Sulphurdioxide far in excess of the permissible standards particularly when the sulphuric acid plant is not operating. The inadequacies which were observed by the Committee had made them to render finding that since the wastes were not properly managed, they have resulted in adverse impact on the environment including the health of the people. The Committee directed the concerned authority of the Government of Tamil Nadu to conduct a detailed environmental audit of the Unit and to assessee the efficacy of its environmental management practices by an independent agency. What prompted the Committee to direct the assessment to be done by an

independent agency, would we be justified in drawing adverse inference against the regulator, TNPCB or did not the Committee have faith in the Governmental machinery of the State of Tamil Nadu or did they doubt the bonafides of the officials of the Government and the TNPCB. These questions have remained unanswered and the TNPCB have been renewing the concerns off and on reiterating the very same conditions knowing fully well that the petitioner had not complied with the same in its entirety.

577.In this regard, it is beneficial to refer to the decision of the Hon'ble Supreme Court in the case of ***Noida Memorial Complex Near Okhla Bird Sanctuary, In Re. [(2011) 1 SCC 744]***. The controversy in the said case was a large project of the Uttar Pradesh Government at Noida. Two of the residents of the area claiming to be public spirited people objected to the project stating that the project undertaken at the instance of the UP Government is a huge unauthorized construction; very large number of trees

were cut down for clearing the ground for the project without permission of the Central Government and the Hon'ble Supreme Court and in gross violation of the provisions of the Forest Conservation Act; project involved massive construction that were made without any prior environmental clearance from the Central Government based on environment impact assessment; constructions were in complete breach of the provisions of the EP Act and the notification issued under Act and more importantly, the project was causing great harm and was bound to further devastate the delicate and sensitive ecological balance of the Okhla Bird Sanctuary. In the said case, a direction was issued by the Court directing the Mo&EF to make a study of the environmental impact of the projects and to suggest measures for undoing the environmental degradation, if any, caused by the project and the amelioration measures to safeguard the adjacent bird sanctuary. The Mo&EF directed the project proponents to have an environmental impact assessment of the project done by some expert agencies. Three groups made a study including the

persons from the Indian Institute of Technology, New Delhi. What is important is the observation contained in paragraph No.84 of the judgment which is as follows:

> *"84.Before putting down the records of the case of a few observations may not be out of place. The EIA Notification dated 14.09.2006 urgently calls for a close second look by the authorities concerned. The projects/activities under Items 8(a) and 8(b) of the schedule to the notification need to be described with greater precision and clarity and the definition of built-up area with facilities open to the sky needs to be freed from its present ambiguity and vagueness. The question of application of the general condition to the projects/activities listed in the schedule also needs to be put beyond any debate or dispute. We would also like to point out that the environmental impact studies in this case were not conducted either by the MoEF or any organisation under it or even by any agencies appointed by it. All the three studies that were finally*

placed before the Expert Appraisal Committee and which this Court has also taken into consideration, were made at the behest of the project proponents and by agencies of their choice. This Court would have been more comfortable if the environment impact studies were made by the MoEF or by any organisation under it or at least by agencies appointed and recommended by it."

578.The observations made by the Hon'ble Supreme Court are very pertinent and very relevant to the case on hand. The rapid EIA for establishment and for increased production was at the instance of the petitioner, the project proponent. The test report submitted by them at various points of time were by Vimta Labs, a choice of the petitioner. The consent conditions states that periodical analysis report has to be submitted and such test reports to be done in the laboratory of the TNPCB or authorized by it and it is based on this material, the authorities at various levels take decision.

579.In the case of ***P.V.Krishnamoorthy vs. Government of India and others [WP Nos.16630 of 2018, etc batch dated 08.04.2018]***, the feasibility study undertaken by an agency was vitiated by plagiarism and non-application of mind and directed to be scrapped. Therefore the environmentalist may be well justified in contending that much credence cannot be attached to report submitted by project proponent himself. Such is the observation of the High Court of Delhi in the case of ***Rajendra Singh and others vs. Government of NCT of Delhi and others [WP No.7506 of 2007 dated 03.11.2008]***. In fact, in the said decision the Court commented upon the report submitted by NEERI stating that it gives an impression that it is an tailor-made report given to suit the requirement of the respondent therein.

580.The Committee appointed by the Hon'ble Supreme Court noted the various inadequacies and specifically recommended not to grant approval

for increased production capacity. Yet the petitioner succeeded in obtaining approval. To understand the quantum of slag generated all that we are required to note is the permitted operating capacity and the average amount of slag that will be generated. Experts have stated that about 2 to 2.2 tonnes of copper slag is generated for every one ton of copper annode manufacture. This figure is taken for illustrative purpose as the petitioner may take a stand that it depends upon the quality of the ore and such factors. The petitioner's permitted production capacity is 1200 tonnes per day and the approximate slag that will be generated per day will be 2400 tonnes which totals to about 800,000 tonnes per year given the optimum functioning of the factory. This staggering figure shocks the system.

581.The petitioner does not possess sufficient land or infrastructure for storage or disposal of this huge quantity of slag generated. The respondents have referred to a report by M/s.SGS India Private Limited, who

have conducted a study of the area between 12.10.2018 and 15.10.2018. This report is objected by the petitioner on all angles and terming the same to be an unscientific study. This report is again by a private agency which states that the soil samples drawn in 12 locations show that they are impacted by varying degrees of heavy metal contamination which is due to indiscriminate dumping of copper slag by the petitioner. The report recommends certain sites to be declared as contaminated sights which would mean that it cannot be put to use for any purpose for all the years to come. Thus the larger question would be as to whom the Court should trust. On the one hand, the regulator took a firm stand. NEERI submitted reports are were adverse to the petitioner. Thereafter on further direction being issued, the TNPCB curiously took a stand that only thirty conditions need to be laid down. The stand taken by the expert body which was given the full liberty by the Hon'ble Supreme Court to give their comments on the report accepted the stand of the regulator, TNPCB and issued directions. Now the TNPCB states that all the conditions which are to be

cumulatively complied, have not been done by the petitioner. Can this lead to an inference that TNPCB was guilty of not placing the full facts before the Hon'ble Supreme Court in the 2013 case. We have held that the past conduct of the petitioner should be and can be taken into consideration by the regulator and while deciding the correctness of the orders passed by the regulator and the Government, the Court also is empowered to take note of the past conduct. We have assigned reasons in support of such conclusion. Hence, the stand taken by the petitioner that they are state of art Unit with utmost commitment to the environment and society is hard to believe. The Courts have their limitation when it comes to examining highly technical issues and this is why the Constitutional Courts have circumscribed a self imposed restriction on judicial review of executive action. The problem which is very peculiar to the case on hand is as to whom to believe. Why do we say so? This is because of the inconsistency of the authorities at various levels at different points of time. Probably this prompted one of the impleaded respondent to take a stand that he

will pursue his claim independently and seek for sustaining the order of closure regardless of party in power in the State. If Courts are left to doubt every technical report relied on by the regulator, it would lead to a disastrous consequences and ultimate self destruction.

582.In the case of ***Noida Memorial Complex***, the Hon'ble Supreme Court observed that the Court would have been more comfortable if the environmental impact studies were made by the Mo&EF or by an organization under it or atleast by agencies appointed and recommended by it. Therefore much may have to be said about these expert bodies manned by experts and as men change probably reports may also change. If such is the situation, it is undoubtedly against public interest and needs to be condemned. For all these reasons, we reject the contentions advanced by the petitioner with regard to their sustainability.

583.The petitioner has been consistently stating that if their plant is shut the requirement of copper in India cannot be met, it will be a great blow on the economy, etc. The Courts have held that when it comes economy pitted against environment, environment will reign supreme. Therefore, economic considerations can have no role to play while deciding the sustainability of a highly polluting industry and the only consideration would be with regard to safeguarding environment for posterity and remedying the damage caused.

584.The Committee during its visit was informed that the petitioner is proceeding for a three times expansion of its capacity from 70,000 TPA to 1.8 lakhs TPA. On coming to know of the said fact, the Committee observed that the existing waste management practices of the petitioner are not in compliance with the environmental standards and solid hazardous waste generated also required to be properly managed, particularly in terms of available space and infrastructure and it would be inadvisable to consider

expansion of the Unit at that stage. Unfortunately, approval was granted for the increased capacity. Therefore, the regulatory authority at various levels have not taken the matter seriously and the inadequacy and incapacity of the TNPCB has added to the confusion. The Committee made a categorical observation that environmental clearance for the proposed expansion should not be granted by the Mo&EF and it did not stop with that and made an observation that if it is granted, it shall be revoked. It appears that the concerned authorities did not take note of the observations of the Committee nominated by the Hon'ble Supreme Court for a specific purpose. The Committee issued direction to the TNPCB to make a detailed visit to the plant to ascertain whether the Unit has already proceeded with the expansion of the project without prior permission from the authorities and in which case directed the TNPCB to take action under the provisions of the EIA notification as well as under the Air and Water Act and HW Rules. Thus, there was material available at the time when the Committee made the visit of the

petitioner Unit in September 2004 indicating the petitioner has commenced expansion activities without prior permission.

585.If such was the state of affairs of the petitioner in 2004, we on going through the factual position and noting the various incidents and issues which have arisen, we can safely conclude that the sustainability as projected by the petitioner may appear good on paper. As mentioned, the petitioner has no vested right or fundamental right to establish a hazardous industry and the permission is subject to the consent granted by the Board and the other authorities. Thus the liability of the petitioner continues as long as they are permitted to operate.

586.In this regard, it would be beneficial to refer to the decision in the case of ***Environment Protection Authority vs. Kembla Copper Pty. Ltd. [(2001) NSW LEC 174 (New South Wales Land of Environment Court)]***.

The defendant therein was a copper smelter and there were five charges against them having breached the conditions of the Environment Protection License. As contended by the petitioner before us, the defendant smelter therein took a stand that the risk assessment process has been carried out in a reasonable manner and there was no inadequacies in the acid plant risk assessment having regard to the current standards and that the Court was advocating a standard of perfection in a hind sight. The Court observed that the very fact that the smelter was adopting a new and complex technology in an operation involving potentially harmful gases should have required a great deal of attention to be paid to risk assessment and to the possibility that incidents would occur during the commission period and that the possibility of the license emission limit would be exceeded on each occasion was reasonable foreseeable and as a result each of the incidents could have been prevented.

587.In the case of ***Environment Protection Authority vs. Adi Limited [(1999) NSWLEC 14],*** the defendant Company had committed an offence of polluting of waters of Murray river by introducing solid waste and ethanol contrary to the Clean Waters Act. The Court observed the fact that the defendant held a license *[which permitted a discharge which did not contain more than 45mg/L of non-filterable residue at various point adjacent to the boundaries of the premises; ethanol was not referred to specifically in license condition]* heightened its responsibility to keep the level of discharge from the premises within the parameters set by the license.

588.The learned Senior Counsel appearing for the petitioner vehemently contended that there are 63 other red category industries in the industrial complex. The petitioner has been singled out, no source apportionment study was undertaken despite an interim direction issued by the NGT that the decision for closure/permanent closure is vitiated by mala fides,

on extraneous consideration it is a colourable exercise of power and for political considerations. Though in several places, the petitioner pleads mala fides, it has not been proved in the manner known to law. Does the petitioner state that the State Government has acted mala fide, if so, what is the foundation of such a plea. If the petitioner states that the TNPCB's action is mala fide it should establish as to which officer or which authority of the regulator acted mala fide. Thus, mere use of the expression mala fide would not make the decision a mala fide exercise of power. Equally we find that there is no colourable exercise of power rather it is a belated exercise of power. We have commented upon the inadequacies in the infrastructure of the TNPCB and also observed that the magnitude of the petitioner was a big deterrent not only to the regulator TNPCB but to the District Administration and the officers of the Government at various levels. If the petitioner makes a statement that the order of closure is for political consideration, then it needs to be examined as to how the petitioner was able to secure an approval from

the State Government in 14 days for establishing this hazardous industry in Thoothukudi when they were unable to do so in two other States in India. In fact, the Division Bench while ordering closure had commented upon the fast track procedure. In the 2013 judgment of the Hon'ble Supreme Court this issue came up for consideration and it was pointed out that the notification issued under the EP Act provided for a rapid environment impact assessment could done. The petitioner while stating that the impugned order was passed for political consideration stated that the order was passed to divert the public attention from the mishandling by the State and the officials are ultimately lead to the shooting incident. This averment is required to be outrightly rejected as vague and devoid of any substance. We had made certain observations as regards the order passed under Section 144 Cr.P.C. Such order was at the behest of the petitioner when they approached the Madurai Bench of this Court by way of two writ petitions virtually for an identical relief. In the instant case, an order under Section 144 Cr.P.C., was passed and

under normal circumstances, such order is passed to protect the public and public properties and not to protect a private asset as that of the case on hand. This appears to be unprecedented. Therefore, if according to the petitioner the order of closure is for political consideration, then it goes without saying that the order granting permission to establish the Unit twenty years ago is also for political considerations. We refrain from making any further observation in this regard.

589.We have held that the petitioner has violated the consent conditions and many of the violations were blatant and the effect of such violations will not be evident immediately it may take several years. The petitioner cannot state that they have been singled out or victimised.

590.In ***Bharat Iron Works vs. Bhagubhai Balubhai Patel & Ors. [(1976) 1 SCC 518]***, the employee of the State Government contended that he

was victimized by his employer. It was observed that victimization is a serious charge by an employee against the employer and therefore, it must be properly and adequately pleaded giving all particulars upon which the charge is based to enable the employer to fully meet them; the onus of establishing a plea of victimization will be upon the person pleading it and a proved misconduct is antithesis of victimization as understood in industrial relations. This decision was referred to in the case of ***Bharat Forge Co. Ltd. vs. Uttam Manohar Nakate [(2005) 2 SCC 480].***

591.Apart from reiterating their stand that no source apportionment study has been done, the petitioner has not established the plea of mala fides or victimization. The other submission is that they have been singled out when there are 63 other red category industries in the same industrial complex. The question would be whether this is a ground to infer discrimination.

592.In ***Budhan Choudry and aothers vs. The State of Bihar [AIR 1955 SC 191],*** the Constitution Bench of the Hon'ble Supreme Court explained the meaning and scope of Article 14 of the Constitution. It was held that Article 14 forbid class legislation, it does not forbid reasonable classification for the purpose of legislation. To pass the test of permissible classification two conditions must be fulfilled, namely, (i) that classification must be founded on a intelligent differentia and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. It was further held that classification must be founded on different bases, namely, geographical or according to objects or occupations or like. This decision is quoted with the approval in ***Ram Krishna Dalmia vs. Mr.Justice S.R.Tendolkar [AIR 1958 SC 538]***, wherein it was held that a law may be constitutional even though it relates to a single individual, if on account of the special circumstances or reasons applicable to him and not applicable to others, the single individual may be treated as a class by himself.

These decisions were referred to in the case of ***S.P.Mittal vs. Union of India [(1983) 1 SCC 51],*** while upholding the "single person" legislation concerning Sri Arabindo Society.

593.In ***Charajit Lal Choowdhuri vs. The Union of India and others [AIR 1951 SC 41]***, it was held that the respondents therein alone was affected is no ground to hold that it is a single person legislation.

594.In the case of ***State of Himachal Pradesh and another vs. Kailash Chand Mahajan and others [1992 (Suppl.) 2 SCC 351]***, the Court upheld the validity of the decision which purported to affect a single person.

595.***In Re. The Special Courts Bill, 1978 [(1979) 1 SCC 380]***, while upholding the legality of the State's power to pick out a hectic phase, the Hon'ble Supreme Court referred to the decision in the case of ***State of Gujarat***

and another vs. Shri Ambica Mills Limited [(1974) 4 SCC 656] and held as follows:

> *"134. Another good reason for upholding the classification is the legality of the State's power to pick out a hectic phase, a hyper-pathological period, a flash flood and treat that spell alone, leaving other like offensive periods well alone because of their lesser trauma. It is a question of degree and dimension. This Court in* ***Ambica Mills*** *observed: (SCC p. 676, paras 56 & 57)*
>
> *Mr. Justice Holmes,, in urging tolerance of under-inclusive classification, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. What, then, are the fair reasons for non-extension ? What should a court do when it is faced with a law making an under-inclusive classification in areas relating to economic and tax matters. Should it, by its judgment, force the legislature to choose between inaction or perfection ?*

The legislature cannot be required to impose upon administrative agencies tasks which cannot be carried out or which must be carried out on a large scale at a single-stroke.

If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. There is no doctrinnaire requirement that the legislation should be couched in all embracing terms. (See West Coast Hotel Company v. Parrish)

The Emergency was witness to criminal abuse of power, so says the Preamble, on a scale unheard of before or after. Therefore, this ominous period lends itself to legislative segregation and special treatment. Mr. Justice Mathew has explored the jurisprudence of selective treatment as consistent with the pragmatism of eglitarianism. The present Bill is a textbook illustration of the dictum: (SCC pp. 676-677, paras 58 to 63)

The piecemeal approach to a general problem permitted by under-inclusive classifications, appears justified when it is considered that legislative

dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt. Administrative expedients must be forged and tested. Legislators, recognizing these factors, may wish to proceed cautiously, and courts must allow them to do so (supra).

Administrative convenience in the collection of unpaid accumulations is a factor to be taken into account in adjudging whether the classification is reasonable. A legislation may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind. Therefore, a legislature might select only one phase of one field for application or a remedy. Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582, 592.

It may be remembered that Article 14 does not require that every regulatory statute apply to all in

the same business; where size is an index to the evil at which the law is directed, discriminations between the large and small are permissible, and it is also permissible for reform to take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

A legislative authority acting within its field is not bound to extend its regulation to all cases which it might possibly reach. The legislature is free to recognise degrees of harm and it may confine the restrictions to those classes of cases where the need seemed to be clearest (see Mutual Loan Co. v. Martell) 56 L.Ed. 175, 180.

In short, the problem of legislative classification is a perennial one admitting of no doctrinnaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think (see Tigner v. Texas) 310 U.S. 141.

Once an objective is decided to be within legislative competence, however, the working out of classification has been only infrequently impeded by judicial negatives.

The Courts attitude cannot be that the state either has to regulate all businesses, or even all related businesses and in the same way, or, not at all. An effort to strike at a particular economic evil could not be hindered by the necessity of carrying in its wake a train of vexatious, trouble some and expensive regulations covering the whole range of connected or similar enterprises.

"All or nothing" may lead to unworkable rigidity. Principled compromises are permissible in law; where non-negotiable fundamentals are not tampered with. The Bill in question, viewed in this light, passes the constitutional test."

596.The above decision would aptly answer the submission of the petitioner. Undoubtedly the petitioner is the biggest industry in the region

generating the maximum amount of hazardous waste. If such is the position the State and the regulator would be well justified in considering the magnitude of the petitioner, as held by the Hon'ble Supreme Court, where size is an index to the evil at which the law is directed, discrimination between the large and small are permissible and it is also permissible for reform to take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

597.The above decision of the Constitution Bench was referred to in the case of ***Heena Kausar vs. Competent Authority [(2018) 14 SCC 724].*** While on this issue, it is relevant to refer to the decision of the Hon'ble Supreme Court in the case of ***M/s.Dhampur Sugars vs. State of Uttranchal [(2007) 5 SCC 418]***, wherein it was held that mere assertion, vague averment or bald statement is not enough to hold the action to be malafide.

598.In the case of ***Ajit* Kumar *Nag vs. Indian Oil Corporation [(2005) 7 SCC 764]***, referred to the decision of the Hon'ble Supreme Court in ***E.P.Royappa vs. State of Tamil Nadu & Anr. [(1974) 4 SCC 3]***, it was pointed out that the burden of proving malafide is on the person making allegation and the burden is "very heavy"; here is every presumption in favour of the administration that the power has been exercised bonafide and in good faith; allegations of malafide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. This principle was elaborated in the case of ***Girias Investment Private Limited vs. State of Karnataka [(2008) 7 SCC 53]***.

> *"14. It is obvious from a reading of the pleadings quoted above that only vague allegations of malafides have been leveled and that too without any basis. There can be two ways by which a case of malafides can be made out; one that the action which is impugned has been taken with the specific object of damaging the interest of the party and, secondly, such action is aimed at helping some party which results in damage to the party*

alleging malafides. It would be seen that there is no allegation whatsoever in the pleadings that the case falls within the first category but an inference of malafide has been sought to be drawn in the course of a vague pleading that the change had been made to help certain important persons who would have lost their land under the original acquisition. These allegations have been replied to in the paragraph quoted above and reveal that the land which had been denotified belonged to those who had absolutely no position or power. In this view of the matter, the judgments cited by Mr. Dave have absolutely no bearing of the facts of the case.

15. .....
16. .....
17. .....
18. .....

19.It is no doubt open to the court to go into the question of malafides raised by a litigant but in order to succeed, much more than a mere allegation is required. Mr. Dave's inference of malafide based on the ground that the change in the location of the trumpet interchange and the access road had been

suddenly made without proper application of mind to help certain unidentified individuals resulting in the acquisition of the land belonging to the appellants is, thus, without any factual basis.

20.Mr. Hulla, the learned counsel appearing for some of the respondents has also placed reliance on Keshab Rao vs. State of West Bengal (1973) 3 SCC 216, First Land Acquisition Collector & Ors. vs. Nirdohi Prakash Ganguli & Anr. (2002) 4 SCC 160, Ajit Kumar Nag vs. G.M.(PJ) I.O.C.Ltd., Haldi & Ors. (2005) 7 SCC 764 and Prakash Singh Badal & Anr. Vs. State of Punjab and & Ors. (2007) 1 SCC 1 to submit that a mere allegation of malafide is not enough and cogent evidence thereof must be given. We respectfully endorse the opinion expressed in these judgments and reiterate that no material or details of malafides have come on record in the present case. We nevertheless quote paragraphs 56 and 57 from Ajit Kumar Nag's case (supra) to support our discussion:

"56. In our view, neither the learned Single Judge nor the Division Bench has committed any error of law and/or of jurisdiction which deserves

interference in exercise of discretionary jurisdiction under Article 136 of the Constitution. As is clear, the situation has been created by the appellant. It was very grave and serious and called for immediate stern action by the General Manager. Exercise of extraordinary power in exceptional circumstances under Standing Order 20(vi) in the circumstances, cannot be said to be arbitrary, unreasonable or mala fide. It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". (vide E.P. Royappa v. State of T.N. (1974) 4 SCC 3) There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in Gulam Mustafa v. State of Maharashtra ((1976) 1

SCC800 p.802, para 2) : "It (mala fide) is the last refuge of a losing litigant."

57. We hold clause (vi) of Standing Order 20 of the Certified Standing Orders of the respondent Corporation valid, constitutional and intra vires Article 14 of the Constitution. We also hold the action taken by the General Manager of the respondent Corporation dismissing the appellant-petitioner from service as legal and lawful. We thus see no substance either in the appeal or in the writ petition and both are, therefore, dismissed. In the facts and circumstances of the case, however, there shall be no order as to costs."

In the light of the above, no further discussion on this aspect is called for.

21. .....

22. .....

23. As observed above, the appellants have not identified any person who had been instrumental in harming their cause. We would, therefore, even be precluded from going into

the question of malafides although we have nevertheless examined the matter in extenso."

599.In the light of the above discussion, we are of the clear view that the petitioner has not been able to establish that the impugned decisions are malafide or on account the extraneous consideration or political consideration or a colourable exercise of power. The petitioner being the biggest in the area cannot plead that they have been singled out and victimized when they have been found to be a violator. This observation will equally apply to the argument of the petitioner that 101 red category industries do not have authorization under HW Rules. This is a sorry state of affairs, the reasons are unknown but that can hardly be an argument to exonerate the petitioner.

600.The learned Senior Counsel for the petitioner referred to the decision of the High Court of Delhi in ***Gopinath Private Limited,*** where the Court held, on facts, that the Pollution Control Board may direct closure of

industry, but it cannot seal the entire industry bringing every unoffending activity to a standstill. We are afraid that this decision can hardly apply to the facts of the present case. In the said decision, the complaint was against a small part of the business carried on by the appellant therein, where casting of iron components using furnace was carried on from a premises residential in nature. The petitioner is a red category industry, the establishments, which are located within the factory complex are inextricable and to be treated as a single establishment and that is how the petitioner has perceived the same. The power plant is a unit for captive power generation and its location is within the same premises. Therefore, the argument that those independent units cannot be closed is an argument that needs to be rejected. The petitioner cannot be heard to say that an ancillary unit, ancillary to a main unit, should be permitted to function when the main unit has been locked, sealed and directed to be dismantled. Therefore, we reject such submission.

601.We had earlier discussed the issue as regards the power of the State Government to permanently close and seal the petitioner industry. It was the argument on behalf of the petitioner that there is no such power vested under Section 18 of the Act. We have assigned reasons as to how such submission is not acceptable by reading all the relevant provisions of the Air and Water Acts, which confer all powers, which are incidental and consequential. In this regard, it would be beneficial to refer to the decision of the Hon'ble Supreme Court in ***Khargram Panchayat Samiti.*** The question, which fell for consideration was whether the Panchayat Samiti, which had authority to grant licence for holding a fair, had the consequential or incidental power to specify a day for holding such fair. The High Court held that the Panchayat Samiti had power to grant licence, but had no consequential or incidental power to specify a date for holding of such fair. Reversing the said decision, the Hon'ble Supreme Court held that the power to grant the licence for holding a fair includes the power to make incidental or consequential

orders for specification of a day on which such fair shall be held; the statutory bodies like the Panchayat enjoy a wide incidental power, that is, they may do everything which is calculated to facilitate or is conducive or incidental to the discharge of any of their functions and the doctrine of ultra vires is not to be applied narrowly. Further, it was pointed out that it is well accepted that the conferral of statutory powers on the local authorities must be construed as impliedly authorising everything which would fairly and reasonably be regarded as incidental or consequential to the power itself. The relevant portion of the judgment reads as follows:-

> *"4. .....The conferment of the power to grant a licence for the holding of a hat or fair under s. 117 of the Act includes the power to make incidental or consequential orders for specification of a day on which such hat or fair shall be held. The deci- sion of the High Court runs counter to the well-accepted principles. It overlooks that the statutory bodies like the Panchayat Samiti enjoy a wide 'incidental power' i.e. they may do every thing which is 'calculated to facilitate, or is*

conductive or incidental to, the discharge of any of their functions' and the doctrine of ultra vires is not to be applied narrowly. It is well-accepted that the conferral of statutory powers on these local authorities must be con- strued as impliedly authorising everything which could fairly and reasonably be regarded as incidental or conse- quential to the power itself. See: de Smith's Judicial Review of Administrative Action. 4th edn., p. 95. HWR Wade's AdminiStrative Law, 5th edn., p. 217. Craies on Statute Law, 6th edn., p. 276. Attorney General v. Great Eastern Railway, LR (1880) 5 AC 473; Baroness Wenlock v. River Dee Co., LR (1885) 10 AC 354. De Smith in his celebrated work Judicial Review of Administrative Action, 5th edn. at p. 95 puts the law tersely in these words:

> *The House of Lords has laid down the principle that "whatev- er may fairly be regarded as incidental to. or consequent upon. those things which the Legislature has authorised. ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."*

This principle was. enunciated by Lord Selborne in Attorney General v. Great Eastern Railway, supra, in these words:

"The doctrine of ultra vires ought to be reasonably. and not unreasonably, understood and applied and whatever may be fairly regarded as incidental to. or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held, by judicial con- struction. to be ultra vires."

These words have been quoted by Professor wade in his monumental work Administrative Law. 5th edn. at p, 2 17 and also by Craies on Statute Law, 6th edn. p, 276. Craies also refers to the observations of Lord Watson in Baroness Wenlock v. River Lee Co., supra, .to the effect:

"Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corpora- tion may legitimately pursue must be ascer- tained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions,"

602.This aspect was explained by the Hon'ble Supreme Court in ***Indian Council for Enviro-Legal Action*** with reference to the EP Act, the Air Act and the Water Act and it was pointed out as follows:-

> *"60. .....Section 3 of the Environment (Protection) Act, 1986 expressly empowers the Central Government [or its delegate, as the case may be] to "take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment.....". Section 5 clothes the Central Government [or its delegate] with the power to issue directions for achieving the objects of the Act. Read with the wide definition of "environment" in Section 2(a), Sections 3 and 5 clothe the central Government with all such powers as are "necessary or expedient for the purpose of protecting and improving the quality of the environment". The Central Government is empowered to take all measures and issue all such directions as are called for the above purpose."*

603.The petitioner faced with the situation and fully conversant with the legal position that it being a company cannot claim shelter under Article 19(1)(g) of the Constitution, as elucidated by the Hon'ble Supreme Court in ***State Trading Corporation of India Ltd.,*** and other decisions, appears to have setup a person residing in Chennai by name Smt.C.M.Vijayalakshmi, W/o.Shri A.Balaganesan stating that she has purchased 12,000 shares in the year 2005 and subsequently, purchased 13,958 shares in 2013 and on account of the petitioner's unit being shutdown, her share value had dropped, therefore, she is vitally interested in the well being of the petitioner company. In paragraph 6 of the affidavit filed in support of the implead petition, she would state that at the time of oral submissions by the State of Tamil Nadu, an objection has been raised that the writ petitioner cannot raise any ground pertaining to Article 19(1)(g) of the Constitution, since fundamental rights are available only to natural persons and not to a corporate entity and therefore, it has become just

and necessary that a shareholder is impleaded as a joint petitioner or a respondent, which adopts the writ petitioner's submissions. She would further state that she had been following up the proceedings and reliably understand that several persons including employee shareholders had sought for impleadment. However, this Court deem it fit not to implead such persons, since the writ petitioner had represented that it would be in a position to take care of its interest. It is further stated that several third parties have been impleaded and a shareholder, who is vitally interested in the business of the company and who is invested in its capital has paramount and direct interest in reopening the plant and therefore, it is just and necessary to implead herself in the proceedings. The petitioner further briefly states that the order of closure is illegal, passed without any authority of law. She would further state that she became aware of the shareholders not being a party to the proceedings by virtue of wide reporting in the newspapers of the submissions by the State Government pointing out the failure of any shareholder being a party to the

writ petition and therefore, she is immediately approaching the Court for impleadment as a writ petitioner along with the petitioner company.

604.From the averments in the affidavit filed in support of the petition, it is evidently clear that the person, who seeks impleadment has been setup by the petitioner. The said Smt.C.M.Vijayalakshmi, at no earlier point of time, had sought to get herself involved in the litigation and her submission is that during the oral submission before this Court, the State contended that Article 19(1)(g) of the Constitution cannot be pressed into service by the petitioner. This averment is sufficient to doubt the bona fides of the petitioner. In any event, at this belated stage, that too, after the objection has been raised by the respondents as regards the applicability of Article 19(1)(g) *qua* the petitioner, we refuse to entertain such an impleadment, that too, when she seeks to get herself impleaded as a writ petitioner along with the writ petitioner. In this regard, it would be beneficial to refer to the decision of the

Hon'ble Supreme Court in ***Dharam Dutt,*** to explain the rights conferred by Article 19 in the following terms:-

> *"36.Article 19 confers fundamental rights on citizens. The rights conferred by Article 19(1) are not available to and cannot be claimed by any person who is not and cannot be a citizen of India. A statutory right as distinguished from a fundamental right conferred on persons or citizens is capable of being deprived of or taken away by legislation. The fundamental rights cannot be taken away by any legislation; a legislation can only impose reasonable restrictions on the exercise of the right. Out of the several rights enumerated in clause (1) of Article 19, the right at sub-clause (a) is not merely a right of speech and expression but a right to freedom of speech and expression. The enumeration of other rights is not by reference to freedom. In the words of the then Chief Justice Patanjali Sastri (In State of West Bengal Vs. Subodh Gopal Bose & Ors., 1954 SCR 587) these rights are great and basic rights which are recognized and guaranteed as the natural rights, inherent in the status of a citizen of a free country. Yet, there*

cannot be any liberty absolute in nature and uncontrolled in operation so as to confer a right wholly free from any restraint. Had there been no restraints, the rights and freedoms may tend to become the synonyms of anarchy and disorder. The founding fathers of the Constitution, therefore, conditioned the enumerated rights and freedoms reasonably and such reasonable restrictions are found to be enumerated in clauses (2) to (6) of Article 19 excepting for sub-clauses (i) and (ii) of clause (6), the laws falling within which descriptions are immune from attack on the exercise of legislative power within their ambit (See: H.C. Narayanappa & Ors. Vs. State of Mysore & Ors., (1960) 3SCR 742).''

Hence, for the above reasons, the petition in W.M.P.SR No.102459 of 2019 is rejected.

605.In ***Karnataka Live Band Restaurants Association,*** the Court after referring to the legal maxims *'salus', 'populi', 'suprima' lex'* and *salus repiblique suprema lex* - meaning the safety of the people is supreme in law;

safety of the State is the supreme law. The Court then proceeded to explain the reasonable restrictions under Clause (6) of Article 19 of the Constitution and it was held as follows:-

> *"64) As held above, the public interest, the welfare and the safety of general public always override the right of an individual. There is no prohibition for any individual to carry on such business. However, if he wishes to carry on such business, he has to follow the norms and the statutory regulation framed for carrying on the business. He cannot be heard to say that he will carry on the business but without ensuring the norms and the regulations framed for the purpose.*
>
> *65) In our opinion, here comes the application of the two maxims quoted supra while determining the rights of an individual qua public and the State.*
>
> *66) Indeed, we can take judicial notice of an incident occurred in recent past in a restaurant in Mumbai where life of several innocent people sitting in the restaurants were lost due to lapses in ensuring compliance*

of safety measures. Yet another incident of the similar nature occurred few years before in Upahar Theater in Delhi where several innocent people lost their life due to non-observance of safety measures.

67) When such incidents occur, they never obliterate from the memories of the citizen and leave a message to all the stakeholders that steps for strict compliance must be taken to avoid any such recurrence in future at any place. We hope that all the stakeholders will keep our observations in mind."

606.The learned Senior Counsel for the petitioner placed reliance on the decisions in the case of ***Asgar, All India Manufacturers Organisation, Joydeep Mukharjee, Daryao*** and ***Amalgamated Coalfields Ltd.,*** to support their contention that Section 11 of the Code of Civil Procedure applies to public interest litigation, substantive *res judicata* and constructive *res judicata* are embodied as statutory principles, no one can be twice vexed on the same cause more particularly, when a judgment is in a public interest litigation is a

judgment in rem and there should be finality to litigation. Further, it was contended that doctrine of *res judicata* applies to Article 32 petitions, when the same was a matter decided under Article 226 by the High Court. The above decisions set down the legal principles. When we apply these principles to the case on hand, we need to examine as to its applicability. To decide this issue, the factual matrix is the predominant material, to come to a conclusion as to whether the principles of constructive *res judicata*, substantive *res judicata* will apply.

607.The argument of the learned Senior Counsel on the applicability of this doctrine stems basically from the contention that the petitioner cannot be twice vexed on the same cause. This submission is predicated on the contention that the 2013 judgment of the Hon'ble Supreme Court puts an end to all controversies, all issues, all disputes and contentions advanced which occurred prior to the decision. We have rejected the said submission and

given reasons to do so and the reasons are manifest on a reading of the 2013 judgment of the Hon'ble Supreme Court. In our view, the proper reading of the judgment of the Hon'ble Supreme Court is to hold that the regulator has power to take action including ordering closure.

608.The respondent-State is right in their submission that the 2013 judgment arose out of an order of the Court directing closure whereas, the impugned orders in these writ petitions are orders refusing to renew the consent to operate by the TNPCB and an order of permanent closure by the Government followed by further orders by the TNPCB. Therefore, the two situations, that is, the situations which prevailed before the Division Bench of the High Court while ordering closure, the correctness of this was tested by the Hon'ble Supreme Court in the 2013 judgment and the present impugned orders are two different situations. Therefore, the 2013 judgment of the Hon'ble Suprme Court cannot be a bar for the authorities issuing directions for closure.

609.As already pointed out, the petitioner was not exonerated by the Hon'ble Supreme Court in the 2013 judgment. Therefore, on facts, we hold that the doctrine of *res judicata* can have no application to the facts of this case and it is not a case where the matter has been determined in a former proceedings and therefore, it is not open to the parties to re-agitate the matter again. At this juncture, it would be worthwhile to refer to the relevant paragraphs of the 2013 judgment of the Hon'ble Supreme Court, which read as follows:-

> *"38.This is not to say that in case it becomes necessary for preservation of ecology of the aforesaid four islands which form part of the Gulf of Munnar, the plant of the appellants cannot be directed to be shifted in future. We find from the affidavit filed on behalf of the State of Tamil Nadu on 29.10.2012 that the Gulf of Munnar consisting of 21 islands including the aforesaid four islands have been notified under Section*

35(1) of the Wildlife (Protection) Act, 1972 on 10th September 1986 and a declaration may also be made under Section 35(4) of the said Act declaring the Gulf of Munnar as a Marine National Park. We have, therefore, no doubt that the Gulf of Munnar is an ecological sensitive area and the Central Government may in exercise of its powers under clause (v) of sub-section (1) of Rule 5 of the Environment (Protection) Rules, 1986 prohibit or restrict the location of industries and carrying on processes and operations to preserve the biological diversity of the Gulf of Munnar. As and when the Central Government issues an order under Rule 5 of the Environment (Protection) Rules, 1986 prohibiting or restricting the location of industries within and around the Gulf of Munnar Marine National Park, then appropriate steps may have to be taken by all concerned for shifting the industry of the appellants from the SIPCOT Industrial Complex depending upon the content of the order or notification issued by the Central Government under

the aforesaid Rule 5 of the Environment (Protection) Rules, 1986, subject to the legal challenge by the industries.

39.The next question with which we have to deal is whether the High Court could have directed the closure of the plant of the appellants on the ground that though originally the TNPCB stipulated a condition in the 'No Objection Certificate' that the appellant-company has to develop a green belt of 250 meters width around the battery limit of the plant, the appellants made representation to the TNPCB for reducing the width of the green belt and the TNPCB in its meeting held on 18.08.1994 relaxed this condition and required the appellants to develop the green belt with a minimum width of 25 meters.

39.1.We find on a reading of the No Objection Certificate issued by the TNPCB that various conditions have been imposed on the industry of the appellants to ensure that air pollution control measures are installed for the control of emission

generated from the plant and that the emission from the plant satisfies the ambient area quality standards prescribed by the TNPCB and development of green belt contemplated under the environmental management plan around the battery limit of the industry of the appellants was an additional condition that was imposed by the TNPCB in the No Objection Certificate. If the TNPCB after considering the representation of the appellants has reduced the width of the green belt from a minimum of 250 meters to a minimum of 25 meters around the battery limit of the industry of the appellants and it is not shown that this power which has been exercised was vitiated by procedural breach or irrationality, the High Court in exercise of its powers of judicial review could not have interfered with the exercise of such power by the State Pollution Control Board.

39.2.The High Court in the impugned judgment has not recorded any finding that there has been any breach of the mandatory provisions of the Air

Act or the Rules thereunder by the TNPCB by reducing the green belt to 25 meters. Nor has the High Court recorded any finding that by reducing the width of the green belt around the battery limit of the industry of the appellants from 250 meters to 25 meters, it will not be possible to mitigate the effects of fugitive emissions from the plant. The High Court has merely held that the TNPCB should not have taken such a generous attitude and should not have in a casual way dealt with the issue permitting the appellant-company to reduce the green belt particularly when there have been ugly repercussions in the area on account of the incidents which took place on 05.07.1997 onwards. It was for the TNPCB to take the decision in that behalf and considering that the appellant's plant was within a pre-existing industrial estate, the appellant could not have been singled out to require such a huge green belt.

40.This takes us to the argument of Mr. Prakash that had the Ministry of Environment and

Forests, Government of India, applied its mind fully before granting the environment clearance and had the TNPCB applied its mind fully to the consents under the Air Act and the Water Act and considered all possible environmental repercussions that the plant proposed to be set up by the appellants would have, the environmental problems now created by the plant of the appellants would have been prevented. As we have already held, it is for the administrative and statutory authorities empowered under the law to consider and grant environmental clearance and the consents to the appellants for setting up the plant and where no ground for interference with the decisions of the authorities on well recognized principles of judicial review is made out, the High Court could not interfere with the decisions of the authorities to grant the environmental clearance or the consents on the ground that had the authorities made a proper environmental assessment of the plant, the adverse environmental effects of the industry could have been prevented. If,

however, after the environmental clearance under the Environment (Protection) Act, 1986, and the Rules and the notifications issued thereunder and after the consents granted under the Air Act and the Water Act, the industry continues to pollute the environment so as to effect the fundamental right to life under Article 21 of the Constitution, the High Court could still direct the closure of the industry by virtue of its powers under Article 21of the Constitution if it came to the conclusion that there were no other remedial measures to ensure that the industry maintains the standards of emission and effluent as laid down by law for safe environment (see M.C. Mehta v. Union of India and others [(1987) 4 SCC 463] in which this Court directed closure of tanneries polluting the waters of Ganga river).

41.We have, therefore, to examine whether there were materials before the High Court to show that the plant of the appellants did not maintain the standards of emission and effluent as laid down by the

TNPCB and whether there were no remedial measures other than the closure of the industry of the appellants to protect the environment. We find on a reading of the impugned judgment of the High Court that it has relied on the report of NEERI of 2005 to hold that the plant site itself is severely polluted and the ground samples level of arsenic justified classifying the whole site of the plant of the appellant as hazardous waste.

42.We extract hereinbelow the relevant observations of NEERI in its report of 2005 relating to air, water and soil environment in the Executive Summary:

"Air Environment:

The emission factors of SO2 from sulphuric acid plant – I (SAP- I) and sulphuric acid plant – II (SAP-II) were 0.55 kg/MT of H2SO4 manufactured which is well within the TNPCB stipulated limit of 2kg/MT of H2SO4 manufactured.

The acid mist concentration of SAP-I was 85 mg/Nm3, which exceeds the TNPCB limit of 50

mg/Nm3. The acid mist concentration from SAP-II was 42 mg/Nm3, which is well within the TNPCB limit. In view of the exceedance of TNPCB limit for acid mist, it is recommended that the performance of acid mist eliminators may be intermittently checked. It is further recommended to install a tail gas treatment plant to take care of occasional upsets.

Out of the seven D.G. sets, one (6.3 MW) was monitored for particulate matter (PM) emissions. The level of PM was 115 mg/Nm3 (0.84 gm/kWh) which is within the TNPCB stipulated limit of 150 mg/Nm3 for thermal power plants of 200 MW and higher capacity (165 mg/Nm3) but higher than that stipulated for diesel engines / Gen sets up to 800 KW capacity (0.3 gm/kWh). Therefore TNPCB may decide whether the present PM emissions from the DG sets of 6.3 MW capacity is within the limit or otherwise.

The fugitive emissions were monitored at four sites to assess the status of air quality with respect of SO2, NO2 and SPM. The results of analysis at all

fugitive emission monitoring sites indicate that the levels of gaseous pollutants SO2 and NO2, were below the respective NIOSH/OSHA standards for work place environment. The levels of SPM were also within the stipulated TNPCB standards for industrial areas.

Impact of stack and fugitive emissions on surrounding air quality was also assessed by monitoring SO2, NO2 and SPM levels at five monitoring locations. The levels of SPM, SO2 and NO2 at all the five sites were far below the TNPCB standards of 120 µg/Nm3 for SO2 as well as NO2 and 500 µg/Nm3 for SPM for industrial zone.

Water Environment:

Surface water samples were collected and analyzed for physico- chemical, nutrient demand parameters. The physico-chemical characteristics and nutrient demand parameters, i.e. with special reference to pH (7.9-8.0), TDS (120-160 mg/L), COD (11- 18 mg/L) and levels of heavy metals viz. Cd, Cr, Cu, Pb, Fe, Mn, Zn and As in surface water, were found within

the prescribed limits of drinking water standards (IS: 10500-1995).

Total eight groundwater samples were collected (seven from hand pumps and one from dug well) to assess the groundwater quality in the study area. The analysis on physico-chemical characteristics of groundwater samples collected from various locations showed high mineral contents in terms of dissolved solids (395-3020mg/L), alkalinity (63-210 mg/L), total hardness (225-2434 mg/L), chloride (109-950 mg/L), sulphate (29-1124 mg/L) and sodium (57-677 mg/L) as compared to the drinking water standards (IS:10500-1995). Thus, it could be concluded that water in some of the wells investigated is unfit for drinking. The concentrations of nutrient demand parameters revealed that phosphate was in the range 0.1-0.3 mg/L while nitrate was in the range 1-7.5 mg/L at all sampling locations which is within the limits stipulated under drinking water standards (IS:10500- 1995). Levels of Chromium, Copper and

lead were found to be higher in comparison to the parameters stipulated under drinking water standards (IS:10500-1995), other heady metal concentrations, viz. iron, manganese, zinc and arsenic were found in the range 0.01-0.05 mg/L, ND-0.01 mg/L and ND-0.08 mg/L respectively which are within the drinking water standards (IS:10500-1995).

To assess the impact on groundwater quality due to secured and fill sites and other waste disposal facilities, five samples were collected from monitoring wells (shallow bore wells located around the waste disposal sites). The Physico-Chemical characteristics of well water around secured land fill site and gypsum pond showed mineral contents higher then the levels stipulated in IS: 10500-1995 in terms of dissolved solids (400- 3245 mg/L), alkalinity (57-137 mg/L), hardness (290-1280 mg/L), chloride (46-1390 mg/L), sulphate (177-649 mg/L) and sodium (9- 271 mg/L). The results of nutrient demand parameters showed phosphate in the range 0.1-0.5 mg/L while nitrate was

in the range 0.8-11.7 mg/L at all sampling locations, which are within the levels stipulated in IS:10500-1995, whereas level of arsenic was found in the range of ND-0.08 mg/L as against the stipulated limit of 0.05 mg/L under drinking water standards (IS:10500-1995). Levels of cadmium, chromium, copper and lead were also found to exceed the drinking water standards in some of the wells.

The hourly composite wastewater samples were collected at six locations. During the sample collection, flow monitoring was also carried out at the inlet and final outlet of the effluent treatment plant (ETP). The concentrations of total dissolved solid (TDS) and sulphate exceed the limit stipulated by the TNPCB for treated effluent. All the other parameters are within the consent conditions prescribed by TNPCB. The treated effluent is being recycled back in the process to achieve zero discharge.

Soil Environment:

Soil samples were also analyzed for level of heavy metals. The soil samples at the plant site showed presence of As (132.5 to 163.0 mg/kg), Cu (8.6 to 163.5 mg/kg), Mn (283 to 521.0 mg/kg) and Fe (929.6 to 1764.6 mg/kg). Though there is no prescribed limit for heavy metal contents in soil, the occurrence of these heavy metals in the soil may be attributed to fugitive emission, solid waste dumps, etc."

It will be clear from the extracts from the Executive Summary of NEERI in its report of 2005, that while some of the emissions from the plant of the appellants were within the limits stipulated by the TNPCB, some of the emissions did not conform to the standards stipulated by TNPCB. It will also be clear from the extracts from the Executive Summary relating to water environment that the surface water samples were found to be within the prescribed limits of drinking water (IS:10500-1995) whereas ground water samples showed high mineral contents in terms of dissolved solids as compared to the drinking water standards,

but concentrations of nutrient demand parameters revealed that the phosphate and nitrate contents were within the limits stipulated under drinking water standards and levels of chromium, copper and lead were found to be higher in comparison to the parameters stipulated under drinking water standards, whereas the heavy metal concentrations, namely, iron, manganese, zinc and arsenic were within the drinking water standards. Soil samples also revealed heavy metals. Regarding the solid waste out of slag in the plant site, the CPCB has taken a view in its communication dated 17.11.2003 to TNPCB that the slag is non- hazardous. Thus, the NEERI report of 2005 did show that the emission and effluent discharge affected the environment but the report read as whole does not warrant a conclusion that the plant of the appellants could not possibly take remedial steps to improve the environment and that the only remedy to protect the environment was to direct closure of the plant of the appellants.

43.In fact, this Court passed orders on 25.02.2011 directing a joint inspection by NEERI (National Engineering and Research Institute) with the officials of the Central Pollution Control Board (for short 'the CPCB') as well as the TNPCB. Accordingly, an inspection was carried out during 6th April to 8th April, 2011 and 19th April to 22nd April, 2011 and a report was submitted by NEERI to this Court. On 18.07.2011, this Court directed the Tamil Nadu Government and the TNPCB to submit their comments with reference to the NEERI report. On 25.08.2011, this Court directed TNPCB to file a synopsis specifying the deficiencies with reference to the NEERI report and suggest control measures that should be taken by the appellants so that this Court can consider the direction to be issued for remedial measures which can be monitored by the TNPCB. Accordingly, the TNPCB filed an affidavit dated 30.08.2011 along with the chart of deficiencies and measures to be implemented by the appellants and on 11.10.2011, this Court directed the

TNPCB to issue directions, in exercise of its powers under the Air Act and the Water Act to the appellants to carry out the measures and remove the deficiencies indicated in the chart. Pursuant to the order dated 11.10.2011, the TNPCB issued directions to the appellants and on 17.01.2012, the appellants claimed before the Court that they have removed the deficiencies pointed out by the TNPCB and on 27.08.2012, this Court directed that a joint inspection be carried out by TNPCB and CPCB and completed by 14th September, 2012 and a joint report be submitted to this Court.

44.The conclusion in the joint inspection report of CPCB and TNPCB is extracted hereinbelow:

"Out of the 30 Directions issued by the Tamil Nadu Pollution Control Board, the industry has complied with 29 Directions. The remaining Direction No.1(3) under the Air Act on installation of bag filter to converter is at the final stage of erection, which will

require further 15 working days to fully comply as per the industry's revised schedule."

From the aforesaid conclusion of the joint inspection report, it is clear that out of the 30 directions issued by the TNPCB, the appellant-company has complied with 29 directions and only one more direction under the Air Act was to be complied with. As the deficiencies in the plant of the appellants which affected the environment as pointed out by NEERI have now been removed, the impugned order of the High Court directing closure of the plant of the appellants is liable to be set aside.

45. We may now consider the contention on behalf of the interveners that the appellants were liable to pay compensation for the damage caused by the plant to the environment. The NEERI reports of 1998, 1999, 2003 and 2005 show that the plant of the appellant did pollute the environment through emissions which did not conform to the standards laid down by the TNPCB under the Air Act and through

discharge of effluent which did not conform to the standards laid down by the TNPCB under the Water Act. As pointed out by Mr. V. Gopalsamy and Mr. Prakash, on account of some of these deficiencies, TNPCB also did not renew the consent to operate for some periods and yet the appellants continued to operate its plant without such renewal. This is evident from the following extracts from the NEERI report of 2011:

"Further, renewal of the Consent to Operate was issued vide the following Proceedings Nos. and validity period:

TNPCB Proceeding	*Validity Up to*
No.T7/TNPCB/F.22276/RL/TTN/W/2007 dated 07.05.2007 No.T7/TNPCB/F.22276/RL/TTN/A/2006 dated 07.05.2007	*30-09-2007*
No.T7/TNPCB/F.22276/URL/TTN/W/2008 dated 19.01.2009 No.T7/TNPCB/F.22276/URL/TTN/A/2008 dated 19.01.2009	*31-03-2009*

TNPCB Proceeding	*Validity Up to*
No.T7/TNPCB/F.22276/URL/TTN/W/2009 dated 14.08.2009 No.T7/TNPCB/F.22276/URL/TTN/A/2009 dated 14.08.2009	*31-12-2009*

Thereafter, the TNPCB did not renew the Consents due to non-compliance of the following conditions:

Under Water Act, 1974,

(i) The unit shall take expedite action to achieve the time bound target for disposal of slag, submitted to the Board, including BIS clearance before arriving at disposal to cement industries, marine impact study before arriving at disposal for landfill in abandoned quarries.

(ii) The unit shall take expedite action to dispose the entire stock of the solid waste of gypsum.

Under Air Act, 1981

(i) The unit shall improve the fugitive control measure to ensure that no secondary fugitive emission is discharged at any stage, including at the points of material handing and vehicle movement area."

For such damages caused to the environment from 1997 to 2012 and for operating the plant without a valid renewal for a fairly long period, the appellant-company obviously is liable to compensate by paying damages.

46.In M.C. Mehta and Another vs. Union of India and Others [(1987) 1 SCC 395], a Constitution Bench of this Court held:

"36. ..... The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise

to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."

The Constitution Bench in the aforesaid case further observed that the quantum of compensation must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect and the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it.

47.In the Annual Report 2011 of the appellant-company, at pages 20 and 21, the performance of its copper project is given. We extract hereinbelow the paragraph titled "Financial Performance":

"PBDIT for the financial year 2010-11 was Rs.1,043 Crore, 40% higher than the PBDIT of Rs.744 Crore for the financial year 2009-10. This was primarily due to higher LME prices and lower unit costs at Copper India and with the improved by-product realization."

Considering the magnitude, capacity and prosperity of the appellant-company, we are of the view that the appellant-company should be held liable for a compensation of Rs. 100 crores for having polluted the environment in the vicinity of its plant and for having operated the plant without a renewal of the consents by the TNPCB for a fairly long period and according to us, any less amount, would not have the desired deterrent effect on the appellant-company. The aforesaid amount will be deposited with the Collector of Thoothukudi District, who will invest it in a Fixed Deposit with a Nationalized Bank for a period of five years. The interest therefrom will be spent for improving the environment, including water and soil, of the vicinity of the plant after consultation with TNPCB and approval of the Secretary, Environment, Government of Tamil Nadu.

48.We now come to the submission of Mr. Prakash that we should not grant relief to the appellants because of misrepresentation and

suppression of material facts made in the special leave petition that the appellants have always been running their plant with statutory consents and approvals and misrepresentation and suppression of material facts made in the special leave petition that the plant was closed at the time the special leave petition was moved and a stay order was obtained from this Court on 01.10.2010. There is no doubt that there has been misrepresentation and suppression of material facts made in the special leave petition but to decline relief to the appellants in this case would mean closure of the plant of the appellants. The plant of the appellants contributes substantially to the copper production in India and copper is used in defence, electricity, automobile, construction and infrastructure etc. The plant of the appellants has about 1300 employees and it also provides employment to large number of people through contractors. A number of ancillary industries are also dependent on the plant. Through its various transactions, the plant generates a huge revenue to

Central and State Governments in terms of excise, custom duties, income tax and VAT. It also contributes to 10% of the total cargo volume of Tuticorin port. For these considerations of public interest, we do not think it will be a proper exercise of our discretion under Article 136 of the Constitution to refuse relief on the grounds of misrepresentation and suppression of material facts in the special leave petition.

49.Before we part with this case, we would like to put on record our appreciation for the writ petitioners before the High Court and the intervener before this Court for having taken up the cause of the environment both before the High Court and this Court and for having assisted this Court on all dates of hearing with utmost sincerity and hard work. In Indian Council for Enviro-Legal Action and Others vs. Union of India and Others [(1996) 3 SCC 211], this Court observed that voluntary bodies deserve encouragement wherever their actions are found to be in furtherance of public interest. Very few would venture to litigate

for the cause of environment, particularly against the mighty and the resourceful, but the writ petitioners before the High Court and the intervener before this Court not only ventured but also put in their best for the cause of the general public.

50.In the result, the appeals are allowed and the impugned common judgment of the High Court is set aside. The appellants, however, are directed to deposit within three months from today a compensation of Rs.100 crores with the Collector of Thoothukudi District, which will be kept in a fixed deposit in a Nationalized Bank for a minimum of five years, renewable as and when it expires, and the interest therefrom will be spent on suitable measures for improvement of the environment, including water and soil, of the vicinity of the plant of the appellants after consultation with TNPCB and approval of the Secretary, Environment, Government of Tamil Nadu. In case the Collector of Thoothukudi District, after consultation with TNPCB, finds the interest amount

inadequate, he may also utilize the principal amount or part thereof for the aforesaid purpose after approval from the Secretary, Environment, Government of Tamil Nadu. By this judgment, we have only set aside the directions of the High Court in the impugned common judgment and we make it clear that this judgment will not stand in the way of the TNPCB issuing directions to the appellant-company, including a direction for closure of the plant, for the protection of environment in accordance with law.

51.We also make it clear that the award of damages of Rs. 100 Crores by this judgment against the appellant-Company for the period from 1997 to 2012 will not stand in the way of any claim for damages for the aforesaid period or any other period in a civil court or any other forum in accordance with law."

610.As pointed out earlier, the Hon'ble Supreme Court in ***Rural Litigation and Entitlement Kendra,*** while considering a case relating to social

safety and for creating hazard-less environment for the people living, it was pointed out that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the Court even if it is said that there was a final order and in such type of matters, it would be difficult to entertain the plea of *res judicata.*

611.It was argued by the learned Senior Counsel for the petitioner that the impugned orders are devoid of reasons and the Government abdicated their power conferred under Section 18A of the Act. In support of such contention, reference was made to the decisions in the case of ***Kranti Associates (P) Ltd.,*** and ***Bandeep Singh.***

612.We have elaborately discussed about the powers exercised by the Board and the Government. We have also discussed the various facets of the Government Order, though a brief order. The delegation, which has been

done by the Government was also considered by us and found to be a general delegation. Thus, we find there is no abdication of powers, in fact, it is a proper exercise of power and jurisdiction. It was further argued that there is absolutely no reasons in the impugned order. The Government Order endorses the decision taken by the TNPCB in addition, it takes note of the mandate under Article 48A of the Constitution, the public interest involved and directs permanent closure and sealing of the industry.

613.In ***Kranti Associates (P) Ltd.,*** the principle on recording of reasons was explained which case arose out of a decision under the Consumer Protection Act challenging an order passed by the National Consumer Disputes Redressal Forum. The challenge in ***Bandeep Singh*** was to matter arising out of a public auction by the Punjab State Leather Development Corporation. These decision do not apply to the facts of the present case for several reasons. Firstly, there was no public element involved in both those

matters. The orders passed by the Board refusing consent to operate sets out reasons and also refers to the earlier general and special conditions. For 20 long years, the petitioner has being issued such orders, be it a closure order or a renewal order. The petitioner was closed twice by TNPCB and thrice by the Court. The matter being a technical matter, the Environmental Engineer of the TNPCB cannot be expected to write a judgment, nor the petitioner can expect him to do so. Non-compliance, violation, partial compliance or total disregard to the conditions would empower the Board to take action against the licensee and such action can be an action to stop, action to close down till the breach is remedied, action to close permanently in cases, which warrant such action and action for permanent closure and removal. Therefore, the impugned orders cannot be stated to be devoid of reasons, as the Government Order while endorsing the closure order of the Pollution Control Board, directs permanent closure and sealing of the unit and has referred to the mandate cast on the State by the Constitution and bearing in mind the larger public interest.

614.In ***B.Krishna Bhat vs. UoI [1990 SCC (3) 65],*** the Hon'ble Supreme Court refused to exercise its jurisdiction under Article 32 of the Constitution on the ground that the said petition before it was filed to enforce the directive principles more particularly, Article 47 of the Constitution. It was pointed out that Article 32 of the Constitution gives the Supreme Court the power to enforce rights, which are fundamental rights, fundamental rights are justiciable, directive principles are not. This decision was cited for supporting the argument that there cannot be any delegation of the duty cast upon the State under the directive principles, it is not justiciable and writ of mandamus will not lie to enforce the same. The writ petition before the Hon'ble Supreme Court was challenging the Constitutional validity of the Kerala Exercise Rules. This decision can hardly render any assistance to the petitioner's case.

615.The entire litigation commenced in 1996 as a public interest litigation to protect the environment. The matters were entertained. The Supreme Court in the 2013 judgment, appreciated the efforts of the public interest litigants that they had the courage to face the petitioner and conduct the litigation to save the environment. Even when setting aside the order of closure directed by the Division Bench of this Court, the Hon'ble Supreme Court left it to the decision of the TNPCB to take a decision including order of closure. Therefore, the litigation having had a chequered history, the question as to whether in the process of deciding these writ petitions whether there is going to be a direction for enforcement of a directive principle is a far fetched argument deserves to be out rightly rejected.

616.It was argued by the learned Senior Counsel for the petitioner that the inability of the State to maintain law and order or to avert a situation of breach of peace can never be a ground to throttle the fundamental right

guaranteed to the petitioner under Article 19(1)(a) of the Constitution. In this regard, reliance was placed on the decision in ***S.Rangarajan*** and ***Sony Pictures Releasing of India.*** Firstly, the petitioner not being a person, is not entitled to the guarantee under Article 19(1) of the Constitution. The petitioner seeks to make out a case as if the shooting incident was the sole reason for the orders of closure and permanent sealing. Forgetting for a moment the past litigation, the orders passed by the Board, the directions issued, the orders passed by Courts, by Tribunals, etc. Therefore, the learned Senior Counsel for the 9th respondent is right in her submission that any action taken in public interest is a reasonable restriction on the right under Article 19(1)(g) of the Constitution which right does not enure in favour of the petitioner as it is not a citizen. At this juncture, it would be worthwhile to reiterate that Section 17(1)(l) states that the functions of the State Board shall be to make, vary or revoke any order for prevention, control or abatement or discharges of wastes into streams or wells; requiring any person to construct

new systems for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or adopt such remedial measures as are necessary to prevent, control or abate water pollution.

617.We have discussed the power under Section 17(1)(l) read with Section 18 as well as other provisions to hold that the impugned order does not suffer from the vice of lack of jurisdiction. In addition to the reasons assigned by us, it would be relevant to examine as to what would be the correct meaning to be assigned to the word "any" occurring in Section 17(1)(l). This power is to make, vary or revoke "any" order. The Hon'ble Supreme Court in ***Raj Kumar Shivhare*** held that the word "any" in the contest of Section 35 of Fema would mean "all". Referring to other decisions, it was held that the word "any" means one or more out of several and includes all. Blacks Law Dictionary explains the word "any" as having a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one". Thus, the impugned orders do not suffer from the vice of lack of jurisdiction.

618.The learned Senior Counsel for the petitioner referred to certain reports, which were submitted before the NGT, which were opposed by the learned Senior Counsel for TNPCB. The question is whether those reports or affidavits, which were placed before the NGT, could be relied on by the petitioner in these proceedings. In our considered view, the petitioner would be precluded from doing so, on account of the decision of the Hon'ble Supreme Court in ***TNPCB vs. Sterlite Industries C.A.Nos.4763-4764/2013*** dated ***18.02.2019***. The judgments of the NGT both interim and final orders setting aside the order of closure passed by the TNPCB were set aside on the ground of maintainability. The consequential order passed by the TNPCB dated 22.01.2019 was also set aside. The Hon'ble Supreme Court relegated the petitioner to the position that the six orders impugned before the NGT, dealt with in its order dated 15.12.2018 and the order dated 29.03.2013 dealt with in the final order dated 08.08.2013 are alive and operative. The Hon'ble Supreme

Court observed that it will be open for the petitioner herein to file a writ petition in the High Court against all the aforesaid orders. Thus, the entire order/judgment of NGT has been set aside in toto, the orders which were impugned before the NGT having been resurrected leaving it open to the petitioner to file writ petitions against those orders. Therefore, by virtue of the judgment of the Hon'ble Supreme Court dated 18.02.2018, the clock has been set back to the position which prevailed in 2013. Therefore, the entire proceedings before the NGT should be held to be non-existing as on date and completely effaced. Therefore, we cannot refer to the affidavits, reports or any observations made before the NGT. In other words, the "slate" has been cleaned and there are no writings on it to rely on.

619.It was argued by the respondents that the petitioner apart from being a chronic polluter from their unit at Thoothukudi, they are also held to be violators in other parts of the country, where other activities are being

carried on by the petitioner. The petitioner contends that this is of no relevance to the case on hand and the Court cannot be prejudiced by any other order or judgment, which were rendered in a completely different factual scenario.

620.We are not fully convinced with the submission of the petitioner more so because, the present industry could not be located by the petitioner in two other States in the country. In fact, when they established the plant in the State of Maharashtra, on account of public protests, the Government cancelled the permission and the establishment had to be dismantled. Therefore, the conduct of the petitioner, in other parts of the country, is of relevance while adjudging the credibility of the petitioner and its commitment towards environment. For such purpose, we refer to two decisions, first of which is in the case of ***Goa Foundation,*** which was a Public Interest Litigation filed before the Hon'ble Supreme Court praying for directions to the Union of India

and the State of Goa to take steps to terminate the mining leases, where mining was carried out in violation of various statutes. The Court pointed out that in renewing the mining leases, the State of Goa completely ignored several relevant, important and significant factors giving the impression that renewals were not quite fair or reasonable; the State ignored the fact that every single mining lease holder (including the petitioner) have committed some illegality or other in varying degrees. To identify these illegalities, a Special Investigating Team had been set up as also a team of Chartered Accountants and instead of waiting for a report from one of these teams, the State of Goa acted in violation of the grant of mining leases policy and renewing the mining leases. A question was posed by the Hon'ble Supreme Court as to why was the report from the Special Investigating Team not awaited or called for and examined. The Court pointed out that unfortunately, the undue haste in which the State acted gives the impression that it was willing to sacrifice the rule of law for the benefit of the mining lease holders and the explanation of

satisfying the needs of some section of the society for their livelihood (after keeping them in the lurch for more than two years) was a mere fig leaf. The real intention of the second renewal was to satisfy avariciousness of mining lease holders, who were motivated by profits to be made through exploitation of natural resources. It was further pointed out that the undue haste in which the State granted the second renewal of mining lease particularly after the amendments proposed to the MMRD Act, were placed before the public domain by the Government of India is a clear indication that the decision of the State was not based on relevant material and not necessarily triggered by the interest of mineral development. That the haste with which the State took its decision also needs to be understood in the background of the fact that the mining had been suspended by the State in September, 2012, i.e., more than two years prior to the grant of second renewal; the urgency suddenly exhibited by the State (Goa), therefore, seems to be make-belief and motivated rather than genuine. Explaining as to how the issues impacting the society are to be

looked into, the Hon'ble Supreme Court held as follows:-

> *"142. We must emphasise that issues impacting society are required to be looked at holistically and not in a disaggregated manner. An overall perspective is necessary on such issues including issues that impact on the environment and the people of a community or a region or the State. It is for this reason that it is necessary to look at them broadly otherwise if that broader perspective is lost everyone will be a loser and no one will be a real beneficiary. One or two violations here and there may be wished away as inconsequential, but multiple violations by several persons can result in serious problems. As the novelist and philosopher Ayn Rand had said: We can evade reality, but we cannot evade the consequences of evading reality. Therefore, there is no doubt that the Mineral Policy, the Grant of Mining Leases Policy, the amendment to the MMDR Act, the report of the EAC and the report of the Expert Committee must be considered in the larger context of*

constitutionalism, the rule of law, environmental jurisprudence as well as the fundamental right of the people of Goa to have clean air and protection of the fragile ecology. Governance cannot and should not be carried out de hors the interests of the people and some uncomfortable decisions may be inevitable for balancing the equities."

Ultimately, the renewal of mining leases granted by the State of Goa were set aside and quashed.

621.In ***Orissa Mining Corporation Ltd.,*** the Orissa Mining Corporation, a State of Orissa undertaking, approached the Hon'ble Supreme Court seeking a Writ of Certiorari to quash the order passed by the MoEF rejecting the stage II forest clearance for diversion of forest land for mining of bauxite ore. The petitioner (Sterlite) filed an application in 2003 before MoEF for environmental clearance for the purpose of starting an Alumina Refinery Project stating that no forest land was involved within an area of 10kms. The

MoEF as per the application submitted by Sterlite, granted Environmental Clearance on 22.09.2004 to the Alumina Refinery Project on one million ton per annum capacity of refinery along with 75 MW coal waste CPP by delinking it with the mining project. After about two months, the State of Orissa informed MoEF about the involvement of large extent of forest land in the project as against 'Nil' mentioned in the environmental clearance and issued show cause notice for the encroachment of forest land. Recommendations of the Forest Advisory Committee and the report of a four-member committee head by Dr.Naresh Saxsena called Saxsena Committee was referred to and we find from the report that the petitioner (Vedanta Alumina Ltd.) has already proceeded with construction activity for its enormous expansion project that would increase its capacity six fold from 1 MTPA to 6 MTPA without obtaining environmental clearance as per the provisions of the EP Act. This expansion, its extensive scale and advanced nature, is in complete violation of the EP Act and is an expression of the

contempt with which the company treats the loss of the land. M/s.Sterlite as well as the Orissa Mining Corporation contended that there is no impediment in MoEF granting stage II forest clearance for the project. It disputed Saxsena Committee's report to suffer from factual error with regard to the extent of land.

622.We have referred to this decision to note the conduct of the petitioner in proceeding with the expansion without clearances, which has been pointed out in the case on hand by two reports thereby exhibiting the conduct of the petitioner.

623.The petitioner has been consistently taking a stand that the people in the area want the petitioner to continue. The downstream industries are eager and waiting for the petitioner to commence operation. The statement given by the public in the villages surrounding the unit to the officials are all

tutored and everybody in Thoothukudi District is happy to have the petitioner there and that Thoothukudi is safer than Chennai. All these submissions deserve to be outrightly rejected after going through the compilation filed by the TNPCB. This compilation is Volume R-10 containing the details of complaints against the petitioner for all these years it is not only public, but also political parties, Members of the Legislative Assembly and the common man and the typed set filed by the 9th respondent in Part-X, which contains the various articles and representations made by the general public. As per the report of the Government of India - National Clean Air Programme dated 10.01.2019, giving a list of most polluted cities in the Country, in Tamil Nadu, Thoothukudi is the only District which finds place in the list of most polluted city in Tamil Nadu. These statistics revealed by the Government of India clearly shows that the averment made by the petitioner that Thoothukudi is safer than Chennai is to be rejected as being unsubstantiated. Referring to newspaper reports and other interviews appearing in social media can in no

way advance the case of the petitioner. Considering the amendments brought about to the Water and Air Acts, which give a role for public participation, the Government is bound to take note of the voice of the public and it cannot be scuttled. The Hon'ble Supreme Court in the decision in ***Justice K.S.Puttaswamy (Retd.) vs. UoI & Ors. [(2017) 10 SCC 1],*** has recognised the right to question, the right to scrutinise and the right to dissent. While on this issue, we need to emphasis that the citizen has a fundamental right to have clean and healthy environment and the doctrine of waiver can have no application in this regard.

624.In the additional common typed set of documents, Volume 2B, the petitioner had annexed in Page 158, a tabulated statement titled "Reply to the queries raised by the learned Senior Advocate Mr.K.V.Viswanathan". Mr.C.A.Sundaram, learned Senior Counsel referred to this document by stating that this was annexed to be paper book filed before the Hon'ble

Supreme Court and the reply given by TNPCB/its officers to Mr.K.V.Viswanathan, learned Senior Advocate appearing for the respondent supports his case. It is submitted that TNPCB has stated that the show cause notice dated 14.02.2017 has come to a logical end. In response to the query as to why there was no reference to the petitioner in the said notice the TNPCB stated that copper slag was dumped in a patta land and when enquiry was made by the revenue officials, it was known that the patta land owner purchased the copper slag and dumped it in his land adjacent to the odai and hence notice was given only to the patta land owner. Similarly other portions of the reply were read out and it was submitted that at no point of time TNPCB held the petitioner responsible for the dumping of the slag.

625.Mr.K.V.Viswanathan, learned Senior Advocate submitted that this correspondence was between himself and the TNPCB during the course of the discussions which were held and it is a material shared by the client with

the counsel and this cannot be relied upon by the petitioner and inadvertently the same was annexed in the paper book filed before the Hon'ble Supreme Court and the petitioner cannot take advantage of the same. Firstly, we express out displeasure in the petitioner referring to the said document inspite of the fact that the respondent has taken a stand that it was inadvertently annexed in the paper book filed before the Hon'ble Supreme Court. That apart the petitioner can stand in a no better footing by placing reliance on the said document. It is an un-signed note, not clear as to who prepared the reply. Secondly the petitioner had hoodwinked the revenue officials by stating that they have sold the slag and they are not responsible. Unfortunately, the revenue officials did not probe into the matter, did not read the conditions of the MOU, did not have a thorough discussion with the top officials of the TNPCB and we can safely conclude that they have colluded with the petitioner by not even issuing a show cause notice to the petitioner while issuing notice to Leelavathi. Therefore, nothing falls out of the reply given by the TNPCB to

Mr.K.V.Viswanathan, learned Senior Advocate and the petitioner ought not to have placed reliance on the said document. Therefore, all contentions advanced based on the said document are eschewed.

626.Along with this batch of cases, W.P.No.21547 of 2019 filed by the 9th respondent, Ms.Fatima, was tagged along. The writ petition is for a direction to remove the petitioner's unit. In fact, in the counter affidavit filed by the Government in these writ petitions, they have taken a specific stand that the petitioner should dismantle and leave the State of Tamil Nadu. However, we find that the petitioner has filed a writ petition before the Madurai Bench challenging the order passed by SIPCOT cancelling the allotment of land and an order of interim stay has been granted in the said writ petition. Therefore, the prayer sought for by the 9th respondent in W.P.No.21547 of 2019 cannot be considered as of now and essentially to be heard and decided along with W.P.(MD) No.20788 of 2018.

627.In the light of the foregoing discussions, this Court is inclined to pass the following order:-

(i) W.P.No.5756 of 2019 filed challenging the order passed by the TNPCB dated 12.04.2018, rejecting the application for renewal of consent is dismissed and the order passed by the TNPCB is upheld;

(ii) W.P.Nos.5764 and 5774 of 2019, challenging the orders passed by the TNPCB directing closure under the Air and Water Acts are dismissed and those orders are upheld;

(iii) W.P.No.5772 of 2019 challenging the order passed by the TNPCB dated 09.04.2018, rejecting the application filed by the petitioner for renewal of consent under the Air and Water Acts is dismissed and the decision taken by TNPCB not to renew the consent is upheld;

(iv) W.P.Nos.5776 and 5801 of 2019 challenging the orders of the

TNPCB dated 23.05.2018 issuing directions for closure and disconnection of power supply are dismissed and those orders are upheld;

(v) W.P.No.5792 of 2019, challenging the Government Order in G.O.Ms.No.72, dated 28.05.2018 and the consequential orders passed by the TNPCB dated 28.05.2018 and orders passed by the Director of Boilers dated 30.05.2018, the order passed by the Joint Director, Industrial Safety and Health dated 30.05.2018 and the order passed by the Director/DGP, Tamil Nadu Fire and Rescue Services are dismissed and the impugned Government Order and the other orders are upheld;

(vi) W.P.No.5793 of 2019, challenging the order passed by the TNPCB dated 28.05.2018 sealing the petitioner's unit is dismissed and the impugned order is upheld;

(vii) In W.P.No.5771 of 2019, the petitioner seeks for direction upon the TNPCB to grant hazardous waste management authorisation. In the light of the decisions taken in the aforementioned writ petitions, the writ petition is dismissed. Consequently, W.P.No.5773 of 2019 seeking for copies of records is also dismissed;

(viii) W.P.No.21547 of 2019 has been filed by Ms.Fatima, who is the 9th respondent in the writ petitions filed by the petitioner unit. The prayer sought for in the writ petition is to direct the State Government, TNPCB and the District Collector, Thoothukudi, do demolish the petitioner's industry and restore the site to its previous state by remediating the environment including the soil and water. This writ petition, filed on 19.07.2019, was directed to be placed before this Division Bench by orders of the Hon'ble The Chief Justice. The writ petition has not been admitted. The SIPCOT, which allotted the land to the petitioner in the industrial complex, passed an order dated 29.05.2018

cancelling the allotment and this order is impugned in W.P.(MD) No.20788 of 2018 and an order of interim stay has been granted on 03.10.2018. Therefore, we direct the Registry to delink this writ petition from this batch of cases to be heard along with W.P.(MD) No.20788 of 2018 after obtaining appropriate orders from the Hon'ble The Chief Justice;

(ix) For the reasons set out by us, W.P.SR No.102459 of 2019 in W.P.No.5792 of 2019 filed by Smt.C.M.Vijayalakshmi seeking for impleadment as the 2nd writ petitioner in W.P.No.5792 of 2019 is rejected. No costs. All connected Writ Miscellaneous Petitions are dismissed.

(T.S.S., J.) (V.B.S., J.)
18.08.2020

Index:Yes
Speaking Order

pbn/cse/abr

To

1.The Principal Secretary to Government,
The State of Tamil Nadu,
Environment and Forest Department,
Secretariat, Chennai-600 009.

2.The Chairman,
Tamil Nadu Pollution Control Board,
No.76, Mount Salai, Guindy,
Chennai-600 032.

3.The District Collector,
Thoothukudi District, Tamil Nadu.

4.The Superintendent Engineer,
Tamil Nadu Electricity Board,
(Presently, Tamil Nadu Generation and
Distribution Company – TANGEDCO),
Thoothukudi District.

5.The Town Welfare Officer,
Thoothukudi Corporation, Thoothukudi.

6.The Director of Boilers,
First Floor (South Wing),
P.W.D. Office Compound,
Chepauk, Chennai-600 005.

T.S.Sivagnanam, J.
and
V.Bhavani Subbaroyan, J.

pbn/cse/abr

7.The Joint Director,
Industrial Safety and Health,
Directorate of Industrial Safety and Health,
Thoothukudi-628 003.

8.The Director/DGP,
Tamil Nadu Fire and Rescue Services,
No.17, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008.

Pre-Delivery Common Order in
W.P.Nos.5756, 5764, 5771,
5772, 5773, 5774, 5776, 5792,
5793, 5801 and 21547 of 2019

18.08.2020