

**BEFORE THE NATIONAL GREEN TRIBUNAL
SOUTHERN ZONE, CHENNAI**

APPEAL No. 9 of 2011

(NEAA APPEAL No. 10 of 2010)

In the matter of:

1. Samata
Through R. Ravi
D.No.14-37-9, Krishna Nagar
Maharanipeta, Vizakhapatnam
2. Forum of Sustainable Development (FSD)
Through its Member, FSD & Coastal Convener
S. Bhujanga Rao
D.No. 4-71-1, Lawson's Bay Colony
Visakhapatnam- 530 007 .. Appellants

-versus-

1. The Union of India
Through the Secretary
Ministry of Environment and Forests
Paryavaran Bhawan
CGO Complex
Lodhi Road
New Delhi- 110 003
2. Andhra Pradesh State Pollution Control Board
Paryavaran Bhawan, A-3, IE
Sanath Nagar
Hyderabad- 500 018
3. M/s. Alfa Infraprop Pvt. Ltd.,
3rd Floor, Rider House
136, Sector-44, Gurgaon- 122 002 .. Respondents

Counsel appearing for:

Appellants : M/s. Ritwick Dutta and Rahul Choudaray, Advocates.

Respondents: Shrimathi C. Sangamithirai, Advocate for respondent No.1

: Shri T. Sai Krishnan, Advocate for respondent No. 2

: Shri Ajit Puduserry, Advocate for respondent No.3.

JUDGMENT

सत्यमेव जयते

Present:

**(1) Hon'ble Justice Shri M. Chockalingam
Judicial Member**

**(2) Hon'ble Prof. Dr. R. Nagendran
Expert Member**

Date: 13th December, 2013

(Hon'ble Shri Justice M. Chockalingam, Judicial Member)

This appeal, which was originally filed before the National Environment Appellate Authority (for short NEAA) as Appeal No. 10/2010, on disbandment and with the establishment of National Green Tribunal (for short NGT) on transfer, is filed seeking to quash the Environmental Clearance (for short EC) dated 15.3.2010 granted by the Ministry of Environment and Forest (for short MoEF) , the respondent No. 1 to M/s Alfa Infraprop Private Limited (for short company) Respondent No. 3 for a coal based Thermal Power Plant near Komarada village in Vizianagaram District, Andhra Pradesh.

2) Short necessary facts for the disposal of the appeal can be stated thus:

The appellant No. 1 is a registered NGO, who works for the rights of Tribal and *Adivasis* and for preservation of natural resources and ecology of Eastern Ghats since 1990, while the appellant No. 2 is as social and environmental group with the objective of working for the welfare of the local communities and creating awareness on environmental issues. The third respondent company made an application with a proposal for setting up of a 4 x 660 MW super critical coal based Thermal Power Plant at Komarada Village in Vizayanagaram District, Andhra Pradesh. The land required for the same would be 1675 acres (678 ha). Imported coal from Indonesia would be used as fuel. The coal supply for the imported coal is in place. The ash and sulphur contents in the coal to be used would be 16 and 0.8 %, respectively. The coal requirement will be 7. 61 MTPA. The water requirement of 8000 m³ per hour will be met from confluence point of Nagavalli and Janjavati rivers situate 2 km from the site from Thotapalli reservoir. Water linkage has been obtained from the Government of Andhra Pradesh. Distance of pipe lines and pumping points would be 2.5 km. That apart, the fly ash will be utilised by cement manufacturers. There are no wildlife sanctuaries, national parks, biosphere reserves, heritage sites, etc., within 10 km radius of the site. The cost of the project would be Rs.11,838 crores. Public hearing was conducted on 4.12.2009 in which members of the applicant organisations participated and made representations to the concerned authorities.

3) The MoEF granted EC subject to the compliance of the conditions attached to the EC to the project under the provisions of EIA Notification 2006, vide its letter dated 15.3.2010. The aforesaid EC granted by the respondent No.1, MoEF to respondent No. 3, the project proponent, is assailed on the following grounds:

4) The EIA Report submitted by the project proponent did not include the crucial information on the project site and also provided false information. The

project proponent has stated in the EIA Report that the 1975 acres (678 ha) of land identified for the proposed project was barren and uncultivable comprising of 38.3% Government land and 61.7% private land. The said statement was false and misleading since the lands were fertile, irrigated and agriculture is undertaken on parts of this land and it is neither barren nor uncultivable. They are agriculturists and for some of whom *pattas* were granted by the Government. The said fact is evident from the G.O. Ms. No. 446 dated 22.5.2010 (Annexure A 2) where it was acknowledged that the land has been under cultivation in parts of the project site. It is pertinent to point out that a large part of the project site falls in irrigation ayacut of Vanakbadi Gadda reservoir project for which the Government of Andhra Pradesh was spending substantial amounts of money. The Government would not have spent so much money if the lands were uncultivable. The EIA report did not include any information on the water bodies in the project site nor does it contain any analysis as to how the proposed thermal power plant would impact these water bodies. There is one *vagu* and 10 to 14 water bodies in the project site. The existence of the water bodies has been acknowledged in the impugned EC letter dated 15.03.2010. Since the project is coal based Thermal Power Plant, it will generate large amounts of ash, sulphur based pollutants which would certainly pollute the water bodies. There is no mention in the EIA report on the location of the thermal power project in the *ayacut* of Vanakbadi Gadda irrigation reservoir project. The said project was undertaken by the State Irrigation Department and the department has already spent Rs. 2 to 3 crores out of Rs. 6.83 crores sanctioned under the Tribal Sub Land Grant and further the works are also in progress. The scheme was likely to be completed soon after November 2009.

5) From a communication dated 5.11.2009 of the Executive Engineer, Irrigation Department to the Andhra Pradesh Pollution Control Board, it is clear that the irrigation project was envisaged to provide irrigation facility to the tribal

ayacutdars and small farmers who are very poor and with marginal land holdings. There were 384 families which had land holdings of less than 2 ha and 80% of the lands belong to SC and ST persons. There are at least 23 reserve forests in the block in the 10 km radius of the project site. Though the EIA report mentions only 23 reserve forest blocks, the same did not assess the impact of the project on those reserve forest areas. Thus, the EIA report by the project proponent contains false information and also concealed the crucial information and hence the Environmental Clearance granted to the project proponent should be revoked on that ground.

6) The public hearing held on 4.12.2009 was not conducted in accordance with EIA Notification, 2006. The EIA Notification, 2006 mandates that the applicant should enclose with the letter of request at least 10 hard copies and an equal number of soft copies of the draft EIA report with the generic structure including summary of Environmental Impact Assessment report in English and in the official language of the State, prepared in accordance with the Terms of Reference (for short ToR) communicated after Scoping. The applicant should arrange to furnish copies to the authorities or officers within whose jurisdiction the project would be located. In the instant case, the EIA report which was made available in the public domain before the public hearing was not in Telugu language. According to the Notification, a public hearing at the site or in close proximity – district wise, to be carried out in the manner prescribed for ascertaining the concerns of the locally affected persons who reside in villages. In the present case, the project affected the persons reside in the villages of the State of Odisha situated within 10 km radius of the project site. But, they have not been given an opportunity to raise their concerns in the public hearing held on 4.10.2009. No public hearing was organised by Odisha State Pollution Control Board. There are many villages which are likely to be affected by the project. Hence, the persons from the said villages should have been given an opportunity to raise their concerns and demand clarifications through a

public hearing. In the instance case, in view of the absence of proper public consultation, it cannot be stated that the process for granting EC was complete. Hence, in view of the inadequacy of public consultation, the impugned EC has to be set aside. Equally, the EC has to be set aside since it has thoroughly ignored the impact on the tribals and the existing *ayacutdars*.

7) Responding to an advertisement seeking objections on the thermal power plant, the Executive Engineer, Irrigation Division, Parvatipuram, in his letter dated 5.11.2009 to the Andhra Pradesh Pollution Control Board, has stated that in the interest of tribal and small farmers it may not be desirable to establish the coal based thermal power plant in Komarada Mandali. In the course of this letter, the Executive Engineer has raised several issues including:

- (a) The Company M/s. Alpha Infraprop Pvt. Ltd., has purchased lands to an extent of 114.31 acres in the *ayacut* of Vanakbadi Gadda Reservoir Irrigation project covered under the villages of Pedakerjala, Regulapadu and Kotipam against the proposed 290.77 acres of land to be purchased by the company without taking any permission from the Irrigation Department.
- (b) The Irrigation facilities being provided under the Irrigation project are for the tribal *ayacutdars* and small farmers who are very poor and have marginal land holdings. 384 families of cultivators have less than 2 ha of land and 80% of the land belongs to the persons from Scheduled Tribes and Scheduled Castes.
- (c) A major part of the land which has been purchased or is to be purchased for the project covered in the foreshore area of the contemplated *ayacut* of Vanakbadi Gadda reservoir scheme which is in progress.
- (d) An amount of Rs. 243 lakhs had already been spent on Vanakbadi Gadda reservoir scheme and further work was in progress. If the project was established in the vicinity of the scheme, the interest of the tribal and small

farmer *ayacutdars* would be badly affected and the purpose for which the scheme was sanctioned would be defeated.

(e) The Irrigation Department would have to answer to the Government and auditors for unprofitable expenditure of Government exchequer to the extent of Rs. 2. 43 Crores which had already been spent on the project.

(f) The contractor who is executing the reservoir project may initiate legal proceedings against the department in case the reservoir project was cancelled or stopped in the mid-way as the contractor had already spent huge amount.

8) The 1st respondent has specified certain conditions in the EC letter with regard to the reservoirs which would be clearly indicative of the non-application of mind on the part of both the MOEF and also the Expert Appraisal Committee (for short EAC). From the Government order in Annexure A-2 and the letter of the Executive Engineer in Annexure- 3, parts of the land that has been alienated for the project were covered in the foreshore area and fall within the *ayacut* area and hence, the reservoir project was bound to be affected by the proposed thermal power plant. No alternative plan has been provided to *ayacut* to compensate the same. Even if any modification is made, it would increase the cost of the project. The extent of 79 acres of Government lands which were being alienated consists of water bodies as evident from the Government order (Annexure- A2). This alienation of Government lands consisting of water bodies for the thermal power plant was in violation of the Government of Andhra Pradesh memorandum dated 22.8.2013. The setting up of the project which is coal based and inherently polluting would certainly have a great adverse effect on the water bodies. The pollutants from the power station would not only contaminate the water bodies but also spread the pollution to Nagavalli River. Furthermore, the residual water availability from Nagavalli and Janjhavati Rivers was not sufficient to meet the water needs of the project and thus,

the project would divert water from agriculture and drinking needs of the local people to meet the project's requirements. The EAC has also not applied its mind while undertaking detailed scrutiny of the project proposal. The perusal of the minutes of the 64th meeting of the reconstituted EAC for Thermal Power and Coal Mine projects held on January 2013 during which the EAC decided to recommend the project for approval reveals that the EAC has not applied its mind on various issues which were raised during the public hearing. A reading of the minutes of the EAC's 64th meeting (Annexure- A4) would clearly show that the EAC enumerated some of the issues which were raised during the public hearing but not all. However, the EAC did not give any reason as to how all the concerns raised during the public hearing have been addressed by the project proponent.

9) It is a well settled law that a decision taken must reflect the consideration of the materials available before the decision maker and the opinion formed on such material and the failure to give reasons for accepting or rejecting the projects would vitiate the decision taken on the ground of non application of mind to relied materials and for arbitrariness. Therefore, the recommendation to approve the project given to the MoEF by the EAC was arbitrary. Hence, for all the reasons stated above, the EC granted by the 1st respondent *vide* its letter dated 15.3.2010 to the 3rd respondent has to be quashed.

10) The averments in the reply affidavit filed by the Member Secretary on behalf of the second respondent, Andhra Pradesh State Pollution Control Board, read as follows:

11) While challenging the EC dated 15.3.2010 by the 1st respondent, the MOEF to the 3rd respondent for a coal based thermal power plant, the appellant has not raised any specific allegation against the Andhra Pradesh State Pollution Control Board. The 2nd respondent has fulfilled all the conditions prescribed in Clause 7(3)

Stage (III) - Public Consultation in the EIA Notification, 2006 and has ensured widest public participation within its jurisdiction. Both the requirements under the public consultation process, namely, obtaining written responses and public hearing were sincerely pursued and successfully concluded by the 2nd respondent. Various individuals from different fields concerned with the project and its effects voiced their opinions and participated in the public hearing which would make it evident that the 2nd respondent made adequate efforts for the participation of the people in the public hearing. Pursuant to the ToR issued by the MoEF by letter dated 15.5.2009 regarding the proposal of the project, the project proponent requested the 2nd respondent to conduct the public hearing as directed by the respondent No.1. Accordingly, the public hearing was fixed to be held on 4.12.2009. On 4.11.2009, a notification was issued both in English and Telugu languages by the Environmental Engineer, Regional Office, Andhra Pradesh Pollution State Control Board, Vizianagaram for the public hearing fixed on 4.12.2009, inviting suggestions, views, comments and objections of the public about the project on or before 4.12.2009. The executive summary of REIA Report, Management Plan along with soft copies were kept available and open to the public at different offices and places which were 14 in number. A copy of the notification issued in English and Telugu languages by the District Environmental Engineer, Regional Office, Vizianagaram, Andhra Pradesh State Pollution Control Board dated 3.11.2009 and published on 4.11.2009 has been attached in Annexure R2/1. In continuation of the said public hearing notice, a corrigendum to the earlier paper notification dated 4.11.2009 with respect to the change in survey numbers was issued in both English and Telugu by the Environment Engineer as found in Annexure R2/2. On 4.12.2009, a public hearing was conducted at the project site in Komarada as scheduled. The concerns expressed by the people were recorded in the minutes of the public hearing. A copy of the minutes of the public hearing (Annexure R2/3) was forwarded to various public

offices including the office of the District Collector, Vizianagaram to be displayed and for the information to the public.

12) With respect to the allegation that there were many villages of Odisha situated within 10 km radius of the project site and that no effort was made to ensure the participation of the affected villages of the Odisha in the public hearing, the 2nd respondent has performed his duty within its jurisdiction. The site boundary of the proposed project in any direction was not shared by Odisha State and confined only to Andhra Pradesh State and the appeal is bereft of merits and liable to be dismissed.

13) The averments contained in the reply filed by the Project Proponent/3rd respondent, are that the respondent is setting up 2640 (4 x 660) MW super critical coal based thermal power plant in Komarada village in Vizianagaram District, Andhra Pradesh. The cost of the project is estimated to be about Rs. 11,838 crore which include Rs. 1180 crore for environmental protection measures. In addition to this, Rs. 30.50 crore per annum would be spent as recurring cost for pollution control, treatment and monitoring system including green belt development in and around the thermal power plant. There are no bio-sphere reserves, wildlife sanctuaries, natural parks, ecologically sensitive locations or heritage sites within 10 km radius of the site. No forest lands are proposed to be used for the project. The project land was mostly barren and uncultivable waste land. The project site did not have any habitation. The project proposed to use the flood waters of 2.5 tmc per year from Nagavalli river stream of Thotapalli barrage for which 'in principle' approval has been accorded by the State Government by their water allocation letter dated 30.1.2009. Out of the initially envisaged total requirement of land of 1665 acres, about 636.38 acres of land has already been purchased by the 3rd respondent and another 640.75 acres of Government lands has been allotted for the project by the Andhra Pradesh Government by G.O. Ms. No. 225 dated 22.10.2010. After the

ToR was finalised by the MoEF vide their communication dated 15.5.2009 the EIA study was conducted by M/s.Vimta Labs Limited, which had worldwide recognition. A comprehensive assessment was done of the possible impacts on environment due to the setting up of the project. While circulating the report and its executive summary in the local language of the concerned authorities, a notification was issued in leading newspapers, 'The Hindu' and 'Eanadu' as per the requirements of the EIA Notification, 2006 regarding the public hearing. A public hearing was held on 4.12.2009 at the project site as per the requirements of the Notification. A large number of persons participated in the public hearing. After all the points raised in the public meeting were suitably addressed by the respondent No. 3, the EAC considered the matter and recommended the project for clearance leading to the issuance of the letter dated 15.3.2010 granting EC for the project.

14) It is pertinent to point out that MoEF has put in as many as 43 conditions to ensure that the project was implemented in accordance with the environmental norms. It is relevant to mention that there is a critical shortage of power in the country due to which in most of the places people resort to using of locally manufactured diesel generator sets which cause acute pollution since the prescribed norms are not followed. By setting up the thermal power plant with strict pollution control norms, atmospheric pollution can be avoided. The project of the 3rd respondent is an infrastructural project which is in the public interest to mitigate the acute shortage of power faced by the country.

15) At the outset, it has to be stated that the appeal has to be rejected as barred by time. In the present case, the EC was granted by the letter dated 15.3.2010. Though the appellants filed their appeal within 30 days, the time prescribed under National Environment Appellate Authority Act, 2007 (for short NEAA Act, 2007) only a few issues like faulty EIA report etc., was raised by the appellants. Then, much after the 60 days time available under the Act, during which

period the delay could have been condoned, the appellants have filed additional submissions on 30.9.2010 raising certain new grounds of appeal. There was no power reserved under NEAA Act, 2007 to condone delay beyond 90 days and hence, the new grounds raised in the appeal are liable to be rejected as barred by time.

16) The appellants are residents of Vishakapatnam, a city situate more than 170 km from the project site and they have not participated in the public hearing held on 04.12.2009. This fact is evident from the perusal of the minutes of the public hearing. The names of the appellants or the organisations which they claimed to represent have not been mentioned therein. The villagers and organisations who participated in the public hearing have not filed any appeal since they were convinced about the need and utility of the project in the area. Apart from that, their objections were satisfactorily answered. The appellants cannot be said to be persons affected within the meaning of NEAA Act, 2007 which is applicable to the present proceedings under Section 38 (5) of the NGT Act, 2010 to maintain the present appeal. The appellants, though claim to be representing the organisations, have not filed on record or any copy of the resolution authorising them to file the present appeal. In the absence of the same, the appellants are entitled to file the appeals on behalf of the organisations and hence, the appeal is liable to be dismissed on that ground also. The appeal is also liable to be dismissed on account of the concealment of material facts. The appellants have produced a letter of the Executive Engineer, Irrigation Department of Andhra Pradesh dated 05.11.2009 raising certain objections, but they have concealed the letter dated 01.12.2009 wherein the Executive Engineer, Irrigation Department, Andhra Pradesh has pointed out that the earlier objections raised by him were not valid any more in view of the revised irrigation scheme.

17) It is denied that the members of the appellant organisations participated in the public hearing as alleged by them. It is not correct to state that the EIA report has failed to mention that the project site was situated within Vanakbadi Gadda Reservoir Irrigation Project. The impact of the project with regard to the lands connected to the said irrigation project was recorded in the minutes of the public hearing. The respondent No. 3 had submitted the EIA report along with the minutes of the public hearing to MoEF which is evident from the EC letter dated 15.03.2013. The MoEF has taken cognisance of the impact on the irrigation project plans due to the activities and operation of the proposed power plant is quite evident from the EC letter. In any case, the *ayacut* of the said irrigation project has been revised and the project is not affecting the implementation of the irrigation *ayacut* area of the irrigation project. The EIA report mentioned the existence of 16 water bodies as against 10 claimed by the appellants. Moreover, the respondent No. 3 while implementing the project or while operating the plant, will not be disturbing the water bodies falling in the project area and would be maintaining all the water bodies as they are.

18) It is not in dispute that there are a number of reserve forest blocks within 10 km radius of the project site. But, the project would not have any impact on any of the reserve forests in any manner because all the pollution control measures laid down both by the Central Pollution Control Board and the Andhra Pradesh State Pollution Control Board will be strictly followed by the project proponents. The appellants have not cited any study report to support their stand that sufficient water was not available in the Nagavalli river or Janjavathi river for the project. The flood waters of Nagavalli river collected during the flood season are proposed to be utilised for the project. From the statement issued by the Executive Engineer, Irrigation Division as found in Annexure R3/4, it is evident that in a continuous period of 12 years, starting from 1997 to 2008, every year surplus of Nagavalli river ranging

from 10 to 157 tmc per year has gone to the sea whereas the water requirements for the power project is only 2.5 tmc per year.

19) A public notification was issued in local newspapers regarding the public hearing at the site as per the requirements of the EIA Notification in which large number of persons participated. There was not a single complaint from any villager in Odisha regarding the denial of opportunity for participating in the public hearing. The generalised allegations made by the appellants are without any factual basis but are only to oppose the project.

20) In so far as the additional submissions are concerned, it is denied that the land is fertile and irrigated. In fact, the EIA Report gave the village-wise land break-up which would show that out of the 1675 acres of land, about 291.05 acres was single crop land, and 8398 acres was barren land. This is supported by G.O. annexed as A1 filed by the appellants wherefrom it is clear that lesser extent was cultivable land as mentioned in the EIA. It is denied that larger part of the project site falls under irrigation *ayacut* of Vanakabadi Gada reservoir project. The *ayacut* of the said project has been revised and the project is not affecting the irrigation project. It is surprising to see that the appellants who are outsiders were concerned with this than the local residents who have not filed any appeal on this aspect. This would show that there was no real problem locally and the appellants who are outsiders have cooked up baseless and unfounded allegations. The EIA Report has mentioned about the location of 16 water bodies and also has clearly dealt with the effect of the operation of the project and how the ash, sulphur and other pollutants would be kept within norms laid down by the Central Pollution Control Board and Andhra Pradesh Pollution Control Board. The ash and sulphur content in the coal would be 12 and 0.7%, respectively. The fly ash would be utilised by the cement manufacturers M/s. AC Cements Ltd., M/s. India Cements Ltd, M/s. Penna Cements Ltd., who have issued 'in principle' acceptance letter to the 3rd respondent. The

project would have twin flue 275 m stack. It is proposed to install ESP of more than 99.9% efficiency to limit the emission of suspended particulate matter concentrations. The ash pond would be protected by creating an impermeable layer/ lining so that leaching of pollutants into ground is avoided. All those aspects were taken into consideration in the EIA.

21) The appellants had deliberately concealed the later developments since the *ayacut* of the Vanakbadi Gada irrigation project has been revised. The concerned irrigation Department has prepared a statement showing the caste-wise *ayacut* particulars for the original and the revised *ayacut* which show that entire projection regarding the effects on the tribal made by the appellant was incorrect. The statement showing the caste-wise *ayacut* particulars prepared by the Irrigation Department is filed as Annexure R3/6. It is evident from the chart that the number of acres being held by backward classes, SC/ST have increased from 1036 to 1125 because of the revision in the proposed *ayacut*. Thus, in fact, the revised *ayacut* was actually beneficial to more number of Backward Class, SC and ST families. The EIA has clearly mentioned the number of reserve forests within 10 km radius of the plant. The appellants have not pointed out that, out of the total area of the project a green belt of almost 483 acres was proposed to be developed in and around the proposed power plant complex, thus adding to the forest cover area. In the proposed green belt, about 3, 75,500 trees were to be planted with a density of about 2000 trees per hectare. The EIA report has clearly established that there would not be any impact on the environment in the surrounding area including the reserve forest. In fact, all the requirements of the EIA Notification were strictly complied with by the respondents. The public hearing was held at the site as provided in the EIA Notification after due publication in leading dailies for participation of the public. The only requirement of the Notification was of organizing the public hearing at the site or in close proximity and the requirement of holding of public hearing district wise was

there only when the project fell in more district than one. In the present case the project is confined to only one district and hence, the objection raised in this regard is liable to be rejected. The public notice was duly issued and nothing prevented the people from Odisha in coming to the public hearing or raise objections. . The issue raised about the water bodies being alienated without permission is absolutely untenable. The appellants have raised bald allegations without any material to substantiate the stand. The Government was entitled to alienate the land including the water bodies and there was no inviolable prohibition in law. The allegation that the coal based thermal power plant would inherently pollute the water bodies was based merely on speculations. If the said stand taken by the appellants is accepted, no project would come up anywhere in the country. The allegation that the EAC has not applied its mind to the materials available is denied. A perusal of the minutes of the EAC which comprised of experts from various fields shows that there was due application of mind before the project was cleared. The EAC is an expert body and as is noted in the minutes after duly considering the objections raised in the public hearing and the clarifications made by the Project Proponent and other materials available, the EAC has recommended the clearance after being satisfied. Thus, in view of the reply given above, the appeal has got to be dismissed as one without any substance.

22) The points for consideration that arise for determination in this appeal are:

- (1) Whether the appeal is not maintainable since the appellants are neither persons aggrieved and they do not have *locus standi* to prefer the appeal and also on the ground that the appeal is barred by time?
- (2) Whether the impugned EC dated 10.03.2010 granted by the respondent No.1/MoEF in favour of the 3rd respondent is liable to be set aside since the public hearing was not conducted as per the mandatory provisions of the EIA Notification, 2006?
- (3) Whether the impugned EC is liable to be set aside on the ground of non-application of mind on the part of the EAC in making approval?

(4) To what relief the appellants are entitled to?

23) As seen above, the appellants have challenged the EC dated 15.03.2010 granted by MoEF shown as respondent No.1 to M/s. Alpha Infraprop shown as respondent No.3 for a 4 x (660) coal based thermal power plant near village Komarada in Vizagapatnam District, Andhra Pradesh as shown under Annexure-A1 as stated above on different grounds. The Project Proponent, the 3rd respondent in the appeal has raised preliminary objections questioning the maintainability of the appeal which have to be considered earlier before entering into the merits or otherwise of the rival contentions put forth by the parties.

Point No.1:

24) Raising the preliminary objections, the learned counsel Shri Ajit Puduserry appearing for the 3rd respondent would submit that the appeal was originally filed before the Appellate Authority, National Environment Appellate Act, 1997 (for short NEAA Act) as appeal No. 10/2010. The appellants, in order to maintain the appeal must show that they are 'persons affected' or organisations functioning in the field of 'environment' and likely to be affected by the clearance granted to the project. But, no material is available on record to show that they are either 'persons affected' or organisations functioning in the field of 'environment' and likely to be affected by the clearance granted to the project. Both the appellants are residents of Visakhapatnam situate more than 170 km from the project site and they had not even participated in the public hearing held for the project. Hence they cannot be said to be the persons affected within the meaning of Section 11(1) (a) of the NEAA Act and thus they are not entitled to prefer the appeal. Even the associations which appellants claimed to represent have not raised regarding the *locus* nor produced any material to demonstrate that they are likely to be affected by the grant of EC and were also functioning in the field of environment. Thus, on the grant of lack of *locus* for filing the appeal as they were not 'persons aggrieved' within the meaning of Section 11(1)(a) of NEAA Act., the appeal is liable to be dismissed.

25) Answering to the above contentions, the counsel for the appellants would submit that the first appellant is a registered NGO working for the rights of the tribal activities of the Andhra Pradesh and the same has been working for the protection of natural resources and ecology of the Eastern Ghats from 1990 onwards. The 2nd

appellant is a social and environmental group with the objective of working for the welfare of the local communities and creating awareness on environmental issues. Hence the contention that the appellants are residents of Visakahapatnam which is situate at a distance of 170 km from the project site has to be rejected. The members of the appellant's organisation have participated in the public hearing and made their representations. While in the matter of ecology and environment every one directly and indirectly affected and also interested persons, in exercise of the right can prefer and maintain an appeal ventilating the grievance. The appellants are members of the organisation functioning in the field of environment and when the EC granted to the Project Proponent is likely to be affected either directly or indirectly, the organisation or every member of the organisation can prefer an appeal and hence the appellants can well maintain the appeals.

26) Admittedly, the appellants originally filed the appeal in Appeal No. 10/2010 before the NEAA. The NEAA Act, 1997, under 'appeals' to authority in Section Nos. 11(1) and 11(2) reads as follows:

11. Appeals to Authority:- (1) Any person aggrieved by an order granting environmental clearance in the areas in which any industries, operations or processes or class of industries, preparations and processes shall not be carried out or shall be carried out subject to certain safeguards may, within thirty days from the date of such order, prefer and appeal to the Authority in such forms as may be prescribed.

Provided that the Authority may entertain any appeal after the expiry of the said period of thirty days but not after ninety days from the date of aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) For the purposes of sub-section (1), "person" means-

(a) any person who is likely to be affected by the grant of environmental clearance;

*(b) ****

(c) any association of persons (whether incorporated or not) likely to be affected by such order and functioning in the field of environment;

(d) ***

(e) ***

27) From the reading of the above provisions, any person 'aggrieved' by the EC can prefer an appeal before the NEAA within the time stipulated therein. According to Section 11(1), the word 'person' employed in Section 11(1) would mean not only any person who is likely to be affected, but also an association of persons likely to be affected by such an order and functioning in the field of environment. In the instant case, both the appellants are association of persons and have been functioning in the field of environment for a long time. While so, the appellants must be able to show they are 'likely to be affected'.

28) By repealing the NEAA Act, 1997, the National Green Tribunal Act, 2010 (for short 'NGT Act, 2010) came into force. Speaking of the appellate jurisdiction, Section 16 of the N.G.T. Act, 2010 reads as follows:

"16. Tribunal to have appellate jurisdiction:- Any person aggrieved by.-

(a) ****

(b) ****

(c) ****

(d) ****

(e) ****

(f) ****

(g) ****

(h) *an order made, on or after the commencement of the National Green Tribunal Act, 2010, granting environmental clearance in the area in which any industries, operations or processes or class of industries, operations and processes shall not be carried out or shall be carried out subject to certain safeguards under Environment (Protection) Act, 1986 (29 of 1986);*

(i) *an order made, on or after the commencement of the National Green Tribunal Act, 2010, refusing to grant environmental clearance for*

carrying out any activity or operation or process under the Environmental (Protection) Act, 1986 (29 of 1986);

(j) any determination of benefit sharing or order made, on or after the commencement of the National Green Tribunal Act, 2010, by the National Biodiversity Authority or a State Biodiversity Board under the provisions of Biological Diversity Act, 2002 (18 of 2003),

may, within a period of thirty days from the date on which the order, or decision or direction, or determination is communicated to him, may prefer an appeal to the Tribunal;

Provided that the Tribunal may, if it is satisfied that the appellant was not prevented by sufficient cause from filing the appeal within the said period allow it be filed under this section within a further period of not exceeding sixty days.

29) Both under Section 11 of the NEAA Act, 1997 and Section 18 of the NGT Act, 2010 any person aggrieved by the grant of EC as shown above can maintain an appeal. The 'aggrieved person' as contemplated in the Act came up for interpretation before the Tribunal in a number of cases. An aggrieved person contemplated in the above provisions would refer to the substantial grievance as to denial of some personal, pecuniary or property right or imposing an obligation on a person. The grievance so ventilated should not be either fanciful or sentimental, but must be substantial. A person calling himself as an 'aggrieved' must have suffered a legal grievance that he has been wrongfully deprived of something or refused wrongfully. The aggrieved person can either be aggrieved either directly or indirectly. In so far as the environmental matters are concerned, it cannot be stated that the person really aggrieved should alone be permitted to initiate an action. It is not necessary that the person, who initiates action, is a resident of that particular area wherein the proposed industrial site is located. It is true that the appellants have not participated in the proceedings of the public hearing. It is true that it is necessary to scan the credentials of the appellants as to their intention and motive. Even assuming that the appellants have not participated in the proceedings of the public hearing, they would lose their right to challenge the approval or the EC. If the appellants come forward with a case apprehending damage and danger to environment and ecology if the

project in question was not properly envisaged and did not satisfy the Principles of Sustainable Development and Precautionary Principles, they can maintain the appeal and be allowed to agitate as to the correctness of the study made in respect of ecology and environment. In the instant case, nothing substantial has been demonstrated in order to doubt the credentials of the appellants. What are all stated by the 3rd respondent is that the appellants are residents of a different area though within the State and they are not aggrieved persons. The first appellant is a registered Non Governmental Organisation working in the field of Environment and the 2nd appellant is a social and environmental group with the objective of working for the welfare of the local communities and creating awareness on environmental issues and have filed the letter of authorisation issued by the respective bodies to initiate proceedings. Hence, they are to be termed as 'aggrieved persons' as envisaged under the above provisions, who can maintain the appeal and thus, this question is answered in favour of the appellants.

30) Equally, the contentions put forth by the 3rd respondent that some of the grounds raised by the appellants by means of additional affidavit and sought for amendment of the pleadings should not have been permitted has to be rejected. The relief sought for by the appellants when they filed the appeals before the NEAA was to set aside the EC granted by the MoEF to the 3rd respondent in respect of the coal based thermal power plant in question. It is true that at the time of filing of the appeal, it was on certain grounds and the appellants have amended the memo of appeal by adding some more grounds. It is put forth that the application for amendment to add some more grounds was resisted by the respondents and rejecting the objections the application was allowed and thus the amendment was ordered. Apart from that, while the application itself attempted to set aside the grant of EC, addition of some more grounds in order to substantiate the case of the appellants for the same relief cannot be denied. Hence, the contentions put forth by the 3rd respondent in that regard are rejected.

Point No. 2:

31) Advancing the arguments on the issue whether the public hearing conducted in respect of the thermal power plant project of the 3rd respondent was not in accordance with law and if so, whether the EC is liable to be set aside on that

ground, the learned counsel for the appellants would submit that the public hearing was not in accordance with the EIA Notification, 2006, since no opportunity was given to the people residing in Odisha who are likely to be affected due to the setting up of the project. The public hearing conducted was limited only to the area of Andhra Pradesh though the project area comprised of villages located in Odisha. It is an admitted fact that the villages in Odisha are located in an area within 10 km from the project site. Thus, the population living in Odisha who are likely to be affected by the project were not given opportunity to raise their concerns and objections. It is not the case of the appellants that the public hearing should be held in Odisha. But the appellants' concern is that since EIA study itself considered the 10 km radius as impact zone, the concerns of the population living in the 10 km zone irrespective of the political and administrative boundaries ought to have been considered. This would have been done through notices and information being provided to villages within 10 km zone. The EIA Notification, 2006 nowhere states or prohibits the dissemination of information with respect to the project which is likely to have impact on people and environment. The EIA notification specifically states that the public hearing is a process by which the concerns of the local affected persons and others who have a plausible stake in the environmental impact of the project or activity are ascertained with a view to taking into account all the materials concerns in the project or activity designed as appropriate. The EIA notification, 2006 clearly states that the concerns of local affected person and others should be ascertained. The term 'local affected persons' does not exclude people living in other States who are within the impact zone of the thermal power plant. The air pollution impacts of the coal fired thermal power plants are not limited to the project site or its immediate vicinity but extend beyond the same. Specifically with regard to the polluting industries including thermal power plants, the wind direction and the locational aspects can have a serious impact on people and ecology within close proximity and therefore, their participation has become essential. Appendix 4 of EIA notification, 2006 specifically mandates to the public hearing which should be arranged in a systematic, time bound and transparent manner ensuring widest possible public participation. The words 'widest possible public participation' are of wide import and necessarily include people who are likely to be affected although the effect due to pollution by the operation of the thermal power plant can spread to a large distance, At the very least, the public hearing should include people living within the study

area. Exclusion of people within the study area from effective participation is contrary to the EIA notification, 2006 and judgments made by Apex court and higher courts and the Principles of Sustained Development. The EC granted is also liable to be quashed on the ground that the public hearing was not conducted as per the mandatory provisions of the EIA Notification 2006.

32) Refuting all the contentions as baseless and contrary to law, the counsel for the 3rd respondent would submit that a comprehensive assessment was done of the possible impacts on environment due to the setting up of the project and the draft EIA and its executive summary were circulated in English and in local language to the concerned authorities. Public notices were also issued in newspapers 'The Hindu' and 'Enadu' for the public hearing which took place on 4.12.2009. The public hearing was held at the project site as per the requirement of the notification. Large number of people participated in the public hearing. After hearing the concerns and objections raised in the public hearing, the 3rd respondent suitably addressed the same. The issue raised by the appellants is that the entire EIA report ought to have been made available in Telugu language. But the EIA notification dealing with public consultation only provides that the concerned Pollution Control Board should invite responses from the concerned persons by placing on their website the summary EIA report prepared in the format given in the Appendix within 7 days from the receipt of the written request for arranging the public hearing. The EIA notification does not provide for EIA report in the local language. In so far as the contention put forth by the appellants as to the public hearing should have been held in the State of Odisha which situates within 10 km of the project site, the same has to be rejected, since it is contrary to the notification itself. Para 2.1 of the Appendix IV of the EIA Notification provides that the applicant should make a request through a simple letter to the Member Secretary of the SPCB or Union Territory Pollution Committee in whose jurisdiction the project is located and in case the project site is extending in a State of Union of Territory, the public hearing is mandated in each State or in Union Territory in which the project is sited. Hence, it is clear from the mandate of the EIA Notification, in the present case the public hearing should be held entirely within Andhra Pradesh where the project is sited and thus there is no legal requirement to hold public hearing in Odisha. Moreover, public notices were issued in newspapers having wide publicity in the area and persons in Odisha also could have participated in the public hearing held for the project. In fact, there was absolutely no complaint

by any person from Odisha about lack of notice or hearing. Hence, the contentions put forth by the appellants in this regard are liable to be rejected.

33) Concededly, following the public notices in leading news papers and circulating the draft EIA, a public hearing was held on 04.12.2009 at the project site as required by the EIA Notification, 2006. Large number of persons who participated in the public hearing were given sufficient opportunity to put forth their objections and concerns which were recorded in the minutes of the meeting as could be seen from the available materials. It is also not the case of the appellants that the persons assembled were not heard or minutes were not recorded properly. As rightly pointed out by the counsel for the respondents, none of the inhabitants of the area who participated in the public hearing filed any appeal being not satisfied with the clarifications given by the Project Proponent during the public hearing. It is pertinent to point out that no material is available that either of the appellants was available at the time of public hearing. It is true that merely because of their absence the right to challenge the proceedings or grant of EC is not taken away. But, it might not be able to state who were all present at the time and in particular, the persons from nearby Odisha State. Paragraph 6 of Section 3 of EIA Notification dealing with Public Consultation requires the concerned Pollution Control Board to invite response from the concerned persons in the website, the summary of EIA report in the format Appendix-III A. It does not require an EIA report in local language. But, it requires only a summary of the report. The contentions put forth by the appellants' side that the applicants should have made a request to the Member Secretary of the State Pollution Control Board of Odisha State for making necessary publication in the concerned district cannot be accepted since the EIA Notification mandates that the public hearing should be held only in the States or Union Territory where the project is sited. In the instant case, it is not in controversy that the project plant is entirely sited in Andhra Pradesh. Apart from that, a video CD of the public hearing furnished during the enquiry of the appeal was viewed by us. In every given case, where EC granted is challenged, one of the grounds is that the public hearing was not conducted properly as required by the EIA Notification, 2006 and hence, on the ground the EC has got to be scrapped. The Tribunal is of the considered opinion that even assuming that there is lapse in the public hearing, it would not be proper to declare the same as illegal or invalid unless the appellants are able to show that the

objections and concerns raised by the people during the public hearing are either not reflected in the proceedings recorded and some prejudice has been caused or not. The validity or otherwise of the public hearing depends always upon the facts and circumstances of each case. If there is a gross violation of the procedure and thereby public hearing becomes a mockery, the Tribunal may not have any hesitation to declare the same as invalid. But, it is not the case of the appellants that the objections and concerns raised by the people present during the public hearing were not reflected in the minutes of the proceedings recorded whereby it has caused any prejudice. Hence, the contention put forth by the appellants' side that the public hearing was not conducted as contemplated under EIA Notification, 2006 is without force and has to be rejected. Accordingly, this point is in favour of the respondents.

Point No. 3:

34) As regards the contention that the recommendation made by the EAC and consequential grant of EC by the 1st respondent in favour of the 3rd respondent has to be set aside on the ground of non-application of mind, advancing his arguments, the learned counsel for the appellants would submit that the EAC has approved the project proposal without proper appraisal and without following the procedure as contemplated in the EIA Notification, 2006. Thus, it has violated not only the EIA Notification, 2006, but also the various judgments of the NGT, High Courts and Apex Court. The EAC has not applied its mind while undertaking the appraisal of the project. In fact, no detailed scrutiny was done during 64th meeting of the EAC, the issues raised by the public were not addressed by EAC and without understanding the true implications of the project some mitigatory measures were prescribed. The EIA report did not consider the likely adverse impact due to the project and hence it cannot be termed as an objective study of the likely environmental and social impacts. The EIA report reads like an environmental management and mitigation plan and thereby it has completely defeated the purpose of conducting the EIA. The study was not in accordance with the ToR issued by the MoEF during the scoping stage. The report did not include any analysis of the real impact due to the project on the water bodies of the area as well as on the forest blocks located within a radius of 10 km. The report has not taken into consideration the impact on the drainage of the area in view of the presence of nearly 16 ponds in the area, which is provided in Table 2.4 (Page C-2.6 of the EIA

report). The combined area of the ponds amounts to more than 45 acres and thus a natural drainage system existed in the area, but no impact assessment has been done on this aspect. The ToR in Sl. No. 10 required the Project Proponent to provide information regarding surface hydrology and water regime and the impact of the same, if any to the project. In response, the Project Proponent has stated that the details of hydrology of the regions are presented in Chapter-III, Section 3.2, Page C-3.1. A perusal of the said page did not reveal any description or impact analysis about the surface hydrology. The Project Proponent at the time of enquiry of the appeal has filed a chart where in it is stated that the impact on drainage and the surrounding has been dealt with in Chapter IV, Page C-4.2, Section 4.23. An appraisal of this would make it clear that no study on impact of drainage has been done as required in the ToR. The ToR clearly requires information regarding surface hydrology and water regime. It is thus clear that no impact study on surface hydrology and water regime has been done by the Project Proponent. The EAC on its part did not discuss the issue with respect to the non-compliance of crucial ToR.

35) Pointing to the EIA Notification, 2006, the learned counsel would add that it is the duty of the MoEF to make a scrutiny of final EIA report strictly with reference to the ToR. Dealing with the procedure for appraisal, Appendix-V of EIA Notification, 2006 states that *“the EIA report and other relevant documents submitted by the applicant should be scrutinised within 30 days from the date of receipt of by the concerned regulatory authority strictly with reference to the terms of reference and the inadequacy noted should be communicated electronically or otherwise in a single set to the members of the EAC/SLEAC”*. But, the perusal of the document furnished by the MoEF reveals that no such exercise was done. Despite the fact that no study on drainage was done the project was recommended for EC. The EAC without considering the surface hydrology, drainage pattern and the likely impact due to setting up of the proposed project recommended for EC with a specific condition *‘no water bodies shall be disturbed due to the activities associated with the setting up of the thermal power plant’*. Thus, without any impact analysis the EAC recommended approval subject to the ‘so called’ specific condition. Thus, it has been done without any application of mind, that too, with a condition which was general in nature. The EAC also recommended that area drainage maintenance and implementation report specifying details of works undertaken to address

preservation of drainage system in and around the project site be submitted to the ministry within 3 months from the date of commencement of construction activities. The said stipulation is contrary to the precautionary principle, since it requires that the environmental actions and decisions must anticipate, attack and prevent the causes of environmental degradation. Thus, the EAC without any advance study has recommended the project for EC. Thus, the EC has to be struck down in view of violation of precautionary principle also.

36) According to the learned counsel for the appellants, a further violation is also evident in case of Sl.No.18 of the ToR which requires the Project Proponent to examine the feasibility of zero discharge. In case of any proposed discharge, its quantity, quality and point of discharge, users downstream etc., should be provided. The Project Proponent in its compliance report to the ToR has stated that about 458 m³/h of water will be discharged into Janjavathi river before the water quality matches the drainage standards. This would clearly indicate that the Project Proponent has not considered the feasibility of zero discharge, the points of discharge and the users downstream. It is stated in the chart filed by the Project Proponent (respondent 3) that downstream users will not be impacted because only the treated wastewater as per norms will be discharged into the river. Despite their glaring omission, neither the MoEF nor the EAC raised any specific queries with respect to the likely impact and non-compliance of ToR.. Hence, the contentions of the counsel for the 3rd respondent that the minutes of the 64th meeting of the EAC reveal that the EAC has applied its mind to various issues and it was not a mechanical exercise has to be rejected.

37) The learned counsel for the appellants with vigour and vehemence would contend that the EC has been granted not only contrary to the provisions of EIA Notification, 2006, but also to Precautionary Principles and Principles of Sustainable Development. The approval made by the EAC is also in clear violation of the principles governing the administrative decision, i.e., duty to give reasons and application of mind to relevant consideration. Pointing to paragraph 4 of the EIA Notification, 2006, the counsel would submit that the appraisal means a detailed scrutiny by EAC and SLEAC of the application and other documents like the final EIA report, outcome of the public consultation including public hearing, including the public hearing proceedings submitted by the applicant to the regulatory authority

concerned for grant of EC. The appraisal should be made by the EAC in a transparent manner in a proceeding to which the applicant shall be invited for furnishing necessary clarifications in person or through an authorised representative. On conclusion of the proceedings, the EAC or SEAC concerned shall make categorical recommendations to the regulatory authority concerned either for grant of EC on stipulated terms and conditions or rejection of the application for prior environmental clearance together with the reasons for the same.

38) Placing reliance on a decision of NGT in Appeal No. 47/2012 in ***Gau Raxa Hitraxak Manch and Gaucher Paryavaran Bachav Trus, Rajula vs. Union of India and others dated 22nd August 2013***, the counsel would submit that the appraisal is not a mere formality and it requires detailed scrutiny by EAC and SEAC of the application as well as the documents filed, the final decision for either rejecting or granting an EC vests with the Regulatory Authority concerned viz., SEIAA or MoEF, but the task of appraisal is vested with EAC/SEAC and not with the regulatory authority. The Hon'ble High Court, Delhi in ***Utkarsh Mandal Vs. Union of India (2009 X AD (Delhi) 365*** has held that the EAC was bound to disclose the reasons following the principle enunciated by the Hon'ble Apex Court in a plethora of cases requiring quasi judicial as well as administrative bodies to disclose reasons for coming to a particular conclusion. The very fact that the EAC is required to undertake a 'detailed scrutiny' of the EIA document as well as the outcome of the public consultation, presupposes the existence of reasons either in the order or in the records. It was held in ***Maharashtra State Board for Secondary and Higher Education Vs. K.S. Gandhi (1999)2 SCC 716*** that the reasons are the harbinger between the mind of the maker of the order to the controversy in question and the decision or conclusion reached. When an order affects the rights of a citizen or a person irrespective of whether it is quasi judicial or administrative order and unless the rule expressly or by necessary excludes recording of reasons, it is implicit that the principles of natural justice or fair play require recording of germane and precise relevant as part of fair procedure in an administrative decision, order/decision itself may not contain reason. But, at least the records should disclose reasons. In order to substantiate his contentions, the learned counsel for the appellants relied on the following decisions of the Apex Court and this Tribunal:

- (i) ***Union of India Vs. E.G. Namdudiri (1991) 3 SCC 38.***
- (ii) ***Gau Raxa Hitraxak Manch and Gaucher Paryavaran Bachav Trus, Rajula vs. Union of India and others dated 22nd August 2013 in Appeal No. 47/2013.***
- (iii) ***Rudresh Naik Vs. Goa Coastal Zone Management Authority in Appeal No. 20 of 2013.***
- (iv) ***S.N. Mukherjee Vs. Union of India (1990) 4 SCC 594.***
- (v) ***Ravi Yashwant Bhoir Vs. Collector (2012) 4 SCC 407.***
- (vi) ***Jeet Singh Kanwar and another Vs. Union of India and others (Appeal No. 10 of 2011)***
- (vii) ***Ramesh Gauns Vs. Ministry of Environment and Forest in W.P.No. 3208 of 2010 (High Court of Delhi).***

39) The learned counsel would submit that for all the reasons stated above, the recommendation made by the EAC and consequential grant of EC by the MoEF have to be set aside.

40) In answer to the above contentions, the counsel for the 3rd respondent would submit that the case of the appellants that the EAC and also the MoEF have not applied their mind at the time of approval and grant of EC are totally incorrect and also against the available materials. A perusal of the entire minutes of the 64th meeting of the EAC wherein the present project has been cleared indicates that there was thorough application of mind on the part of the EAC. In fact, a perusal of para 2.4 dealing with the Thermal Power Plant by M/s, Nelcast Energy, para 2.7 dealing with the clearance for the plant of the 3rd respondent, para 2.15 dealing with the plant of M/s. Sravanthi Energy (P) Ltd, para 2.18 dealing with plant of M/s, Pel (P) Ltd., clearly show that in each case the EAC has flagged the areas of concern and imposed special conditions in addition to all the general conditions for recommending environmental clearance of the plants. This by itself clearly shows

that EAC has in fact applied its mind while recommending clearance for the project. The objection raised by the appellants that the EAC has not provided reasons for clearing the project and has not dealt with all the objections raised during the public hearing which has vitiated the clearance granted in favour of the 3rd respondent was also wrong and contrary to law. The Hon'ble Apex court in the judgment reported in **(2008) 14 SCC 306 DC in the matter of Mylarappa Vs. Dr. R. Venkatasubbiah and others** has clearly laid down the parameters for decision making by an expert body. It has been held that there is no rule or regulation requiring the Board to record reasons. In the absence of any rule or regulation, requiring the Board to record the reasons, and in the absence of the *mala fides* attributed against the members of the Board, a selection made by the Board without recording reasons cannot be faulted with. In the instant case, no *mala fides* are attributed to the expert committee. The EIA Notification, 2006 clearly provides in Para i of Chapter IV Stage 4 about appraisal where it says the EAC or SLEAC concerned should make categorical recommendation to the Regulatory Authority concerned either for grant of prior environment clearance or stipulated terms and conditions or rejection of the application for prior environmental clearance together with reasons for the same. Thus, it is clear that there was no requirement on the part of the EAC to record reasons while hearing a project. Only conditions necessary are to be stipulated.

41) In view of the binding pronouncement of the Apex Court, the decision of the Delhi High Court much relied on by the appellants in **Ukarsh Mandal Samithi** case is not a good law. More so, when EIA notification provides that reasons need not be given by the EAC when the approval which, after approval of the project in a transparent manner in a proceeding to which the applicant shall be invited for furnishing necessary clarifications in person or through an authorised representative. Pointing to Para 40 of the judgment of the Delhi high Court made in **Ukarsh Mandal Samithi** case, the counsel would add that while extracting the apportioned portion, the Hon'ble High Court has quoted only first part of the notification and has omitted the relevant part which mandates that reasons need only be given when the committee is rejecting the project. In view of the above, the judgement of the Delhi High Court which is *per incuriam* both for not taking into account the binding law laid down by the Apex Court as also for misquoting the EIA notification. It is not a good law.

42) In fact, the EAC comprises experts in various sectors as provided in Appendix 6 of the EIA notification and they have applied their mind for the clearance of the present project which is evident from the specific conditions laid down while clearing the project. In so far as the alienation of water bodies is concerned, it was pointed out that the Commissioner of Land Administration has prohibited the alienation of water bodies in connection with the *Neeru Meeru* scheme of Andhra Pradesh Government. This contention has no substance since it applies only to *Neeru Meeru* scheme and did not apply to the allotment made for the present project. Moreover, the allotment letter by Government in para (e) and (f) clearly provides that the water bodies cannot be touched in any manner and they have to be protected and they would be open for inspection by the authorities without any prior intimation or notice at anytime. It is also contended by the appellants' side that the project being a thermal power plant would have an adverse effect on the water bodies and the pollutants would not only contaminate the water bodies but also spread pollution into the Nagavalli river into which they drain. This contention is meritless because it is pointed out in the EIA report that the project envisaged was a super critical thermal power plant to function on imported Indonesian coal and the analysis of the same is provided in Table 2.6 (c) of EIA. The project proposed to install high efficiency electro-static precipitator with 99.9% efficiency which would limit the outlet emission to 100-mg/nm³. An effluent treatment plant to treat all the effluents and other possible pollutants like ash, water, rainwater, runoff from the coal pipe etc., was provided in water treatment system to take care of all causes of possible pollution from water. In Para 7.2 it is provided that only treated water matching Andhra Pradesh Pollution Control Board /CPCB discharge standards would be discharged into the Janjavathi river which flows about 0.5 km from the plant. The anticipated impact of the projects and mitigation measures are dealt with in Chapter 4, page 111 to 148 of the EIA report. In view of the specified mitigation measures proposed to be taken and conditions laid by both Andhra Pradesh Government as also Central Government regarding the water bodies, the allegation made by the appellants that the project would have a great adverse impact on the water bodies was incorrect and it has to be rejected. Within the land demarcated for the project, about 438 acres of land would be developed as a green belt to take care of the effects of the running of the plant. The breakup of the land use for the project is given in Table 2.2 of EIA from which it would be evident that the ash pond is also

going to be situated inside this area. The green belt development is given in para 4.6 of EIA. As per the proposal, a green belt with a width of 50 to 100 m would be developed around the plant site. According to the proposal, about 3, 75,000 trees would be planted with a minimum density of 3000 trees per ha inside the plant and vicinity. Green belt development is provided in Table 4.3 and species of trees of plantation is given in Table 4.14.

43) In so far as the question as to non-application of mind by both the EAC and MoEF, it would be better to look into necessary provisions in the Notification and also decision of the higher courts thereon before considering the merits or otherwise of the rival contentions. Speaking on the stages on the prior EC process for new projects, paragraph 7 of the EIA Notification, 2006 which is ruling the entire field states that it would comprise of maximum of 4 stages, which are:-

- (1) Screening (only for Category B and activities),
- (2) Scoping,
- (3) Public Consultations
- (4) Appraisal,

44) Stage-IV, Appraisal: (1) Appraisal means together with the reasons for the same. The plain meaning of the word 'appraisal' is to 'appraise the thing'. The word 'appraisal' in legal forlorn is defined in Black's Law Dictionary as follows:

"Appraisal: (1) The determination of what constitutes a fair price, valuation, estimation of work, (2) the report of such determination- also term 'appraisement'.

45) Thus, the appraisal of the project requires not only evaluation, but also estimation of works in order to make an assessment or determination of the same. The process of appraisal would certainly require application of mind independently and make evaluation of the available materials to make an approval to regulatory authority to grant EC or place before the regulatory authority with the report to refuse EC. The notification makes it mandatory not only a scrutiny but also a detailed scrutiny to the EAC or SLAEC of the application and other documents like final EIA report, outcome of the public consultation including public hearing proceedings submitted by the Project Proponent. The word 'scrutiny' should have been employed in the Notification by the Legislature with clear intention that a critical observation or examination of all the available materials before submitting a recommendation to the

regulatory authority. The Notification requires a categorical recommendation from the EAC or SLEAC on conclusion of the proceedings of appraisal. Hence, the appraisal cannot be a mere formality or a simple ritual to pass on. The Hon'ble High Court, Delhi in ***Utkarsh Mandal Vs. Union of India (2009 X AD (Delhi) 365*** has held as follows:

“We, therefore, hold in the context of EIA Notification dated 14 September 2006 and the mandatory requirement of holding public hearings to invite objections, it is the duty of the EAC, to whom the task of evaluating has been delegated, to indicate in its decision the fact that such objections, and the response thereto of the project proponent were considered and the reasons why any or all of such objections were accepted or negated. The failure to give such reasons would render the decision vulnerable to attack on the ground of being vitiated due to non application of mind to relevant consideration and therefore arbitrary. (Para 4).”

46) The Hon'ble Apex Court in ***Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi (1991) 2 SCC 716*** has held as follows:

“21. Thus, it is settled law that the reasons are harbinger between the minds of the maker of the order to the controversy in question and the decision or conclusion arrived at. It also excludes the chances to reach arbitrary, whimsical or capricious decision or conclusion. The reasons assure an inbuilt support to the conclusion/decision reached. The order when it affects the right of a citizen or a person, irrespective of the fact, whether it is quasi judicial or administrative fair play requires recording of germane and relevant precise reasons. The recording of the reasons is also an assurance that the authority concerned consciously applied its mind to the facts on record. It also aid the appellate or revisional authority or the supervisory jurisdiction of the High Court under Article 226 or the appellate jurisdiction of this Court under Article 136 to see whether the authority concerned acted fairly and justly to mete out justice to the aggrieved person.”

47) **The NGT in Appeal No. 20/2013 in Rudresh Naik Vs. Goa State Coastal Zone Management Authority** has held as follows:

“ It is settled rule that administrative authorities which are dealing with the rights of the parties and are passing orders which will have civil consequences, must record appropriate reasons in support of their decisions. Certainly, these decisions must not be like judgments of the courts, but they must provide insight into the thinking process of the authority as to for what reasons it accepted or rejected the requests of the applicant. (Para 12, 13 and 14)

48) Placing reliance on the above decisions, the learned counsel appearing for the appellants has submitted that the EAC has not whispered for what reasons it accepted the materials available and made a recommendation that the project is worthy of grant of EC or set out the reasons to reject the objections or concerns made at the time of public hearing.

49) The learned counsel for the respondent No. 3 much relied on the decisions of the Hon'ble Apex Court reported in **(2008) 14 SCC 306 DC in the matter of Mylarappa Vs. Dr. R. Venkatasubbiah and others** wherein it has been held as follows:

“ 29. It is not in dispute that there is no rule or regulation requiring Board to record reasons. Therefore, in our view, the High Court was not justified in making the observation that from the resolution of the Board selecting the appellant for appointment, no reason was recorded by the Board. In our view, in the absence of any rule or regulation requiring the Board to record reasons and in the absence of mala fides attributed against the members of the Board, the selection made by the Board without recording reasons cannot be faulted with.”

50) It is also contended by the learned counsel for the 3rd respondent that in view of the above decision of the Apex Court no reliance can be placed on the Judgment of the High Court, Delhi in **Utkarsh Mandal Vs. Union of India (2009 X AD (Delhi) 365** referred to above. Further, as per the EIA Notification, 2006, the

EAC or SLEAC concerned shall make categorical recommendations to the regulatory authority concerned, either for grant of prior environmental clearance on stipulated terms and conditions , or rejection of the application for prior EC together with the reasons for the same. A perusal of the provisions of the EIA Notification, 2006 would show that there is no requirement on the part of the EAC while clearing a project to record reasons for the same.

51) (After a careful consideration of the submissions made, the Tribunal is of the considered opinion that the contentions put forth by the appellants' side have got force from the judgment made by the High Court, Delhi in ***Utkarsh Mandal Samithi*** case which was to the effect that it is a mandatory requirement and also a duty of the EAC to whom the task of evaluation has been delegated to indicate its decision that the objections and concerns raised at the public hearing and the response of the Project Proponent thereon were considered and as to what reasons those objections and concerns were accepted or negated. In the said decision, it has been unambiguously held that the failure to give such reasons and render the decision vulnerable to attack on the ground of being vitiated due to non application of mind to relevant consideration and therefore, arbitrary.

52) The decision relied on by the 3rd respondent reported in ***(2008) 14 SCC 306 DC in the matter of Mylarappa Vs. Dr. R. Venkatasubbiah and others*** cannot be applied for the reason that it was in respect of a resolution passed by a selection Board for appointment wherein it was held that the Board need not record its reasons in the absence of any rule or regulation requiring to do so and in the absence of mala fides attributed against the members of the Board. It is true that the appellants have not attributed any mala fides against the members of the EAC. But, in the instant case, there was a duty cast upon the members of the EAC as mandated by the EIA Notification, 2006 to record the reasons both for accepting the proposal on the material available to make a recommendation for the grant of EC and also the reasons why any or all the objections raised at the public hearing were negative. Admittedly, the project in question was taken up for consideration in the 64th meeting of the EAC on 30.01.2010 along with other projects. In so far as the consideration for EC in respect of the project in question, the minutes of the 64th meeting of EAC reads as follows:

“ 2.7. 4 x 660 (2640) MW Coal Based Thermal Power Plant of M/s. Alfa Infraprop Pvt. Ltd., near village Komarada in Vizianagaram District in Andhra Pradesh- Reg. Environmental Clearance.

The proposal is for consideration of environmental clearance. The Project Proponent gave a presentation and provided the following information:

The proposal is for setting up of 4 x 660 MW Super Critical Coal Based Thermal Power Plant at Komarada, in Vizianagaram District., in Andhra Pradesh. Land requirement will be 1675 acres (678 ha). Imported coal from Indonesia will be used as fuel. Coal supply for imported coal is in place. Ash and Sulphur contents in coal will be 16% and 0.8% respectively. Coal requirement will be 7.61 MTPA. However, the project proponent informed that at a later stage, it is proposed to use domestic coal to which the Committee informed that it is not a matter of concern to this Committee since the appraisal presently was being done with the imported coal as the fuel. Water requirement will be 8000 cubic meter/hour, which will be met from the confluence point of Nagavalli and Jhanjavathi rivers at a distance of 2 km from the site. Water linkage has been obtained from Government of Andhra Pradesh. Distance of pipeline from pumping point will be 2.5 km. Fly ash will be utilised by cement manufacturers viz., M/s. ACC Ltd., M/s. India Cements Ltd., and M/s. Penna Cements Ltd., A twin flue 275 m stack will be installed. There are no wildlife sanctuaries, national parks, biosphere reserves, heritage sites etc., within 10 km of the site. Public hearing was held on 04.12.2009. Cost of the project will be Rs. 11,838 crore.

The Committee also discussed the issues raised in the public hearing and the response made by the project proponent. The main issues raised were regarding nature of land proposed to be acquired; impact on Totapalli and Jhanjavati reservoirs; compensation for the displaced people; employment of local people; civic amenities like health and education facilities for villagers;

impact due to fly ash generation; impact on flora and fauna; impact on reserve forests within 10 km of the site etc., The project proponent submitted its response to the issues raised in the public hearing. The project proponent also submitted that no litigation is pending in any Court with respect to the project.

Based on the information and clarifications provided, the Committee recommended the project for environmental clearance subject to stipulation of the following specific conditions.”

53) A reading of the above would make it abundantly clear that it is bereft of reasons either for negating the objections and concerns in the public hearing nor for accepting the response, information and clarifications provided by the Project Proponent. What are all stated is the gist of the original application of the project, the main issues raised at the public hearing and except the above, it was recorded that there was submission of response by the Project Proponent to the issues raised and based on information and clarifications, the Committee recommended the project for EC subject to the specific conditions stated therein.

54) It is not in controversy that at the time of public hearing many objections and concerns were raised and the same were also recorded in the minutes of the public hearing. As rightly pointed out by the learned counsel for the appellants that all issues raised at the time of public hearing were not even stated in the above recordings of the minutes. The detailed scrutiny as required by the notification in order to make an evaluation of the project has not been done since there is nothing to indicate in the minutes of the meeting that in respect of the issues raised at the time of public hearing in respect of each issue i.e., objections raised at the public hearing and what was the correspondence and clarification made by Project Proponent thereon and why and for what reasons those objections were negated and the clarifications of the Project Proponent were accepted. Thus, the Tribunal is able to notice a thorough failure on the part of the EAC in performing its duty of proper consideration and evaluation of the project by making a detailed scrutiny before approving the same. The contentions put forth by the learned counsel for the respondents that number of specific condition were stipulated by the EAC at the time of recommendation and without proper consideration of both objections and

concerns at the time of providing and proper responses made by the Project Proponent, those conditions could not have been stipulated cannot be countenanced. It is true that the EAC while recommending the project for the grant of EC has stipulated conditions. Mere stipulation of specific conditions *ipso facto* cannot be an answer, while the minutes recorded above clearly indicate that there was no appraisal wherein an evaluation by detailed scrutiny of the project is required as per the mandatory provisions of EIA Notification, 2006. The Central Government, in its wisdom thought it fit and necessary and circumstances also warranted issuance of the EIA Notification, 2006 superseding the earlier Notification, 1990 whereby EAC has been constituted for all projects in Category A and SLEAC for Category B for the purpose of screening, scoping and appraisal of the projects.. The EAC is constituted consisting of a Chairman and number of members who are experts from different fields only with the sole objective of national interest in order to ensure establishment of new projects or expansion of already existing activity without affecting the ecological and environmental conditions. Thus, a duty is cast upon the EAC or SLEAC as the case may be to apply the cardinal and Principle of Sustainable Development and Principle of Precaution while screening, scoping and appraisal of the projects or activities. While so, it is evident in the instant case that the EAC has miserably failed in the performance of its duty not only as mandated by the EIA Notification, 2006, but has also disappointed the legal expectations from the same. For a huge project as the one in the instant case, a thermal power plant with an estimated cost of Rs. 11,838 crore, covering a total area of 1675 acres of land, the consideration for approval has been done in such a cursory and arbitrary manner even without taking note of the implication and importance of environmental issues. On the same day the EAC took for appraisal not only the thermal power plant in question, but also other projects which would be indicative of the haste and speedy exercise of its function of appraisal of the project. It casts a doubt that whether the EAC would have accepted the response made by the Project Proponent in respect of the objections and concerns raised at the time of public hearing as a Gospel Truth. Thus, the EAC has not conducted itself as mandated by the EIA Notification, 2006 since it has not made proper appraisal by considering the available materials and objections in order to make proper evaluation of the project before making a recommendation for grant of EC.

55) The EAC, is a High Level Committee entrusted with the task of evaluating the projects, which exercise it has to do with its wisdom, experience and expertise of the members. Needless to say, while doing that exercise for such evaluation, the Committee should keep wider interest of the nation as paramount in its mind. A duty is cast upon the EAC to strike a balance between the development on one side and ecology and environment on the other, thereby ensuring larger interest of the society of the State. While such vital and indispensable task is entrusted with the fervent hope and expectation, shirking of responsibility in a hasty or evasive manner would not only be against the objective of its constitution, but also defeats the purpose for which the Committee is functioning. Where a particular point is not decided unanimously, specific noting should be prepared and scientific reasons for accepting the majority view should be recorded and maintained for future reference. It should not be forgotten by the EAC that either the acceptance or rejection of a proposal should be the result of a proper and purposeful exercise on the recommendations of which the regulatory authority can safely act and take a correct decision thereon.

56) Based on the EIA report, the appellants have filed a chart alleging that a number of inadequacies are found in the EIA report as shown in the chart. In reply, the 3rd respondent has filed a detailed chart containing the answers for the objections raised by the appellants. The main objections raised were in respect of the existence of Janjavathi river within half a kilometre from the project site and the same was not shown in the site selection criteria, the land use of the study area as well as the project area, whether there were any national park, sanctuary, elephant/tiger reserve, animal migratory route exist within 15 km, that the EIA did not mention whether the site required any filling and if so the details of filling, the important drainage on the surrounds, the information regarding surface hydrology, non availability of data in respect of meteorology, the quantum of fuel required and non availability of a confirmed fuel linkage, no statistics is made available as to the availability and use of requisite availability of water, discharge of water not provided to the downstream users, non mentioning of ash pond impermeability and soil analysis report.

57) Pointing to those materials, the learned counsel for the third respondent would submit that the Project Proponent placed the necessary response and clarifications before the Committee at the time when the EAC took up the matter for

consideration. We do not want to make any comment about the rival contentions, since the EAC has to take up every issue separately and get clarifications from the Project Proponent and should record whether it was satisfied with the response of the Project Proponent or sustain the objections and concerns along with the reasons therefor.

58) We have had occasions to go through the minutes of EAC meetings with regard several developmental projects. Almost all of them are very generic in their structure and the recordings appear rather routine and stereotyped. Generally, an array of issues connected with a particular sector (eg., Thermal Power) are listed and a mention is made that these were “considered”. Being a body that recommends the clearance or otherwise of a project from environmental angle, the EAC should record and maintain the details of technical discussion amongst its members. This procedure demonstrates transparency in decision making and helps framing not only sector specific, but also site-specific technical conditions, both during construction and operation phases of projects. In order to demonstrate threadbare nature of discussions while considering a project for giving its recommendation, it is essential that the views, opinions, comments and suggestions made by each and every member of the committee are recorded in a structured manifest/ format. Seldom do the minutes of EAC meetings make a specific mention about the viewing of videograph of the public hearing submitted for its consideration. The EAC is directed to take note of this and incorporate its view on the same in the minutes of the meeting, in future.

59) In the instant case, the appellant has raised that EAC did not carry out a complete scrutiny as to the compliance of all items listed in the ToR given by it. This aspect has come to our notice while hearing similar cases in the past as well. In this connection, we direct that the scrutiny mechanism is reviewed by the MoEF and a more explicit documentation is made and maintained, in future. The Chairman of EAC may be directed to ensure complete compliance of this aspect in all future appraisals.

60) A perusal of the mandatory conditions listed in letter No. J-13012/13/2009-IA.II(T) dated 15.3.2010 (subject: environmental clearance) issued by the MoEF indicates that they are comprehensive and address all necessary

issues related to environmental and ecological protection. However, a few of them appear to be rather generic. The MoEF is directed to restrict such generic conditions to a bare minimum and impose conditions that would reflect the need and feasibility to address specific issues on a case to case basis.

61) The EAC is directed to discuss the following items in detail, even if these have already been taken into consideration and add specific mandatory conditions as appropriate,

1. Impact of the project on drainage and surface hydrology during the normal and monsoon conditions. The specific engineering interventions required to be made to preserve the hydrological integrity of the area should be clearly delineated as a mandatory condition.
2. The EAC is directed to call for an action plan for maintaining the drainage system from the Project Proponent, scrutinize the same from both engineering and environmental angles and stipulate mandatory conditions, if so required, in the list of conditions.
3. Prior to the issuance of the consent to operate, the Andhra Pradesh Pollution Control Board is specifically directed to satisfy itself in terms of design, projected efficiency levels of various treatment units and the quality characteristics with regard to the discharge of treated wastewater into river Janjavathi.
4. The EAC is directed to review its appraisal process with regard to issues raised in the public hearing and give attention to points missed by it, if any, during the earlier process of appraisal and stipulate additional conditions, if so warranted.
5. The EAC is directed to discuss the ecological aspects of the flood plain of the riverine systems in the vicinity of the proposed project and impose conditions, if required, to be followed by the Project Proponent.

62) It is not as if the Tribunal is not unmindful of the fact that the proposed project is a thermal power plant estimated at a cost of approximately Rs.11,830 crore and if commissioned the State would be relieved of the acute

shortage of power to some extent and also the fact that the process till the grant of EC for the project and pendency of the proceedings before the forum had consumed nearly 4 years. But, when it is noticed by the Tribunal that the EAC had not made proper exercise by applying its mind to make a proper evaluation and the same also remained unnoticed by the MoEF while granting the EC for the project in question, taking into account the larger interest of the nation from the point of view of ecology and environment, the Tribunal cannot give its nod either for the the recommendations made by the EAC or for the grant of EC made by MoEF.

63) After making a careful scrutiny of the entire materials available and following anxious consideration on the elaborate deliberations made by the learned counsel on either side, the Tribunal is satisfied that all the procedural formalities as required by the EIA Notification, 2006 have been followed at all stages except at the crucial stage of 'appraisal' by the EAC before making its recommendations to the regulatory authority.

64) Under the circumstances, keeping in mind the Precautionary Principle and Principle of Sustainable Development as envisaged under Section 20 of the NGT Act, 2010, the Tribunal is of the considered opinion that instead of scrapping the EC granted by the MoEF in respect of the thermal power plant in question, it would be suffice to keep the EC under suspension for a period of six months with the following directions to carry out the re-exercise of 'appraisal' within the said period, by calling for response from the Project Proponent in respect of all concerns and objections even if they are minor in nature and consider the objections and concerns along with the response given by the Project Proponent at the time of meeting to be convened and conducted for the said purpose, after giving an opportunity to the Project Proponent to be present at the time of that meeting. The EAC is directed to consider each and every issue separately and independently and record the reasons either for rejecting or accepting the concerns and objections and also the response by the Project Proponent thereon enabling thereby to understand both the Project Proponent and Objectors, ensuring transparency in the process of recommending either for acceptance or for rejection of the EC by the regulatory authority, namely the MoEF.

65) With the above directions and suggestions the appeal is disposed of accordingly.

66) No cost.

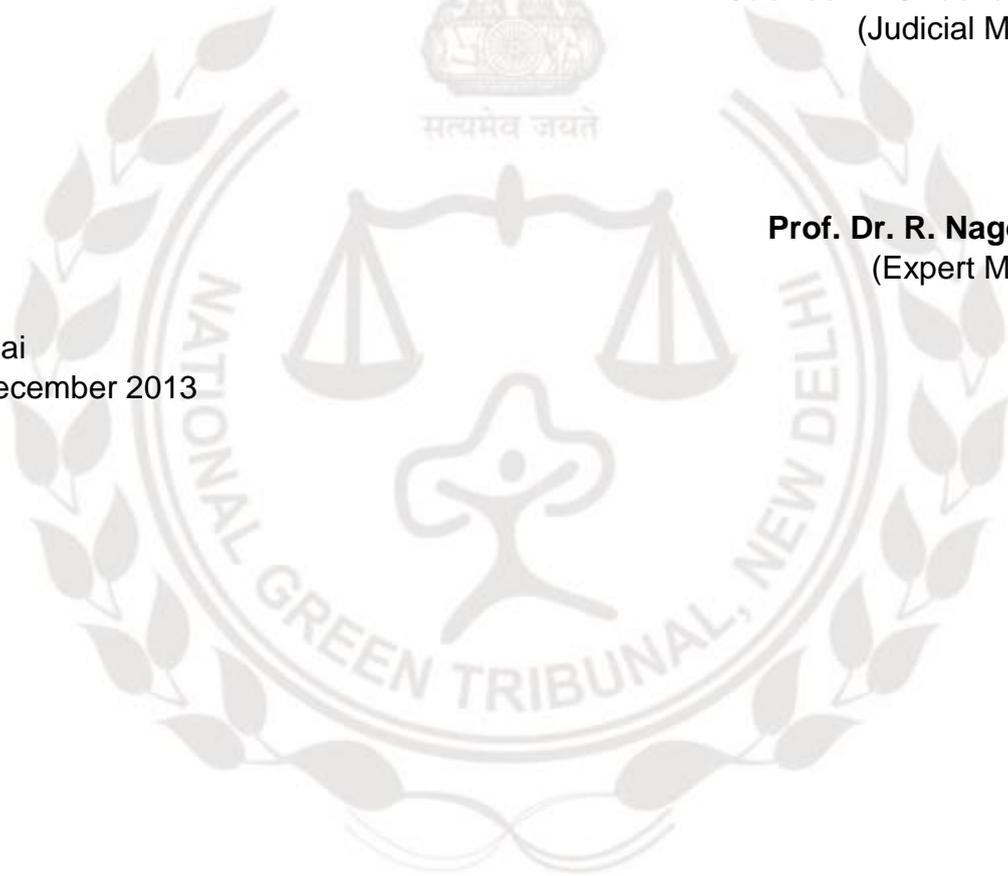


सत्यमेव जयते

Justice M. Chockaligam
(Judicial Member)

Prof. Dr. R. Nagendran
(Expert Member)

Chennai
13th December 2013



NGT