



**LEGISLATIVE MEASURES AND CONTROL OF
AIR POLLUTION IN INDIA: RETROSPECT AND
PROSPECT**

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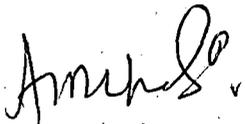
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CERTIFICATE

This is to certify that **Mrs. Madhumita Dhar Sarkar** has pursued research work under my supervision for more than two years and fulfils the requirements of the Ordinances relating to Doctor of Philosophy of the University. She has completed her work and the thesis is ready for submission. To the best of my knowledge and belief, the thesis contains the original work done by the candidate and it has not been submitted by her or any other candidate to this or any other University for any degree previously. In habit and character the candidate is fit and proper person for the Ph.D. Degree.

I recommend submission of her thesis.


[ALI MEHDI]

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INTRODUCTION

The Blue space viewed as the ethereal canopy over the earth, the moving air, the water flowing or conserved and the land on the plains and the hills that allow raising of fields, farms and forests on it are all varied forms of nature. The exploitation of environment by man is nothing new. This has increased to the maximum in the 20th century all over the world. Man exploits natural resources like ores minerals, oils, underground waters and above all plants and trees but substitutes nothing to maintain equilibrium. In the environment the various elements are measured. Their quality and quantity have been laid down which is considered to be a standard or normal ratio. The industrial growth, vehicular movements and fast urbanizing trends in the society have affected the nature's equilibrium. The ratio of the gases in the environment has got aberrations. The alarming situation may be referred to the increasing ratio of Carbon dioxide in the environment.

Air pollution is a major threat and a matter of greatest concern in the world today. Depletion of ozone layer is another big problem that the world is facing. Air is one of the most important constituents of man's environment. It is calculated that a man breathes about 22,000 times a day inhaling about 16 Kg of air by weight. Therefore clean and pure air is very essential for his health and survival. Any changes in the normal composition of the air either quantitative or qualitative that may affect adversely the living system, particularly the human life inevitably because air pollution. The problems created by air pollution need to be studied to enable one to understand the problem of air pollution. To protect the environment from air pollution which is causing serious damage to the public health and property.

One of the main objects of the study is to look into the problem posed by the gap between policy framework and present state of achievement in our country. The policy frame of this problem is to find out all sources and

elements which are responsible for causing pollution of air. Then to find out the method to eliminate the pollutants from its source and also from the atmosphere by applying various means. This means should certainly be scientific but the legal means cannot be ignored. The work being a piece on legal study would concentrate more on the legal problem and policy for controlling air pollution.

The importance of clean and pure air is known to all is very essential for the life of an individual. In change in the normal composition of air qualitatively or quantitatively initiates the process of air pollution. The initiation of this problem becomes grave when it starts affecting the living system adversely. Air is the most vital component of the biosphere without which no living organism can survive. It is this urge for survival, which leads us to trace the various sources of air pollutants.

According to Bureau of Indian Standards, IS-4167 (1980) air pollution is the presence of substances, in the ambient atmosphere generally resulting from the activity of man in sufficient concentration present for a sufficient time. It interferes with comfort, health or welfare of persons or with reasonable use or enjoyment of property. Thus, if concentration of any substance or element in air is more than a certain value, it may affect man and property, directly or indirectly and may be termed as air pollution. The meaning of pollution is limited only to outdoors i.e. ambient air.

'Air Pollution' is defined¹ to mean any solid, liquid or gaseous substances (including noise)² present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment. Section 2(b) defines 'air pollutant' as it means the presence in the atmosphere of any air pollutant.

Air pollution is the contamination of air by discharge of harmful substances. Air pollution can cause health problems including eyes and nose, itchy irritated throat and breathing problems. Some chemicals found in polluted

¹ Under Section 2(a) of the Air (Prevention and Control of Pollution) Act 1981.

² w.e.f 1-4-1988.

air can cause cancer, birth defects, brain and nerve damage, and long-term injury to the lungs and breathing passages in certain circumstances. Above certain concentrations and durations certain air pollutants are extremely dangerous and can cause severe injury or death. It can also damage the property, trees, lakes and animals.

Air pollution has also thinned the protective ozone layer above the earth. The bluish-green layer of ozone if disappeared, then all life on earth would disappear and the sun's ultraviolet rays would sterilize the surface of the globe, annihilating all terrestrial life. This thin filter efficiently screens out all the ultraviolet rays from the sun. Slightest damage to this layer, will inevitably and dramatically lead to rise in an all round disaster. It would lead to the ultraviolet rays to reach the earth's surface and this ground level radiation would have adverse effects on human health, damaged ecosystems and destroy all life forms.

Ozone (O_3) is a gas that is a variety of oxygen. Ozone is the upper atmosphere, where it occurs naturally in what is known as the ozone layer, shields the earth from the sun's dangerous ultraviolet rays. However, at ground level where it is a pollutant with highly toxic effects, ozone damages human health, the environment, crops and the wide range of natural and artificial materials. Ground-level ozone can irritate the respiratory track, caused chest pain, persistent cough, an inability to take the breath and an increased susceptibility to lung infection. Ozone can damage trees and plants and reduce visibility. Ground-level ozone comes from the breakdown (oxidation) of volatile organic compounds found in solvents, vehicles and industries.

The major air pollutants are Carbon Monoxide (CO), Carbon Dioxide (CO_2), Chlorofluorocarbons (CFC) Lead (Pb), Nitrogen Oxide (NO_2), Sulfer Dioxide (SO_2), Hazardous Air Pollutants, Particulate Matter and Volatile Organic Compounds (VOC_3). Carbon monoxide, carbon dioxide and nitrogen oxide are produced by the incomplete burning of carbon-based fuels, including gasoline, oil and wood. Low concentration of CO after being inhaled can cause dizziness, headaches and fatigue; high concentrations can be fatal. CO_2 if

inhaled it can be toxic in high concentrations, causing an increase in the breathing rate, unconsciousness and death. Chlorofluorocarbons (CFCs) are chemicals used in great quantities in industry, for refrigeration and air conditioning and in consumer products. CFC's when released in the air, rise into the stratosphere (a layer of atmosphere high above the earth). In the stratosphere, CFCs take part in chemical reactions that result in reduction of the stratospheric ozone layer, which protects the earth's surface from the sun. Reducing the release of CFC emissions and eliminating the production and use of ozone-destroying chemicals is very important to the earth's stratosphere, as once they are emitted into atmosphere, they will persist for several decades.

The other greenhouse gas emissions are primarily Carbon dioxide, methane and nitrous oxide. The main cause of global warming is green house gases. The naturally occurring green house gases keep the earth warm enough to be habitable. Prior to the industrial revolution, the amounts of these gases remained constant over thousand years. Another main cause of global warming is ozone depletion in outer atmosphere.

Lead is a highly toxic metal that produces a range of adverse health effects particularly in young children. Lead can cause nervous system damage and digestive problem and some lead containing chemicals cause cancer. Lead can also harm wild life. Lead can be inhaled or ingested from the source that include paint (for houses and cars), smelters, manufacture of lead batteries, fishing lures, certain parts of bullets, some ceramic ware, miniblinds, wind pipes and a few hair dye products. Nitrogen oxide and Sulfur dioxide is major contributor to smog and acid rain. It causes harm to vegetation and metals and can cause lung problems including breathing problems and permanent damage to lungs. Nitrogen oxide is produced from burning fuels, including gasoline and coal. Some industrial processes such as production of paper and smelting of metals produce sulfur dioxide.

Hazardous air pollutants are chemicals that cause serious health and environmental effects. Health effect include cancer, birth defects, nervous system problems and death due to massive accidental releases, such as disaster

that occurred in the Bhopal holocaust (1984), where more than 3000 persons died and about 2 lakh were effected by the leakage of Methyl Isocyanate (MIC) gas. Hazardous air pollutants are released by sources such as chemical plants, dry cleaners, printing plants and motor vehicles including cars, trucks and planes.

Particulate matter is any type of solid in the air in the form of smoke, dust and vapours, which can remain suspended for extended periods. Apart from reducing visibility and soiling clothing, microscopic particles in air can be breathed into lung tissue becoming lodged and causing increased respiratory disease and lung damage. According to the West Bengal Pollution Control Board Index, the ambient air quality from Haldia in the South to Siliguri in the North is unhealthy. A survey of the town in the State indicated that the air has 361 micrograms (average) of suspended particulate matter, way above 200 mark adopted by the Central Pollution Control Board as the air quality in residential areas.

From Television report³ it is found that 46 percent of the urban children between the ages of four to fifteen is said to be severely effected by the air quality in the city compared to 14 percent in the rural areas. The children are finding it difficult to breathe and as a result it has been affecting their performance in the field of games and study. Another television report⁴ stated that a large number of persons in the city of Delhi are having breathing problem together with heart problems and 40 percent of such problems have been attributed to the menacing air pollution of which vehicles are a major source. The health of a man is determined by the interplay and integration of the internal environment of man himself and external environment that surrounds him. A disease is only due to a disturbance in the delicate balance between man and his environment.

Tropospheric and stratospheric ozone depletion, aerosol scattering and absorption of solar and terrestrial radiation, green house, gas warming, rain and

³ Zee News, June 23, 2000.

⁴ Zee News, June 9, 2000.

precipitation quality, long range transport of air pollutants, heat island are known to be the main global air problems. Significant and sometimes devastating effects of air pollutants have been recognized on plants. Thick smog has killed more than a million trees in southern California. The visible injury symptoms on plants and leaves are tissue collapse and neurotic patterns, chlorosis, colour patterns and growth alterations.

Air pollution damage to property is a very important economic aspect of pollution. Air pollution damage to property covers a wide range corrosion of metals, soiling and eroding of building surfaces, fading of dyed materials, rubber cracking. Air pollutants have a direct or indirect effect on climate, vegetation, man and material. Research suggests that in West Bengal alone 30 lakhs patients are admitted in hospitals every year due to air pollution related diseases.⁵ The impact of air pollution is not just persistent cough or the burning sensation in the eyes but worse, lungs are bleeding internally and victims remain unaware.

People in large cities are visiting 'Oxygen Cafes' at least some days a week to compensate for the inadequacy of oxygen in the body due to the quality of breathing air. Similarly, a man walking in the park taking deep breaths may be attempting a 'Oxygen therapy' an alternative therapy that is the newest fashion in our polluted cities today.

Pure, clean and healthy air is in reality nature's invaluable gift to mankind. We must strive to preserve our atmosphere from being polluted, because a person can survive for five weeks without food and five days without water but only five minutes without air. A need to find out the methods for implementation of the goal to prevent air pollution has become necessary. The study should be made at first to ascertain how the pollution of air has paved the way for enacting laws to prevent air pollution. Law has played effective roles in controlling and regulating.

One of the more specific problems of air pollution in the cities and towns is incessant pumping out of poisonous gases from the vehicles, which

⁵ Times of India, Jan 15, 2000.

are sometimes very highly injurious to life. The problem is graver in the developed and developing cities. Vehicular pollution suffers from a remarkable lack of adequate and functionally competent normative structure. This arises out of the belief that such pollution is relatively a minor problem in developing countries like India. Increasing urbanization and industrialization, however, come hand-to-hand with atmospheric pollution. Dust fumes particulates from industrial process and vehicular traffic characterize the atmosphere in most cities in India.

Ultimately during the last two, three decade the increasing depletion of natural resources and the degradation of environmental quality evoked deep concern of mankind. For the first time in the decade of seventy of the 20th century attention of the world community was drawn towards environment in serious manner. In 1972, from June 5 to 16 under the auspices of UNO, a conference was held at Stockholm (Sweden) known as Stockholm Conference on Environment and Development. Its declaration on Action programme of the protection of Environment has awakened the mankind to undertake all possible ways and means to control the growing pollution of the mother earth, air and space or prepare to face disastrous consequences which make the very existence of life impossible in the years to come. While stressing on the qualities of life of human being the Stockholm Declaration stated that man has the fundamental right to adequate conditions of life, in a environment of quality that permits a life of dignity and well being. Further a responsibility to protect and improve the environment for present and future generation has also been imposed on every individual. The Conference has also directed the member States to make such environmental policies as to enhance their present and future development. Subsequently at the International level some developments have taken place which shall be studied at due place.

As the emission of smoke and gases from industrial activity and disposal of chemical and factory wastes in river causes pollution of environment and thereby affect the quality of life, so also excess of sound may causes disturbance to the living being leading to the interference with the right to

wholesome environment. Excess of sound, which is regarded as noise, is a type of pollution. Emission of noise causes environmental pollution whose growing menace is increasing day by day.

Law has played an effective role in controlling and regulating the human conduct. The present work looks into the aspect of the legislative measures which have been taken to curb the menace of air pollution. Since law is something which is evolved by the society to curb the social problem. The study analyses the development of law for prevention of air pollution. There is an attempt to trace laws relating to the control of air pollution from the common law principles till this date. It also attempts to study how far these laws are effective in controlling air pollution.

Chapter I of the work introduces the subject. Chapter II traces the development of the law to control air pollution from common law principles. At common law the rules of pollution control exists in the areas such as nuisance, negligence and strict liability. It consists of several heads and sub heads. It explains the concept of negligence and the degree of care, which is required in a particular situation to avoid imputation of negligence. It also deals with the origin of the principle of strict liability, the defenses to the rule and the evolution of a more stringent rule of strict liability in India i.e. the concept of absolute liability. Finally it deals with nuisance, which is most closely connected with "Protection of environment". The Private nuisance and Public nuisance have been discussed at lengths.

In pursuant to the United Nations Conference on Human Environment held in Stockholm in 1972, in which India participated, the Constitution (42nd Amendment) Act 1976 was passed. By this amendment Articles 48-A and 51-A(g) were incorporated, regarding protection of environment into the Constitution. Article 253 of the Constitution empowers Parliament to make laws implementing India's international obligations. Under third chapter the Constitutional provisions providing for the legislative competence relating to the control of air pollution is incorporated.

The right to clean air as a fundamental right has been evaluated along with the infringement of right to life by smoking which has upheld in a recent case-by the Supreme Court. The other sub-headings include noise pollution and Fundamental Right, the right for prevention of air pollution exercised under Articles 32 and 226 along with Public Interest Litigation. A number of cases decided by the Apex Court and various High Courts have been examined.

To prevent and control air pollution there has been score of legislations laying down measures to control air pollution. These legislations have been examined under chapter four. The effectiveness of the legislative provisions under the Indian Penal Code, Civil Procedure Code, Criminal Procedure Code, Easement Act, Specific Relief Act, Factories Act and other Acts have been analyzed in different sub topics.

Chapter five deals with the problem of air pollutions and the development of the special legislations to control it. This chapter also consists of work dealing with the Air (Prevention and Control of Pollution) Act 1981, the Environment Protection Act, 1986 the legislative developments to prevent vehicular pollution, the Noise Pollution Regulation and Control Rules, 2000 and the legislative measure for protection of ozone layer. These Special legislation have been studied analytically to find out their effectiveness.

In 1984 there was the world's most disastrous accident in Bhopal killing thousands and injuring lakhs of people. The problem of compensation to such large number of victims drew attention of the Parliamentarians and the Government. The quick remedy to the sufferers was the basic issue and consequently two legislations namely Public Liability Insurance Act was passed in 1991 and National Environment Tribunal Act was passed in the year 1995 for providing expeditions remedy. The focus on the authority empowered to give remedy, and nature along with the principles of liability has been dealt under chapter VI. The procedure and other incidental power of authorities under Public Liability Insurance Act and National Environment Tribunal Act 1995 have been studied. The efficacy of National Environment Appellate Authority Act 1997 has also been studied. The rules framed under the

Environment Impact Assessment Regulation 1994 have been analyzed. People participation in selecting the sites etc have been given a statutory status have been given. It shall be looked how far the public has some say in the aforesaid aspect.

The seventh chapter includes the judicial approach to the problem. In present day situation when judicial activism is at its peak, the Supreme Court has handled environmental issues in its original jurisdiction. The existing Environmental legislations have yet to see the door of the Supreme Court, as a not a single case has reached in the Court involving interpretation of the Air Act. Such ventures have been bearing fruitful results and as such could not be ignored in the larger context. Here both substantive and procedural provisions of the Constitution, namely Article 21 and Article 32, in the garb of public interest litigation has been looked into with an aim to prevent and control air pollution and the environmental pollution in general. The other approach of the court towards the control of air pollution has also been analyzed. The Supreme Court appears to be deeply concerned over the risk posed by pollutants in the environment and therefore playing a leading role to prevent and control the degradation of environment. The court has introduced a new principle of liability that is the absolute liability in the Indian soil a step ahead of the strict liability concept. The sustainable development and its elements have been recognized and implemented as part of Indian Environmental law by the Apex Court. The cases related to such issues have been cataloged, analyzed and an appraisal of such observations have been made. The judicial decisions on the air pollution issues are in fact the bulk of laws controlling the air pollution. Therefore, a detailed study has been made on such cases.

Finally the eighth and last chapter contains the conclusions of the work and some suggestions for curbing the menace of air pollution have been made.

COMMON LAW PRINCIPLE

At common law, as reflected in the law of Torts, pollution control rules exist in areas such as nuisance, negligence and strict liability. The roots relating to environmental liability have considerably evolved from the law of Tort. An analysis of the common law action for causing air, water or noise pollution would enable us to understand the doctrinal roots of modern environmental law.

R.N.D.Hamilton as aptly states it: "the deepest doctrinal roots of modern environmental law are found in the common law principles of nuisance. It may be caused through escape of water, filthy liquids or substances, smokes, fumes, gas, noise, heat, vibrations, electricity, disease, bacteria, trees, etc".¹ Actions brought under tort law are among the oldest of legal remedies to abate pollution. Most pollution cases in tort law fall under the categories of nuisance, negligence and strict liability. The rules of tort law were introduced in India during British Rule.

2.1. Negligence

A common law action for negligence may be brought to prevent environmental pollution. An act of negligence may also constitute a nuisance if it unlawfully interferes with the endowment of another's right. The judgement in *Heaven v. Pender*², was reiterated in *Donoghue v. Stevenson*³, where Lord Atkin propounded the principles, that one must take reasonable care to avoid acts or omissions which one can reasonably foresee, which would be likely to injure one's neighbours.

¹ Prof.Satish Shastri, *Environmental Law & Public Participation*, 1986, p. 2.

² (1883) II QBD 503.

³ [1932] A.C. 532.

2.1. (i). Meaning of Negligence

Negligence is the breach of duty caused by the omission to do something, which a reasonable man, guided by those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do.⁴

According to Winfield, 'Negligence as a tort is a breach of a legal duty to take care which results in damage to the claimant'.⁵ Thus, its ingredients are (1) a legal duty to take; (2) breach of that duty, i.e., a failure to come up to the standard required by law; (3) consequential damage, due to such breach of legal duty to take care.⁶

It is not for every careless act that a person may be held responsible in tort law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care.⁷ This traditional rule of law is applied as much to environmental litigation as to any other type of litigation. Environmentalist had to prove, not merely that a certain activity causes damage, but that the damage is one for which enterprised sued is liable in law.

In the celebrated case of *Donoghue v. Stevenson*⁸, Lord Atkin said:

"In English law there must be, and is, some general conception of relations giving rise a duty of care, of which the particular cases found in the books are instances. The liability for negligence, whether you style it such or treat is as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral Code would censure cannot in a practical world be treated so as to give right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour and the lawyer's question, Who is my neighbour? Receives a restricted reply. *You must take reasonable care to avoid acts or omissions which you*

⁴ *Blyth v. Birmingham Waterworks Co.*, (1856) 11 Ex, 784.

⁵ Winfield & Jolowicz, *Tort*, 16th edn, p 103.

⁶ *Ibid.*

⁷ *Supra* note 5 at p. 104.

⁸ *Supra* note 2.

*can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*⁹.

A major achievement made in this case¹⁰ was that the fallacy of privity of contract was done away with, by allowing the consumer to bring an action in tort against the manufacturer, with whom there was no privity of contract.

2.1. (ii). The Degree of care

The degree of care, which a man is required to use in a particular situation in order to avoid the imputation of negligence, varies with the obviousness of the risk.¹¹ If the danger of doing injury to the person or property of another by the pursuance of a certain line of conduct is great, the individual who proposes to pursue that particular course is bound to use great care in order to avoid the foreseeable harm. On the other hand, if the danger is slight, only a slight amount of care is required. In the words of Lord Reid : “Reasonable men do in fact take into account the degree of risk and do not act upon a bare possibility as they would if the risk were more substantial”.¹² The purpose to be achieved must also be taken into account and a balance struck between the risk involved and the consequence of not taking it.

The degree of care as observed by the Supreme Court in the context of hazardous industries: “We cannot possibly adopt a policy of not having any chemical or hazardous industries merely because they pose hazard or risk to the community. If such a policy were adopted, it would mean the end of all progress and development. Such industries even if hazardous have to be set up since they are essential for economic development and advancement of well

⁹ Supra note 5 at p. 109.

¹⁰ *Donoghue v. Stevenson*

¹¹ In blackout conditions, a new duty is imposed on a person walking on the road, by reason of the difficulty which the driver of a vehicle has of seeing a person or thing not illuminated by a light, and in those circumstances, it is the duty of such a person to take all reasonable steps to minimize the difficulty of the drivers of the oncoming vehicles; *Franklin v. Bristol Tramways Co.*, (1941) 1 All ER 188 : (1941) 1 KB 255.

¹² *Bolton v. Stone*, (1951) AC 850 (HL) p. 865.

being of the people. We can only hope to reduce the element of hazard or risk to the community by taking all necessary steps for locating such industries in a manner which would pose least risk of damage to the community and maximizing safety requirements in such industries.”¹³ The rule that a man is held to the exercise of the degree of care, which an ordinary prudent man would exercise in the same situation, is subject to one or two exceptions. If a person is highly skilled about a particular business, and knows that to be dangerous, which another, not so skilled as he, does not know to be dangerous, the law will hold him guilty of negligence in failing to use such expert skill. If a man holds himself out as being specially competent to do things requiring professional skill, he will be held liable for negligence if he fails to exhibit the care and skill of one ordinarily an expert in that business. In the commercialized world degree of care would also be determined by reference to the price which is being charged; e.g., a five star hotel owes a very high degree of care for the safety of its guests.¹⁴

2.2. Strict Liability

Strict liability has its origin in the case of *Rylands v. Fletcher*¹⁵, where the facts were that the defendants who had a mill near Ainsworth in Lancashire wanted to improve its water-supply. They constructed a reservoir by employing reputed engineers to do it. When the reservoir was filled, water flowed down the plaintiff's neighbouring coal mine causing damage. The engineers were independent contractors. There was some negligence on their part in not properly sealing disused mine shafts which they had come across during the construction of the reservoir and it was through those shafts that the water flooded the plaintiff's mine. The defendants were in no way negligent having employed competent engineers to do the job and as the engineers were independent contractors, the defendants could not be made vicariously liable

¹³ *M.C.Mehta v. Union of India*, (1986) 2 SCC 176 (201). But by an order passed on 20th Dec. 1986 in the same case, the Supreme Court held that the liability of an enterprise engaged in a hazardous industry is absolute.

¹⁴ *Klans Mittelbachert v. The East India Hotels Ltd.*, AIR 1997 Delhi 201

¹⁵ (1868) LR 3 HL 330.

for their negligence. The Court of Exchequer dismissed the claim as showing no cause of action. But the Court of Exchequer Chamber allowed the appeal. The House of Lords approved the judgment of Blackburn, J., of that Court which laid down a new basis of liability. The basis of liability was laid down by Blackburn, J. in these words: "The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape."¹⁶ Blackburn, J., further said: "The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali work is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to other so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences." In the House of Lords, Lord Cairns while approving the judgment of Blackburn, J., laid down that the rule applied when there was non-natural user of land.

In *State of Punjab v. Modern Cultivators*¹⁷, where damage was caused by overflow of water from a breach in a canal the Supreme Court held that use of land for construction of a canal system is an ordinary use and not a non natural use. The case was decided in favour of the plaintiff on the finding of negligence. This case does not modify the rule of *Rylands v Fletcher*. It was so

¹⁶ *Fletcher v. Rylands*, (1866) LR 1 Ex 265, 279.

¹⁷ AIR 1965 SC 17.

held in *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*¹⁸ which was a case of damage caused by overflow of water from a reclamation bundh constructed by the State of Gujarat for reclamation of vast area of land from saltish water of sea. This case too was decided not on the reasoning that this was non natural use of land but on the basis of violation of public duty and negligence which lay in defective planning and construction of the bundh. The rule of *Rylands v. Fletcher* was again referred to in *Indian Council for Enviro Legal Action v. Union of India*¹⁹ but the case was decided on the Mehta principle of strict liability which was held to have laid down an appropriate principle suited to our country, apart from being of binding authority.

The above discussion of authorities lead to the conclusion that if the defendant makes 'non-natural use' of land in his occupation in the course of which there is escape of something which causes foreseeable damage to person or property outside the defendant's premises, the defendant is liable irrespective of any question of negligence on the basis of the rule of strict liability propounded in *Rylands v. Fletcher*.

The principle of *Rylands v. Fletcher* was held to apply where a company stored in close proximity nitrate of soda and dinitrophenol for the purpose of making munitions for Government, with the result that on a fire breaking out they exploded with terrific violence causing loss of life and serious damage to adjoining property.²⁰ Similarly where the defendants drove a very large number of piles into the soil, thereby setting up such heavy vibrations as to cause serious structural damage to an old house belonging to the plaintiffs, with the result that the greater part had to be taken down in compliance with a dangerous structure notice, it was held that the defendants were responsible as insurers for all damages caused by the escape of the vibrations, they had so created.

Under the principle of *Rylands v. Fletcher*, a person who brings dangerous substances upon premises and carries on a dangerous trade with

¹⁸ (1994) 4 SCC 1.

¹⁹ AIR 1996 SC 1446.

²⁰ *Rainham Chemical Works Ltd. V. Belvedere Fish Guano Co.*, (1921) 2 AC 465.

them is liable if, though without negligence on his part, these substances cause injury to persons or property in their neighbourhood. It is immaterial whether he is or is not aware of the danger at the time when he brings and uses them. Thus a tramway company was held liable for using wood-blocks coated with creosote which gave off fumes which injured plants and shrubs of the plaintiff whose premises were near the road.²¹

The dangerous thing which is liable to cause fire should have been brought by the defendant on his premises in the course of some non-natural user.²² If a person uses a traction engine which emits sparks in spite of all precautions being taken to prevent their emission, he will be liable if another person's hayrick be set on fire by the sparks, upon the ground that such an engine is a dangerous machine.²³

2.2.(i). Defences to the Rule

In *Rylands v. Fletcher* the following are the defence available to the Rule:

(i) Consent of the claimant

Where the claimant has expressly or impliedly consented to the presence of the source of danger and there has been no negligence on the part of the defendant, the defendant is not liable.

(ii) Common benefit

Where the source of the danger is maintained for the common benefit of the claimant and the defendant, the defendant is not liable for its escape.

(iii) Act of stranger

If the escape was caused by the unforeseeable act of a stranger, the rule does not apply.

(iv) Statutory authority

The rule in *Rylands v. Fletcher* may be excluded by statute.

(v) Act of God

²¹ *West v. Bristol Tramways Co.*, (1908) 2 KB 14.

²² *Mason v. Levy Auto Parts*, (1967) 2 All ER 62.

²³ *Powell v. Fall*, (1880) 5 QBD 597.

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Where the escape is caused directly by natural causes without human intervention.

(vi) Default of the claimant

If the damage is caused solely by the act or default of the claimant himself, he has no remedy.

2.2. (ii) Rule in *M.C.Mehta v. Union of India*

A more stringent rule of strict liability than the rule in *Rylands v. Fletcher* was laid down by the Supreme Court recently in the case of *M.C.Mehta v. Union of India*²⁴. The case related to the harm caused by escape of Oleum gas from one of the units of Shriram Foods and Fertiliser Industries. The Court held that the rule of *Rylands v. Fletcher* which was evolved in the 19th century did not fully meet the needs of a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries were necessary to be carried on as part of the development programme and that it was necessary to lay down a new rule not yet recognized by English law, to adequately deal with the problems arising in a highly industrialized economy. The Court laid down the rule as follows: "Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-à-vis* the tortious principle of strict liability under the rule in *Rylands v. Fletcher*". The Court earlier pointed out that this duty is "absolute and non-delegable" and the enterprise cannot escape liability by showing that it had taken all reasonable care and there was no negligence on its part. The bases of the new rule as indicated by the Supreme Court are two: (1) If an enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume

²⁴ (1987) 1 SCC 395 : AIR 1987 SC 965.

that such permission is conditional on the enterprise absorbing the cost of any accident (including indemnification of all those who suffer harm in the accident) arising on account of such hazardous or inherently dangerous activity as an appropriate item of its over-heads; and (2) The enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards.

The rule in *Rylands v. Fletcher* requires non-natural use of land by the defendant and escape from his land of the thing, which causes damage. The rule in *M.C.Mehta v. Union of India* is not dependant on these conditions. The necessary requirements for applicability of the new rule are that the defendant is engaged in a hazardous or inherently dangerous activity and that harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity. The rule in *Rylands v. Fletcher* will not cover cases of harm to persons within the premises for the rule requires escape of the thing which causes harm from the premises. The new rule makes no such distinction between persons within the premises where the enterprise is carried on and persons outside the premises for escape of the thing causing harm from the premises is not a necessary condition for the applicability of the rule. Further, the rule in *Rylands v. Fletcher* though strict in the sense that it is not dependent on any negligence on the part of the defendant and in this respect similar to the new rule, is not absolute as it is subject to many exceptions but the new rule in *Mehta* case is not only strict but absolute and is subject to no exception. Another important point of distinction between the two rules is in the matter of award of damages. Damages awardable where the rule in *Rylands v. Fletcher* applies will be ordinary or compensatory; but in cases where the rule applicable is that laid down in *M.C.Mehta's* case the Court can allow exemplary damages and the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it. But in *Charan Lal Sahu v. Union of India*,²⁵ doubts were expressed as to correctness of this view as to damages by Misra CJ., that the view taken in *Mehta* case was obiter and

²⁵ AIR 1990 SC 1480.

was a departure from the law applied in western countries. But doubts expressed by Misra C.J. have not been accepted in *Indian Council for Enviro Legal Action v. Union of India*²⁶ and it was held that the rule laid down in *Mehta* case was not obiter and was appropriate and suited to the conditions prevailing in our country. This was a case where hazardous chemical industries had released highly toxic sludge and toxic untreated waste water which had percolated deep into the soil rendering the soil unfit for cultivation and water unfit for irrigation, human or animal consumption resulting in untold misery to the villagers of surrounding areas.²⁷

2.3. NUISANCE

In modern parlance, nuisance is that branch of the law of tort most closely concerned with “protection of environment”. Ordinarily, a nuisance means anything that annoys, hurts or offends; but for an interference to be an actionable nuisance, the conduct of the defendant must be unreasonable. Further, a nuisance must not be momentary, but must continue for sometime. A single, short inconvenience is not actionable. A nuisance would include offensive smells, noise, air pollution and water pollution.

According to Winfield nuisance is incapable of exact definition, but for the purpose of the law of Torts it may be described as “unlawful interference with a person’s use or enjoyment of land or of some right over or in connection with it”.²⁸ Clerk and Lindsell in their book on Torts²⁹ have observed that nuisance is an act or omission which is an interference with disturbance of or annoyance to a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is public nuisance, or (b) his ownership or occupation of land or of some easement, quasi-easement, or other right used or enjoyed in connection with land, when it is private nuisance.” This should be noted that public nuisance is always a criminal offence, the same cannot be said

²⁶ AIR 1996 SC 1446.

²⁷ Ratanlal & Dhirajlal, *The Law of Torts*, 24th edn., 2002, p. 483-484.

²⁸ Winfield on Tort, Sixth Edition, 1954, p.536.

²⁹ Eleventh Edition, (Chapter 17 page 560).

to be a private nuisance. It follows as a corollary from it that the acts constituting public nuisance are all of them unlawful acts; those, which constitute private nuisances, are not necessarily or usually unlawful. An action for private nuisance may seek injunctive relief as well as damages. In cases of a continuing cause of action, such as pollution of a stream by factory wastes or smoke emissions from a chimney, the proper course is to sue for an injunction. Repeated actions for damages may be brought to recover the loss sustained up to the date of the court's decree; but future losses, which are contingent on the continuance of the wrong, are not usually awarded. Damages offer poor relief since the plaintiff would be compelled to bring successive actions. Ordinarily, therefore, courts grant the plaintiff an injunction where a nuisance exists or is threatened, unless he or she is guilty of improper conduct or delay.

Private Nuisance and Public Nuisance

Private nuisance is using or authorizing the use of one's property or of anything under one's control so as to injuriously affect an owner or occupier of property by physically injuring his property or by materially interfering with his health, comfort or convenience. Thus sending deleterious substance like gas, smoke or filth on the property of another person is private nuisance. It consists in an unjustifiable interference with proprietary rights of an ancillary type e.g. to use and enjoy one's property peaceably. Public nuisance on the other hand consists in an act causing common injury, danger, annoyance or obstruction to the public in the exercise of common rights.³⁰

In *Datta Mal Chiranji Lal v. L.L.Prasad*³¹, the Court distinguished between public and private nuisance. It observed that a public nuisance is a civil wrong but a private nuisance is a criminal offence, an act not warranted by law or an omission to discharge legal duty which act or omission, according to Stephen's Digest of Criminal law "obstructs or causes inconvenience or damage to the public in exercise of rights common to all His Majesty's Subjects".

³⁰ Dr. Vijay Chitnis, *Law of Torts*, p.71-72.

³¹ AIR 1960 All 632.

A civil action could also lie for a public nuisance under the circumstances under which a criminal action can lie now under Section 268 of the Indian Penal Code which runs as: "A person guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right".

Similarly, Section 277 of Indian Penal Code penalizes fouling water of public spring or reservoir while Section 178 penalises making atmosphere noxious to health.

A private person, however, cannot sue for a public nuisance unless he could prove that he has suffered a particular or special damage over and above the damage caused to the general public and that the damage caused to him was "direct and substantial". The Attorney General in England and the Advocate General (or Collector in a district place) in India can take an action for public nuisance.

Nowadays, however this action is less frequently taken by the Advocate Generals or the Collectors since in many instances, the local bodies or other authorities may have adequate statutory powers to deal with such situations. The remedies of injunction, damages and abatement are available nuisance in Tort.

2.3.(i) Private Nuisance

A private nuisance usually is caused by a person doing on his own land something, which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his acts are not confined to his own land but extend to the land of his neighbour in one of the following three ways:

1. By causing an encroachment on his neighbour's land, when it closely resembles trespass.
2. Causing physical damage to his neighbour's land or buildings or works or vegetation upon it, or

3. Unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land. It is also a nuisance to interfere with some easement or quasi-easement used or enjoyed with his neighbour's land.³²

It will be manifest that making unreasonable noises comes in the third category and to be actionable it must be such as to be a real interference with the comfort or convenience of living according to the standards of the reasonable person. The law of private nuisance, in this sense, is undoubtedly elastic and it was in this connection that Lord Halbury made the following observations in *Colls v. Home & Colonial Stores Ltd.*³³

A dweller in towns cannot expect to have as pure air as free from smoke, smell, and noise as if he lived in the country, and distant from other dwelling, and yet an excess of smoke, smell and noise may give an cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action.³⁴

In *Sturges v. Bridgman*³⁵ Theisiger, L.J., expressed his views thus:

“...whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bormondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders of manufacturers in a particular and established manner not constituting a public nuisance,” Judges and Jurists would be justified in finding, and may be trusted to find, that the trade on manufacture so carried on in that locality is not a private or actionable wrong.³⁶

There are several cases of private nuisance where the courts have restrained the polluters from generating dust and polluting air. In *Ram Baj Singh v. Babulal*³⁷, the court recognized a private right of action arising from a public nuisance. In this case, the plaintiff-appellant a doctor complained that the defendant, a brick-powdering mill, caused special damage and substantial injury to him.

³² Supra note 29, at 561-563.

³³ (1904) AC 179.

³⁴ Id, at 185.

³⁵ (1879) 11 ChD 852.

³⁶ Id., at 865.

³⁷ AIR 1982 All 285.

Learned Counsel appearing for the plaintiff has argued that the two courts below have not correctly appreciated the meaning of the expressions 'substantial injury' and 'special damage', as used in law.

The grievance of the plaintiff-appellant was that the brick-grinding machine was generating dust, which polluted the atmosphere and entered the consulting chamber of the plaintiff-appellant and caused physical inconvenience to him and his patients who came to his chamber. It was further stated that the said machine had been set up by the defendant-respondent without any permission or licence from the Municipal Board.

Respondent contended that no dust emanated during the process of grinding bricks and there was no question of any pollution being caused in the atmosphere. He further stated that the bricks were moistened before being subjected to grinding process and no dust resulted therefrom. He further stated that his machine did not produce any noise and according to him, the erection and working of the machine did not cause any nuisance—whether public or private. The trial court came to the conclusion that the defendant-respondent had erected the brick-grinding machine in the year 1965 without obtaining any licence from the appropriate authority. It further held that the dust did emanate and pollute the atmosphere and that such dust was injurious to health. It also came to the conclusion that the dust produced by the machine entered the consulting chamber of the plaintiff-appellant depending on the direction of the wind. The trial court, however, dismissed the suit of the plaintiff-appellant on the finding that the dust resulting from the machine did not cause any substantial injury either to the plaintiff or to his patients.

The Court of appeal did not interfere. Appeal to High Court was preferred where the court opined no precise or universal formula has been devised to determine the distinction between a trivial consequence of an act or a consequence which can be termed to be of substantial magnitude. The test, which has always been found to be useful in distinguishing the two sets of cases, is the test of ascertaining the reaction of a reasonable person according to

the ordinary usage of mankind living in a particular society in respect of the thing complained of.

The two [lower] courts... have been largely influenced by the fact that the plaintiff-appellant did not examine any of his patients to prove that any actual damage was caused to them on account of the dust emanating from the machine of the defendant-respondent. From this omission on the part of the plaintiff, they have drawn an adverse inference against him and have come to the conclusion that the plaintiff-appellant has failed to establish that any special damage or any substantial injury was caused to him.

The expression 'special damage' is used in law to indicate a damage caused to a party in contra-distinction to damage caused to the public at large. The damage caused to the public at large on account of a nuisance is referred in law as a public nuisance.

The expression 'special damage' was found by the textbook writers to be somewhat inaccurate and confusing. It actually follows from the findings recorded by the two courts below that the plaintiff had succeeded in establishing damage, which was particular to himself. It has been held by the court of appeal that the dust emanated from the crushing of bricks was a public hazard and was bound to cause injury to the health of the persons. It has further held that dust from bricks entered in sufficient quantity into the consulting chamber of the plaintiff-appellant so that a thin red coating was visible on the clothes of the persons sitting there. In view of these findings it is difficult to comprehend how it could be said that the plaintiff had failed to prove that special damage was not being caused to him on account of the offending brick grinding machine.

The court held that coming to the question of substantial injury, every injury is considered to be substantial which a reasonable person considers to be so. In assessing the nature of substantial injury, the test to be applied is again the appraisalment made of the injury by a reasonable person belonging to the society. In view of the fact found by the two courts below concurrently, it was impossible to hold that no substantial injury was being caused to the plaintiff-

appellant. Causing of actual damage by the act complained of as a nuisance is beside the point. If actual damage or actual injury were to be the criterion a person will have to wait before the injury becomes palpable or demonstrable before instituting a suit for its abatement. Any act would amount to a private nuisance which can reasonably be said to cause injury, discomfort or annoyance to a person. For reasons stated above the appeal must succeed.

A plaintiff in a tort, action may sue for damages or an injunction or both. *J.C. Galstaun v. Dunia Lal Seal*³⁸, may be the earliest reported pollution case in India. It is an illustration of the common law regulatory system existing in the pre-industrialized society. It is a case where perpetual injunction to abate a nuisance was granted alongwith damages on account of the same. In this case the Plaintiff had a garden-house in the Manicktollah Municipality and the Defendant had a shellac factory situated 200 or 300 yards to the north-west of it. The Defendant discharged the refuse-liquid of his manufactory into a Municipal drain that passed along the north of the Plaintiff's garden, and the Plaintiff alleged, first, that the liquid was foul-smelling and noxious to the health of the neighbourhood and specially to himself, and, secondly, that it had damaged him in health, comfort and the market value of his garden property. The Plaintiff had, therefore, asked for a perpetual injunction against the Defendant to restrain him from discharging the liquid refuse into the Municipal drain and for five thousand rupees as damages.

The Subordinate Judge decreed the suit, granted a perpetual injunction and awarded the Plaintiff a thousand rupees as damages. The Defendant went for appeal against the decree. On appeal it was held that the defendants action constitutes a legal nuisance, which the Plaintiff is entitled to restrain. Carrying on an offensive trade so as to interfere with another's health and comfort or his occupation of property has been constantly held in England to be a legal nuisance against which the courts will give relief.

³⁸ (1905) 9 CWN 612.

The Court observed that it is plain that if no injunction is issued, there will be nothing to prevent defendant from aggravating the present nuisance by further enlarging his factory and discharging still more refuse into the drain. An injunction for the permanent stoppage of the nuisance is the only effectual remedy, and they have abundance of authority for issuing an injunction in the cases decided in England.

With regard to the question of the damage caused to the Plaintiff, objections have been urged against the opinion formed by the Subordinate Judge. Persistence in a proved nuisance has been held in England to be a just cause for giving exemplary damages. The Defendant has certainly persisted in spite of Municipal warnings. This, therefore, is not a case in which the damages awarded should be nominal. There can be no doubt that material injury has been caused to the Plaintiff and the damages should be substantial; and, while holding this view, they thought that Subordinate Judge's estimate is reasonable and not excessive. For these reasons, they affirmed the decree of the court below and dismiss this appeal with costs.

In *Rapiér v. London Tramways*³⁹, the defendants kept a large number of horses in the stable to run tramways and the noise and smell therefrom was complained of by the neighbourers, the interference amounted to nuisance and the same was stopped by issuance of injunction.

A similar incident was decided by the Calcutta High Court in *Nirmal Chandra v. Municipal Commissioner, Pabna*⁴⁰, where the court held that injunction is the usual and proper remedy in case of continuing nuisance unless the injury is trivial. In this case the plaintiff sued the Municipality for erecting a defective Hackney carriage stand with no suitable contrivance for drainage by Pabna Municipality had become a source of nuisance to the neighbours. The plaintiff also complained that the hackney stand in front of the plaintiff's property was causing nuisance, and by reason of the bad smell, his tenants have left. The District judge inspected the locality and found that there was no

³⁹ (1836) 2 KB 468.

⁴⁰ AIR 1936 Cal 707.

proper drain or channel to drain off the urine of the horses. The result was that offensive matter drains into and accumulates in a long strip of land between the pucca stand and the plaintiff's land. But the Ld. District Judge found that the smell emitting from the stand itself is no more noxious or disagreeable than the smell emitting from the street of Pabna generally. The Ld. District Judge refused the prayer of injunction but awarded the plaintiff Rs. 50 as damages. The plaintiff preferred an appeal against this judgement and decree of the Learned District Judge of Pabna. The High Court opined that injunction is the usual and proper remedy in the case of continuing nuisance. It ought to grant to some form unless the injury complained is trivial. The High Court observed:

“I hold that injunction is the proper relief. Having taken all the circumstances into consideration I think that Commissioners of the Municipality should not be directed to remove the stand elsewhere, but that they should be directed to take proper care in the matter of keeping the stand and the adjoining places reasonably clean and for that purpose they are directed to clean and to keep in a reasonably clean state the strip of land in between the hackney carriage stand and the plaintiff's land by providing a suitable pucca drain. They are accordingly directed to construct a suitable pucca drain on that piece of land within six months from this date. If they fail to do so the plaintiff will have such a drain constructed and recover the costs thereof from the Commissioners of the Municipality. As I am giving the plaintiff an injunction in this limited form, I discharge decree for damages.”⁴¹

In *Christie v. Davey*⁴² the defendant alleged that he was being irritated by considerable amount of music and singing lessons by the plaintiff. In this case the plaintiff gave music and singing lessons for four days per week, totaling 17 hours. The neighbour who was aggrieved by the same had resorted to knocking on the party wall, beating trays, whistling, shrieking and in this way interfering with the music teaching. It was held that this was not an unreasonable use of the house, which could be restrained by an injunction. But the person who was interfered with the music teaching was found to have done

⁴¹ Id. At p.710.

⁴² (1893) 1 CH 316.

so out of malice, which was a significant factor and caused a nuisance and as such an injunction was granted against such nuisance caused by the neighbour.

In *Rushmer v. Polsue and Alfeiri Ltd.*⁴³, in a neighbourhood devoted to printing, a printing office was established next door to the plaintiff's residence, which rendered sleep impossible. It was contended that a person living in that locality could not complain of such a noise as the neighbourhood carried on, and was devoted to printing work. This argument was repelled by the Court of Appeal, and in repelling it Cozens-Hardy L.J. especially observed:

"I cannot assent to this argument. A resident in such a neighbourhood must put up with certain amount of noise.... but whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendants' works may be so substantial as to create a legal nuisance".⁴⁴

When the case went on appeal, the House of Lords approved these observations. Accordingly it was concluded that the area in which nuisance occurs may be an industrial or noisy area, but that does not give right to create noise and disturbance of sleep of others at night.

In *Hollywood Silver Fox Farm Ltd. v. Emmet*⁴⁵, the plaintiff Hollywood Silver Fox Farm Ltd carried on the business of breeding Silver foxes on their land. The vixen of these animals are extremely nervous during the breeding season and if they are disturbed by any loud noise, they may not breed during that season, may miscarry or kill their own young ones. The defendant maliciously caused guns to be fired on his own land but as near as possible to the breeding pens with a view to cause damage to the plaintiff by interfering with the breeding vixen. The Court held that defendant had no right to disturb others and the plaintiff was entitled to an injunction and damages.

The principles enunciated in some of the earliest English cases have been followed by the High Courts in India. In the case of, *Land Mortgage Bank*

⁴³ (1906) CH 234.

⁴⁴ Id., at 250.

⁴⁵ AIR 1919 Mad 1185.

*of India v. Ahmedbhoy Habibbhoy*⁴⁶ which was decided in 1833, the plaintiff's buildings at Colaba known as 'Great Buildings' were situated very near a Hydraulic Press Company, which was converted into a spinning and weaving mill. The question was whether the noise made by the working of the machines, machinery and gear by the mill on the defendant's premises interfered with the comforts of the occupants of certain division of the two blocks of the plaintiffs' buildings. Sargent, C.J., while delivering judgement observed about the occupants of those blocks of the buildings in following words:

"Fastidious or highly sensitive they probably are not as a rule, but they have a standard of comfort in which I cannot doubt that peace and quiet and freedom from noise must be very important factors; and the noise of the mill, as heard in the above divisions, I cannot but think is one which must seriously interfere with that standard of comfort.I am of opinion that the noise caused by the working of the mill has always constituted and still continues a nuisance to the occupants of divisions No. 2, 3 and 4."

The Division Bench, which heard the appeal, also came to the conclusion that the smoke, cotton fluff and noise proceeding from the mill caused serious inconvenience to the inhabitants of Division Nos. 2, 3 and 4 of the eastern block of the grant buildings.

In *Sadasiva v. Rangappa*⁴⁷ the appellant (defendant) purchased a house adjacent to the plaintiff's dwelling house and set up an oil mill of the country pattern in the yard of his house. The noise of the mill caused by the turning of the machine drawn by the bullocks, the state of the ground trodden by the bullocks and the droppings of the bullocks created much nuisance. The District Munsiff found that the machine occupied the entire vacant space in the defendants compound was very near the occupied portion of the plaintiff's house; the machine was worked by the defendant both day and night, that the noise caused by the working of the Machine was unbearable and prevented the defendant from attending to his photographic work; and the noise proceeding

⁴⁶ ILR 8 Bom. 35.

⁴⁷ AIR 1925 All 392.

from the mill machine could be heard at a distance of two furlongs; and also black, dirty, foul smelling water containing mosquitoes and worms was found in the defendant's compound on account of the washing of the nuts and of the dung stored in it, especially during the rainy season. The District Munsiff came to the conclusion that the business of the defendant was an actionable nuisance for the abatement of which the plaintiff could sue. The appellate court substantially concurred in the findings of the District Munsiff. Then the defendant preferred second appeal before the High Court. The Madras High Court did not interfere with the decision of the courts below and dismissed the appeal with costs.

However, the plaintiff could not prove serious discomfort in *Biharilal v. James Maclean*⁴⁸, the plaintiff owned a house in Bezar Karta Ahmedganj in Farrukhabad city where the plaintiff owned and occupied a house. The defendant's flourmill worked by an oil engine was behind this house. On the allegation of nuisance the trial court had referred to the evidence only of one of the plaintiffs and held on the basis of that evidence that the soot arising from the chimney would fall upon the articles kept in the house of the plaintiffs, there would be bad smell produced from the kerosene oil and noise produced from the engine would cause substantial inconvenience to the tenants occupying that house. The High Court therefore thought that a case of substantial interference with the physical comfort of the residents of the house was not made out. It was also pointed out that a discomfort to be actionable must be substantial not only to persons with dainty, or elegant modes or habits of living, but to any person occupying the premises of the plaintiff, irrespective of his position in life, age or state of health. It was found by the High Court that another flourmill worked by a gas engine was already there at a distance of 20 to 25 paces and no body had taken objection on the score of discomfort. Relying on further evidence of several residents of locality, who deposed that the residents of the locality due to this oil engine suffered no discomfort. The Hon'ble High Court while allowing the appeal observed that whether anything

⁴⁸ (1924) ILR 46 All 297.

is a nuisance or not is a question to be determined not merely by abstract consideration of the thing itself but with reference to its circumstances; and where a locality is used for the purpose of carrying on a trade or manufacture, the fact that such trade or manufacture does not exist elsewhere, not far from the place cannot be left out of account.

In *Janki Prasad v. Karamat Hussain*⁴⁹, the plaintiff in a representative capacity had brought a suit for declaration of their right of worship and of taking out processions with music past an adjoining mosque and for an injunction restraining the defendants from interfering at any time with the aforesaid rights of the plaintiffs. In this case Mukherjee J. observed that interference with religious observances according to the notion of a particular class of individuals does not amount to private nuisance.

In *Shaikh Ismail Sahib v. Nirchanda*⁵⁰, the defendant had set apart a portion of his house for what he considered to be a charitable purpose viz. to allow anyone to use it temporarily (for performing marriage ceremonies, pujas etc. free of rent, and loud noise was caused there during the ceremonies by loud and discordant instruments long after the hour when people ordinarily go to sleep). It was held by the trial judge that the act of the defendant to be actionable nuisance must be something, which the society does not tolerate. Accordingly, the trial judge was of the opinion that there was no actionable nuisance. The High Court did not agree with the finding of the court below and held that it amounted to an actionable nuisance and that the plaintiff was entitled to an injunction restraining the defendant from making loud noise during hours of sleep, charity cannot be accepted as a defence in such cases.

In *Jawand Singh v. Mahomed Din*⁵¹, it was held that though the plaintiffs had an inherent right to call out the 'azan' -- from the mosque, an injunction could be issued to restrain malicious acts of creating loud noise to the annoyance of the neighbours.

⁴⁹ AIR 1931 All 674.

⁵⁰ AIR 1936 Mad 905.

⁵¹ AIR 1919 Lah 6.

The following five propositions sum up the general law in India, in this regard.

1. Every person has a right to worship.
2. The right is independent of custom.
3. The right is not absolute but is limited by other or others.
4. The exercise of right may be limited by order of the public authorities, and
5. The Civil Courts on grounds of nuisance, public or private, may limit the exercise of the right.⁵²

In *Dhanna Lal v. Chittorsingh Mahtapsingh*⁵³, it was held that the abnormal noise produced by the flourmill set up by the defendant, materially impaired the physical comforts of the occupants of B's house and as such amounted to actionable nuisance. The decision of the Madhya Pradesh High Court is important as the law of nuisance (as regards noise pollution) was summarized the principle governing nuisance caused by constant noise. The High Court referred English cases and a few Indian cases. The Indian cases referred by the High Court are (i) *Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, (ii) *Sadasiva v. Rangappa*, (iii) *Shaikh Ismail Sahib* case. From these cases the High Court deduced the principles governing nuisance caused by noise and summarized those principles as follows:

1. Constant noise, if abnormal or unusual can be an actionable nuisance, if it interferes with one's physical comforts.
2. The test of a nuisance causing personal discomfort is the actual local standard of comfort, and not an ideal or absolute standard.
3. Generally, unusual or abnormal noise on defendant's premises which disturbs sleep of the occupant of the plaintiff's house during night, or which is so loud during day time that due to it one cannot hear ordinary conversation in the plaintiff's house, or which does not allow the

⁵² B.S.Sinha, *Law of Torts through Indian Cases*, 1969 edn., p. 202.

⁵³ AIR 1959 MP 240.

occupants of the plaintiffs house to carry on their ordinary work is deemed to be a noise which interferes with one's physical comforts.

4. Even in a noisy locality, if there is substantial addition to the noise by introduction of some machine, instrument, or performances at defendants premises, which materially affects the physical comforts of the occupants of the plaintiff's house, then also the noise will amount to actionable nuisance.
5. If the noise amounts to an actionable nuisance, the defence that the defendant is making a reasonable use of his own property will be ineffectual. No use of one's property is reasonable if it causes substantial discomfort to other persons.
6. If the defendant is found to be carrying on his business so as to cause a nuisance to his neighbours, he is not acting reasonably as regards them, and may be restrained by injunction, although he may be conducting his business in a proper manner and according to rules framed in this behalf either by the municipality or by the government. The latter defence can be effective in a case of public nuisance.
7. If an operation on the defendants' premises cannot by any care and skill be prevented from causing a private nuisance to the neighbours, it cannot be undertaken at all, except with the consent of those injured by it.
8. The right to commit a private nuisance can in certain circumstances, be acquired either by prescription or by the authority of a statute.

Applying these principles to the facts of the instant case the Court stated that the abnormal noise produced by the flourmill materially impaired the physical comforts of the occupants of the house of the respondent (Plaintiff) and as such amounted to actionable nuisance. The defence taken by the appellants (defendants) is that the Municipal Committee had given a license for starting the flourmill and the license had been renewed. On this point B.K.Chaturvedi J. stated: "This in my opinion, is not an effectual defence in such cases. The

Municipality is after all a creature of the statute. It has no power to confer rights upon anybody to commit private nuisance. In this view of the matter, it is clear that this appeal must fail.”

In *Radhey Shiam v. Gur Prasad*⁵⁴ the Court quoted the decision of *Dhanna Lal v. Chittorsingh Mahtapsingh*⁵⁵ and opined that applying the principle set forth it is manifest that a person can claim injunction to stop nuisance if in a noisy locality there is substantial addition to the noise by introducing of some machine, instrument or performance at defendant's premises which materially affects the physical comforts of the occupants of the plaintiff's house. The appellate court below has found as a fact that the running of the impugned machines would seriously interfere with the physical comfort of the plaintiff and the members of his family according to the ordinary notions prevalent among reasonable men and women. This finding being based on evidence is not assailable in second appeal. The plaintiffs were therefore, rightly held to be entitled to the injunction claimed by them. There is no merit in both the appeals.

The Punjab High Court in *Ram Rattan v. Munnal Lal*⁵⁶ took up the problem of nuisance created by the additional noise in noisy locality. The court while rejecting the plea of serious addition of the noise as to warrant the conclusion that actionable nuisance existed, expressed the view: “The standard of comfort differs according to the situation of the property and the class of people who inhabit there. But whatever the standard of comfort in a particular district may be, the addition of fresh noise caused by the defendants works may be so substantial as to create a legal nuisance”. The Court further said: Thus a locality devoted to noisy trades (such as printing and allied trades in a printing house of a factory) if subjects the occupier of an adjoining residence to such an increase of noise as to interfere substantially with the ordinary comfort of human existence according to the standard of comfort prevailing in the locality, that is sufficient to constitute an actionable wrong.

⁵⁴ AIR 1978 All 86.

⁵⁵ Supra note no. 53.

⁵⁶ AIR 1959 Pun. 217.

In *Datta Mal Chiranji Lal v. L.L.Prasad*⁵⁷ the appellant (defendant) established an electric flourmill in a premises in the Bazar locality of Mussorie, which was adjacent to the plaintiff's house. The plaintiff alleged that it caused a lot of noise and vibration so that plaintiff and the members of his family found it difficult to reside in their house, and it caused great inconvenience and discomfort to them. The learned Judge held that the mill caused inconvenience and trouble to the plaintiff and the residents of his house and the running of the mill amounted to a nuisance. He considered the observations made in several judicial pronouncements and took the view that the plaintiff's suit was well founded. He therefore decreed the suit. On appeal by the defendant, it was contended that in an action for private nuisance, substantial damage or injury must be proved, which has not been done in the present case. Secondly, he contended that the house of the parties situate in the Library Bazar, a busy market place in Mussorie and the standard of physical comfort and quietness demanded by the plaintiff was unreasonably high. The Allahabad High Court dealt with these two contentions together and stated: Every owner of the property is entitled to use it beneficially subject to such limitations as may be incidental to similar and beneficial enjoyment of other owners of their properties. The plaintiff in the instant case is therefore entitled to reside comfortably in his own house, and if the defendant by running his flourmill produces such noise and vibrations as to cause substantial discomfort to the plaintiff and does not allow him to reside comfortably in his own house the defendant's action amounts to a nuisance.

The learned High Court Judge further maintained that: Damage to the property may be caused after some time, the injury to health might become evident after some time, but it does not mean that the plaintiff should wait till such happens. This means that plaintiff may claim preventive action by the court as soon as such danger appears.

⁵⁷ AIR 1960 All 632.

Finally, the Allahabad High Court approved the decision of the court below on the ground that the running of the flourmill is a nuisance; and dismissed the appeal.

*Gotham Construction Co. v. Amulya Krishana*⁵⁸, tells the story of nuisance caused by noise in a residential area where the peace and quiet of the place was broken by the terrific sound coming out of the workshop of Gotham Construction Co. The workshop worked every day from 8 am or thereabouts to 8 pm or even later. The appellate Judge found that the hammering sounds coming from the factory caused substantial interference with the comforts of the plaintiffs and others residing in the locality. The appellant defendant came up to the Calcutta High Court in second appeal. The Calcutta High Court approved the decision of the courts below and observed:

“ In granting a decree for perpetual injunction the principle a court of law goes by, is to do justice to both the parties, if it can. The above form of injunction secures just that. Thus in a suit for perpetual injunction to prevent a private nuisance created by hammering of metal sheets in the defendant’s workshop a decree ‘permanently restraining the defendant from carrying any sound nuisance in the workshop’, saves the plaintiffs and others living in the locality from being discomfited by nuisance from noise. It keeps too the business of the defendant intact, provided care is taken by scientific method to keep the noise within the limits of the workshop”.⁵⁹

In *Ram Lal v. Murtazabad Oil & Cotton Ginning Factory*⁶⁰, the appellant (plaintiff) had instituted a suit for permanent injunction restraining the respondents (defendants) from erecting or working flour mill, oil expellers, cotton ginning machine or any other power driven machinery in the premises ABCD. The premises are situated in the new grain market within the municipal limits of Jagadhri and lies beside the residential house of the plaintiff. It was stated in the plaint that the premises were reserved for residential purposes and as shops for sale of agricultural produce and other consumer articles. The trial court found no case of actionable nuisance but the High Court while allowing

⁵⁸ AIR 1968 Cal 91.

⁵⁹ Id., at 99.

⁶⁰ AIR 1968 P & H 399.

the appeal of the plaintiff, granted permanent injunction restraining the defendant from the use of the machinery. Hon'ble Justice Tekchand expressed his opinion as follows:

“Actionable nuisances are of multiple varieties; and they include unreasonable noises or vibrations and other causes which are responsible for personal inconvenience resulting in interference with one's quiet enjoyment. In the very nature, it is not possible to lay down absolute standards. It is always a question of degree whether interference with comfort or convenience is sufficiently serious to constitute a nuisance. The seriousness is governed by time, place, extent or the manner of performance of operations that are said to have become a nuisance. In our modern society and in the machine age, every one must put up with certain amount of discomfort resulting from legitimate activities of one's neighbour. In the courts, the old maxim *sic utere tue, ut alienum non laedas* – so use your own property as not to injure your neighbours, and the homely phrases ‘give and take’, ‘live and let live’ are indicative of the principles which are borne in mind, but these do not serve exact yardstick for it is not possible to measure the extent of the discomfort or annoyance. It is generally conceded, that in determining the question whether a nuisance has been caused, a just balance must be struck between the right of the defendant to use property for his own lawful enjoyment, and the right of the plaintiff to the undisturbed enjoyment of his property. In order to be actionable, a nuisance must materially interfere with the comfort or convenience of ordinary persons judged by the standards of an average man. The substantial extent of the discomfort has to be determined not merely with reference to the plaintiff, but from the point of view of any person occupying the plaintiff's premises irrespective of his position in life age or state of health....

We have to bear in mind that *len non favet delicatorem votes* – the law favours not the wishes of the dainty. Another consideration to be borne in mind is the character of neighbourhood. A person living in the heart of the large manufacturing town cannot reasonably expect the same freedom from noise as in a secluded countryside.⁶¹

Hon'ble Justice Tekchand from a review of case laws deduced the following principles relating to actionable nuisance:

⁶¹ Id., at 401.

1. In determining whether an actionable nuisance exists, the degree or the extent of the annoyance or the inconvenience is to be considered. For what may amount to a nuisance in one locality may in another place and under different surroundings be deemed unobjectionable.
2. As the precise degree of annoyance or inconvenience does not admit of exact calculation, each case depends largely on its own facts.
3. The injury or annoyance, which warrants a relief against the nuisance complained of, must be of real and substantial character disturbing comfort or impairing enjoyment of property. For slight, trivial or fanciful inconvenience resulting from delicacy or fastidiousness, no relief can be granted.
4. As a general rule, but allowing for known exceptions, a nuisance involves the idea of continuity or recurrence. Such nuisance, if continued indefinitely, will be actionable though not if indulged in only one or two occasion.
5. Actionable nuisance does not admit of enumeration and any operation, which causes injury to health, to property, to comfort, to business, or to public morals, would be deemed a nuisance.
6. In certain circumstances and under certain conditions, even a natural tendency to cause injury, and a substantial fear or reasonable apprehension of danger, may constitute nuisance.
7. Jarring and vibration caused to the plaintiff's premises, and noises exceeding a certain norm and interfering with the actual physical discomfort of persons of ordinary sensibilities, are deemed actionable nuisances. They have to be of such intensity as unreasonably interfering with the comfort and enjoyment of property although no physical injury to the health of the complaining party or his family is shown. But no fixed standard can be set as to quantum of noise that constitutes actionable nuisance and it is a matter, which depends upon the circumstances of each case.

8. Once a noise is considered to be nuisance of the requisite degree, it is no defence to contend, that it was in consequence of a lawful business or arose from lawful amusements or from places of religious worship.⁶²

In *G. Veerabhadrappa v. M.Nagamma*⁶³, the plaintiff filed a suit for restraining the defendant by means of a permanent injunction from installing or running the chilly pounding machine in the suit premises. The plaintiff's alleged that the pounding machine was set up without complying with the requirements of law and great nuisance was being created on account of vibration due to the pounding of the chilly. This had potential danger to the safety of the buildings as cracks had developed after its installation. Secondly, chilly dust shooting out of pounding pit is a health hazard to the plaintiffs and their family members and lastly the sound and vibration caused mental agony to the plaintiffs and their family members. It was being worked day and night; their mental peace was also affected and sleeps disturbed. On the issue of health hazards, the trial court found the issue in the negative but held that the working of the machine causes nuisance on account of sound and noise interfering with the normal work, life and mental peace of the plaintiffs and other inhabitants in the locality. Accordingly the trial court restrained the defendant from running the chilly pounding machine in the premises. The first appellate court concerned with the findings of the trial court.

In the second appeal, the Karnataka High Court held that in a suit by neighbours for permanent injunction restraining the defendant from running the chilly pounding machine in the locality as the sound and noise produced by the machine disturbed the normal life of the plaintiffs, the concurrent findings of the courts below that the working of the machine with metallic poulder produced great sound and noise which was a nuisance to the plaintiffs disturbing their normal life are findings of facts which have to be accepted in second appeal. However, Karnataka High Court further held that in

⁶² Id., at 402-403.

⁶³ AIR 1988 Kant. 277.

circumstances of the case, it would not proper to absolutely restrain the defendant from working the machine only on the ground that such working caused nuisance when there was no hazard to the health or safety of the buildings of the plaintiffs and the nuisance could be abated by adopting certain devices to prevent or minimize such nuisance.

In *D. Ramanatha v. S. Razaack*⁶⁴, the case of the plaintiff was that he had been enjoying light and air from the windows and ventilators from the upstairs of his building for 50 years. Therefore, the plaintiff has acquired an easementary right. The defendant's construction of a two-storied building would completely shut up those windows and there will be no air and light and there will be no passage through which the air and light pass to the property of the plaintiff. Hence, he averred that the defendant is not entitled to obstruct the air and light coming through the windows. Hence, he instituted the suit for permanent injunction against the defendant with a prayer for issuance of an injunction permanently, prohibiting the defendant from shutting out the windows and ventilators situated in the plaintiff's property and for costs.

The suit for injunction was dismissed as not tenable. The court observed:

"It may be mentioned that sections 15, 28, 33 and 35 of the Easements Act should be read together in the matter of prescriptive right with regard to the flow of light and air. Mere diminution of air and light would not give the plaintiff a cause of action to sue for injunction. It should be substantial interference with the normal enjoyment of light and air so as to disturb the usual mode of life of the inhabitants of the building. In other words it should amount to an actionable nuisance."⁶⁵

In *B. Venkatappa v. B. Lovis*,⁶⁶ the Andhra Pradesh High Court upheld the lower court's mandatory injunction directing the defendant to close the holes in a chimney facing the plaintiff's property. The court ensured enforcement of its order by authorizing the plaintiff to seal the holes at the defendant's cost, if the defendant failed to do so. The High Court stated that the

⁶⁴ AIR 1982 Kant. 314.

⁶⁵ Id., at 318.

⁶⁶ AIR 1986 AP 239.

smoke and fumes that materially interfered with ordinary comfort were enough to constitute an actionable nuisance and that actual injury to health need not be proved. The court also observed that the existence of other sources of discomfort in the neighbourhood were no defence, provided that the source complained of materially added to the discomfort. The court rejected the defence that the plaintiff 'came to the nuisance': 'The fact that the nuisance existed long before the complainant occupied his premises, does not relieve the offender unless he can show that as against the complainant he has acquired a right to commit nuisance complained of'.

In *Rajat Ali v. Sugni Bai*⁶⁷, the plaintiff sued the defendant for eviction. One of the grounds for such eviction was that the defendant had installed machinery, which was committing acts of nuisance to other occupants of the buildings in the neighbourhood. The Court observed that the machinery was installed in the building since 1970 and there was no complaint of nuisance prior to filing eviction petition. The Court opined that in a wide sense any industrial activity might create sound while such activities are in operation. Such sound may be uncomfortable to those who are over sensitive to such noise. But then care must be taken because every inconvenience cannot become an actionable nuisance. To make it an actionable the nuisance must be of a reasonable perceptible degree. The Supreme Court in this case was not inclined to treat the noise as amounting to nuisance due to the aforesaid reasons. Therefore, the High Court decision that the respondent had caused nuisance and damages to the premises was set aside by the Supreme Court.

In *Kuldip Singh v. Subhash Chandra Jain*⁶⁸, The plaintiff, Subhash Chandra Jain, feared that the baking oven and 12 foot chimney built by his neighbour would cause a nuisance when the bakery commenced. The trial court restrained the defendant since operation of the oven 'would result in emitting smell and generating heat and smoke which taken together would amount to nuisance'. The Supreme Court drew a distinction between an existing nuisance

⁶⁷ AIR 1999 SC 283 at p. 286-287.

⁶⁸ 2000 (2) Scale, 582.

and a future nuisance: 'In case of a future nuisance, a mere possibility of injury will not provide the plaintiff with a cause of action unless the threat be so certain or imminent that an injury actionable in law will arise unless prevented by an injunction. The Court may not require proof of absolute certainty or a proof beyond reasonable doubt before it may interfere; but a strong case of probability that the apprehended mischief will in fact arise must be shown by the plaintiff.' In a remarkable conclusion, the apex court found that the plaintiff's apprehension about a smoking oven next door causing a nuisance was not justified by the pleadings or the evidence and dismissed the suit.

2.3. (ii) Public Nuisance

If smoke vapour and noisome gases are communicated to the air which enters the plaintiff's house so as to cause inconvenience to the occupier thereof making the house less comfortable, the act will be a nuisance. When such nuisance is committed to make the atmosphere noxious to public health, it is indictable as an offence under Section 268 of the Indian Penal Code. There have been penalties laid down under the Air (Prevention and Control of Pollution) Act 1981, which is dealt in a separate⁶⁹. Proceeding under Section 133 of the Criminal Procedure Code can also be taken for removing a public nuisance caused by Air, Noise or other environmental pollution. Two memorable decisions of the Supreme Court have added new dimension to this rarely used provision of law.

*Municipal Council, Ratlam v. Vardhichand*⁷⁰ has given flesh and blood to skeleton provisions in Section 133 of the Code; *Krishna Gopal*⁷¹ gives it a new vigour and life.⁷² Some cases discussed here would enable us to understand how far the right to a pollution free environment was a part of the basic jurisprudence of the land. It would also establish how effective was the Penal provisions used to control air pollution.

⁶⁹ Chapter V.

⁷⁰ AIR 1980 SC 1622.

⁷¹ (1986) Cri.LJ 396.

⁷² See Chapter III.

*Gobind Singh v. Shanti Swaroop*⁷³, is the first case in which the Supreme Court examined the scope of Section 133 of the Code to approve the order of the Magistrate to demolish the oven and chimney of a baker as the baking process caused air pollution. The Supreme Court of India while upholding the Magistrates observations rightly remarked that:

“We are of the opinion that in a matter of this nature (public nuisance) where what is involved is not merely the right of the private individual but the health, safety and convenience of the public at large, the safer course should be to accept the view of the learned Magistrate, who saw for himself the hazard resulting from the working of the bakery.”

In *Bhuban Ram v. Bibhuti Bhusan*⁷⁴, a steam paddy husking machine working day and night was alleged to be causing public nuisance by the dust, smoke, smell and noise of the machine. On complaint the District Magistrate prohibited the working of the mill by night and summoned the proprietors and the manager under Section 290 of the Indian Penal Code. At the trial the persons living close to the mill said that they were annoyed by the mill in various ways but chiefly because it disturbed their sleep at night. The trying Magistrate held that the working of the mill at night in a residential portion of the town was objectionable and that the noise of it amounted to a public nuisance and fined the manager and three proprietors Rs. 50 each under Section 290 of the Indian Penal Code. On revision petition the Session Judge set aside the conviction of the proprietors and was of the opinion that their conviction was bad in law. However, the Session Judge approved the conviction of the Manager.

The Calcutta High Court agreed with the finding of the learned Session Judge. According to the High Court the proprietors could not be made liable, as they were not living in the premises where from the nuisance caused. On this point the court held:

“Speaking Generally, where the user of premises gives rise to a nuisance the person liable under Section 290 of Indian Penal

⁷³ AIR 1979 SC 143.

⁷⁴ AIR 1919 Cal 539.

Code is the occupier for the time being whoever he may be. A proprietor who is not in occupation of the premises is not liable unless his conduct amounts to an abatement of the offence under that section.”⁷⁵

The general rule is that principal is not criminally answerable for the acts of his agent. The High Court did not interfere with the conviction order of the manager and directed that the fine imposed on the proprietors must, if paid, be refunded.

In *Krishna Mohan v. A.K.Guha*⁷⁶, there was an iron yard belonging to the petitioner. The Principal of a Training School near the yard complained to the District Magistrate that an intolerable noise was made in the yard. After a police enquiry the Sub Divisional Magistrate issued a notice under Section 133, Criminal Procedure Code, calling upon the petitioners to abate the nuisance or to show cause against the order. Subsequently the Magistrate dealt with the matter under Section 137, Criminal Procedure Code and made the order absolute. On revision petition the case came before the Calcutta High Court. It was contended on behalf of the petitioner that the noise was not in fact a nuisance, that it was made to carry on a lawful trade and that the Magistrate had no jurisdiction to make the order. Rejecting this contention the Court held: “A noise made in the carrying on of a lawful trade under a licence, if injurious to the physical comfort of a community, is a public nuisance and a Magistrate has jurisdiction to proceed under Section 133 for the abatement of the nuisance”. The Court further pointed out that existence of an alternative remedy does not deprive the Magistrate of jurisdiction. On the question evidence it stated: “Evidence is not to be judged by volume and the testimony of a few witnesses may be sufficient to prove that a noise is injurious to the physical comfort of a community”⁷⁷. Thus the Court approved the order of the Magistrate.

⁷⁵ Ibid.

⁷⁶ AIR 1920 Cal 550.

⁷⁷ Ibid.

In *Emperor v. Ram Charan Ahir*⁷⁸, Miss Beech, a Missionary lady residing in Sultanpur, made a report complaining against the conduct of Ram Charan Ahir, a chaukidar in the Private employment of Babu Ganpat Sahai, a pleader of Sultanpur. Her complain was to the affect that the chaukidar of Babu Ganpat Sahai made a noise at night by shouting “*Jagte raho, jagte raho*” and thereby disturbed her sleep at night. Upon this complain the police prosecuted the chaukidar for an offence under Section 290, Indian Penal Code. The Trial Magistrate tried the case summarily and fined Rs. 20 under Section 290 Indian Penal Code. The Session Judge to the High Court under Section 438 reported the case.

The first plea urged before the Sessions Judge was that the shouting at night did not amount to a public nuisance within the meaning of the term “public nuisance” as defined in Section 268 Indian Penal Code. The Session Judge stated in his order that the injury contemplated by Section 268, Indian Penal Code must be a common injury and must affect the public and not any one individual. The fact that Miss Beech suffers annoyance because chaukidar makes a noise at night does not amount to a public nuisance within the meaning of the term as defined in Section 268 I.P.C. The expression ‘people in general’ means a body or a considerable number of persons. The law makes no allowance for the susceptibilities of hypersensitive persons like Miss Beech. The High Court agreed with the Session Judge and set aside the conviction and sentence. The Court also directed the refund of fine, if paid.

In *Murlidhar v. Onkar*⁷⁹, Onkar Vyankat Patil applied to the District Magistrate, East Khandesh at Jalgaon complaining that the flour mill installed by the petitioner Murlidhar Bahtai Patil close to his house was a cause of nuisance to him as also to the other residents in the locality. He alleged that the operation of the flourmill created vibrations and those vibrations were likely to cause danger to the people residing nearby. After due enquiry a conditional order was passed under Section 133, Criminal Procedure Code, directing the

⁷⁸ AIR 1926 Oudh 414.

⁷⁹ AIR 1961 Bom 263.

flourmill owner to remove the mill within a period of two months or to appear before the Sub divisional Magistrate to show cause why that order should not be enforced. When the case came before the High Court Hon'ble Justice Shah stated:

“An order under this Section could be justified only if the conduct of the trade is injurious to health or physical comfort of the community. These words necessarily mean that the conduct of trade is injurious in present to the health or physical comfort of the community. It follows, therefore, that a distant possibility of an injury to the health or physical comfort of the community by reason of the conduct of any particular trade would not justify an order being made under this section. Unless there is an imminent danger to the health or physical comfort of that community or the conduct of the trade or occupation is in fact injurious to the health of or the physical comfort of that community, in my opinion an order under Section 133 cannot be passed”⁸⁰

Shah J. agreed even assuming that an order could be passed under the Section to safeguard the properties of the people, in the surrounding locality, the danger even to those properties should be so imminent as to call for the intervention of the Magistrate under Section 133 of the Criminal Procedure Code. This does not mean that the people of the surrounding locality should wait until the houses actually collapse.

In *Ivor Hyden and others v. State of Andhra Pradesh*⁸¹, the petitioners (accused) were convicted by the Trial Court for the offence of public nuisance under Section 290 of Indian Penal Code. They were found guilty of playing a radio loud. The Andhra Pradesh High Court in revision quashed the order of conviction by holding that the act was too trivial to be taken cognizance of the act of playing a radio loud was considered to be excusable under Section 95 of Indian Penal Code.

In *Himmath Singh v. Bhagwan*⁸², the Rajasthan High Court held that the offensive smell caused the particles of fodder carried by the Sand wind and

⁸⁰ Id., at 265.

⁸¹ 1984 Cri LJ 16 (NOC) 30.

⁸² 1988 Cri LJ 614,

noise caused by the fodder cutting machine, to the residential locality created public nuisance.

The Madhya Pradesh High Court in *Krishna Gopal v. State of Madhya Pradesh*⁸³ held that the order of dismantling the alkaline factory causing noise and odour in the residential locality was valid despite the fact that only a single person took up the matter with the executive magistrate.

In *Krishna Panicker v. Appukuttan Nair*⁸⁴, the Kerala High Court held that Special Acts like the Water Act or Air Act couldn't be held as repealing Section 133 of the Code of Criminal Procedure and put at rest the controversy on the question.

In *State of Madhya Pradesh v. Kedia Leather and Liquor Ltd.*⁸⁵ the Supreme Court laid down that Section 133 of Code of Criminal Procedure is not impliedly repealed by the enactment of the Water and Air Acts and that it continues to be a potent weapon for fighting ecological maladies and pollution of water and air.

The discretionary power of the Court under Section 133 is not unbridled or uncontrolled. The Court has to be careful in applying its mind when a complaint is brought before him. *Pranab Kumar Chakraborty v. Md. Akram Hussain*'s⁸⁶ decision is an illustration where the Gauhati High Court opined that the Magistrate must satisfy himself in an objective manner in finding out whether there is nuisance or likelihood of nuisance. In this case the owner approached the Magistrate and complained that the tenant had kept some unhygienic articles in the room kept under lock and key for more than five months and that those articles were producing odour. The lower Court granted relief under Section 133 Cr. P.C. As the police did not find any article causing odour, the High Court quashed the order of the Magistrate and the room was restored to the tenant. The High Court decided that with the help of an order

⁸³ 1986 Cri LJ 396.

⁸⁴ (1993) 1 KLJ 725.

⁸⁵ (2003) 7 SCC 389.

⁸⁶ (1991) Cri LJ 3156.

under Section 133 of the Code of Criminal Procedure, a landlord could not evict his tenant.

The scope of law of nuisance under Section 133, Code of Criminal Procedure, was extended by other High Courts. In *Ajeet Mehta v. State of Rajasthan*⁸⁷, it was alleged that the business of loading, unloading and stocking of fodder near a residential locality was a serious health hazard. The whole atmosphere was polluted on account of fine dust particles of the fodder. Endorsing the order of the Magistrate for removal of the business from the locality, the Court observed:

It is very unfortunate that little care is now bestowed to the pollution problem and very lackadaisical approach is taken... very rarely people come forward and resist the same. They are normally discouraged on account of slow moving of the state machinery as well as the Court. But this is one of the unique cases in which the petitioner has taken the whole exercise and brought the motion to put an end to this problem of pollution of that area.⁸⁸

The Kerale High Court in *Madhavi v. Thilakan*⁸⁹ brought an action against nuisance created by an automobile workshop in a residential area. The Court held:

We recognize every man's home to be his castle, which cannot be invaded by toxic fumes, or tormenting sounds. This principle expressed through law and culture, consistent with nature's ground rules for existence, has been recognized in Section 133(1)(b). The conduct of any trade or occupation, or keeping of any goods or merchandise injurious to health or physical comfort of community could be regulated or prohibited under the Section.

The provision under the Code of Criminal Procedure does not mean conferring on the executive magistrate, criminal jurisdiction. On the contrary, the provision contains the inherent characteristics of preventive and remedial jurisdiction. Only disobedience of an order of the executive magistrate invites

⁸⁷ (1990) Cri LJ 1596.

⁸⁸ *Id.*, at 1598 per Mathur J.

⁸⁹ (1989) Cri LJ 499.

criminal prosecution.⁹⁰ The Supreme Court of India in *Municipal Council Ratlam v. Vardhichand*⁹¹ was faced with a difficult question to decide whether by an affirmative action under Section 133, Code of Criminal Procedure, 1973, a Court can compel a statutory body (i.e., municipal council) through its officers to carry out its duty to the community by constructing sanitation facilities at great cost and on a time bound basis and thus abate nuisance on pain of punishment under Section 188 of Indian Penal Code.

The facts of the case is of common occurrence in Indian urban centers and are capable of universal application depicting the silent subjection of groups of people to squalor and of callous public bodies habituated to deleterious inaction. Residents of the locality within the limits of Ratlam Municipality tormented by stench and stink caused by open drains and public excretion by nearby slum-dwellers moved the Magistrate under Section 133 of Criminal Procedure Code, 1973 to direct municipality to do its duty towards the members of the public. The Magistrate being convinced by the applicant's grievances gave directions to the Ratlam Municipality to draft a plan within six months for removing nuisance.

The Sessions Court reversed the Magistrate's order in appeal. However, the High Court concurred with the Magistrates' order and approved of it. The Supreme Court in appeal upheld the High Courts' contention and affirmed the Magistrates' order.

Section 133, Code of Criminal Procedure, is categorical although reads discretionary. Judicial discretion when facts for the exercise are present has a mandatory import. Therefore, when the Sub divisional Magistrate, Ratlam has, before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance,

⁹⁰ P. Leelakrishnan, *Environmental Law In India*, Butterworths India, 1999, p.43.

⁹¹ Supra note no. 70.

triggered by the jurisdictional facts. The Magistrates' responsibility under Section 133, Cr.P.C. is to order removal of such nuisance within a time to be fixed in order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by Section 188, Indian Penal Code. Therefore, the Municipal Commissioner or other executive authority bound by the order under Section 133 Cr.P.C shall obey the direction because disobedience if it causes obstruction or annoyance or injury to any persons lawfully pursuing their employment, shall be punished with simple imprisonment or fine as prescribed in the section. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone of Section 133, Cr.P.C. read with the punitive temper of Section 188, I.P.C. make the prohibitory act a mandatory duty. The Court further observed that- although these two Codes are of ancient vintage, the new social justice orientation imparted to them by the Constitution of India makes it a remedial weapon of versatile use. Social Justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a Magistrate under Section 133, Cr.P.C. In the exercise of such power, the judiciary must be informed by the broader principal of access to justice necessitated by the conditions of developing countries.

*Ratlam*⁹², *Krishna Gopal*⁹³ and *Madhav*⁹⁴ illustrate the judicial enthusiasm in rejuvenating the rarely used provision in the Code of Criminal Procedure for protecting the environment. One finds that enthusiasm slips in a few cases, where the judiciary had to deal with pollution of water and air. Two decisions *Tata Tea Limited v. State of Kerala*⁹⁵ and *Abdul Hamid v. Gwalior Rayon Silk Manufacturing Co*⁹⁶, show that courts at times tend to limit the

⁹² Supra note no. 70.

⁹³ Supra note no. 83.

⁹⁴ Supra note no. 89.

⁹⁵ 1984 KLT 645.

⁹⁶ (1989) Cri LJ 2013.

application of the concept of public nuisance only to those areas not covered by new legislation.

Tata Tea was decided by the Kerala High Court four years after *Ratlam*. The question was whether the District Magistrate could prevent the discharge of effluents to the river from a factory after the authorities under the Water Act already granted the consent and while actions were available under that law. The petitioners contended that resort to an action against public nuisance is not possible as there is a specific law laying down machinery to deal with water pollution. Accepting the contention, the Court held that in so far as the action relates to the prevention of water pollution, the provisions in Section 133 of CrPC was impliedly repealed by the Water Act of 1974. According to the Court, the petitioner was correct in contending that the Water Act is a code in itself so far as it provides an exhaustive remedy against pollution and violation of the law relating to the control of pollution of water. The State Pollution Control Board can prosecute, or under the old provision give sanction to prosecute the offenders⁹⁷ and then a judicial first class magistrate court can take cognizance of the offence under the Water Act. Access of citizens to the executive magistrate under Section 133 of the CrPC may not be conditioned by any such restrictions. The Court said, this did not make any difference, since under the provisions of the Water Act, a citizen could approach the Board, which could, or with the sanction of the Board a citizen could petition a judicial magistrate. The Court concluded that the executive magistrate had no jurisdiction to deal with pollution of water under Section 133 of the CrPC as a special statute, which provided the machinery for redressal of grievances, had now covered the area.

The power vested in the Board by the Water and Air Acts to sanction prosecution, as it stood before the amendments in the late eighties, was the ground on which the Madhya Pradesh High Court denied the Magistrate

⁹⁷ The 1988 amendment gave the right to prosecute directly to a person but only after giving a sixty day notice to the board.

jurisdiction under Section 133 of the CrPC in *Abdul Hamid*⁹⁸. According to the Court, the Water and Air Acts were meant for protecting industries and for ensuring a proper balance between the conflicting claims of national growth and control of pollution. The Acts provided for taking samples of effluents at emission levels. The Court said the results of the analysis were inadmissible in evidence before a court, if the sample was taken and analysis made without complying with the safeguards provided by the statute. This position, according to the court, led to the view that the statute was intended to protect industry. These observations were unnecessary and stand on a weak foundation. In reality, the aim of the special law is the protection of the environment from abuse by industrialists.

In *Krishna Panicker v. Appukuttan Nair*⁹⁹ the Division Bench of the Kerala High Court held that it is wrong to have presumed that the Water and Air Acts and Section 133 of the Code of Criminal Procedure, operate on the same field.¹⁰⁰ Special law overrides general law, only if, both operate on the same field. One relates to pollution control, the other refers to maintenance of public order and tranquility. Pushing the aggrieved citizens to the board does not bring effective results, as the board has to put itself in the position of a complainant and seek remedies before a judicial magistrate. The Code provides a mechanism for quick remedy against nuisance. Remedy under the law of public nuisance has now become feasible, functional and reachable to the common man.¹⁰¹

2.4. Conclusion

The cases studied under this Chapter enables us to understand that the right to clean air was acknowledged by the common law since long. However, the Common Law remedies for nuisance as applicable to cases of environmental pollution are not exhaustive and contain certain gaps, which

⁹⁸ Supra note no. 96.

⁹⁹ Supra note no. 84.

¹⁰⁰ Id., at 729.

¹⁰¹ Supra note no. 90 at 45-46.

have largely been filled by legislative remedies provided progressively over the past few years.

The concept of nuisance at present maintain certain objective standards of environmental quality based on modern ecological considerations, this requires more legislative and judicial activism.

The extent of the prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose, according to the Indian Easement Act should be restricted.

It is submitted that Section 28 (d) of the Indian Easement Act should be suitably amended and there should not be any statutory provision granting an acquisitive right by way of prescription to pollute air or water.

In case of noise pollution, physical damage affecting the health and the nervous system may enable a person to recover damages and injunction. We find that there have been a substantial amount of cases in this respect in India.

There have been cases where pollution of air has been accepted in India as amounting to nuisance.

The Common Law action for negligence may be brought to prevent environmental pollution. A major achievement made in *Donoghue v. Stevenson*¹⁰² was that the fallacy of privity of contract was done away with by allowing the consumer to bring an action in tort against the manufacturer, with whom there was no privity of contract. In such cases, pecuniary compensation payable for the commission of the wrong may be either substantial or exemplary. While the former is for the purpose of restitution, the object of the latter is to deter the wrongdoer. The casual connection between the negligent act and the plaintiff's injury was often the most problematic link in pollution cases. The party seeking to recover compensation for damage had to prove that the party against whom he complained was in the wrong. If, eventually, the case was evenly weighed on both sides, and the court was not satisfied that it

¹⁰² Supra note no. 3.

was occasioned by the negligence or default of the other party, the action could not succeed.

In course of time, there were situations where a person was made liable for some harm, even though he was neither negligent in causing it, nor intending to do so. The liability recognized was strict liability from this principle the present concept of absolute liability evolved.

Therefore, the rule of strict liability in *Rylands v. Fletcher*¹⁰³ can very well be applied in cases of escape of dangerous substances causing pollution, as has been rightly observed by the Supreme Court in *M.C.Mehta v. Union of India*¹⁰⁴.

The Supreme Court had rightly observed in *Vellore Citizens Welfare Forum v. Union of India*¹⁰⁵ that the Constitutional and Statutory provisions protect a person's right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right to clean environment.

¹⁰³ Supra note no. 15.

¹⁰⁴ Supra note no. 24.

¹⁰⁵ AIR 1996 SC 2715.

CONSTITUTIONAL PROVISIONS

The concern for preservation and betterment of environment has gained attention for the last forty years, when it became clear that natural wealth of a nation is not unlimited. The first serious attempt for the protection of environment at the global level was made through Stockholm Declaration in 1972. The Declaration carried the environmental issues from local to world sphere. It is a Magna Carta on human environment. After the Conference, nations throughout the world started giving priorities to laws by way of their legislative agenda. India being a signatory was energized to frame laws relating to control and prevention of pollution. Provisions were incorporated in Constitution in the 44th Constitutional Amendment Act to capture the wave of Stockholm Declaration. This brought into existence the newly added Articles, Article 48-A and Article 51-A. Article 48-A mandates that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. Article 51-A (g) imposes fundamental duty on every citizen of India to protect the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

3.1. Legislative enactments under Article 253

The Air Act a Central legislation was passed by the Parliament under Article 253 of the Constitution of India in pursuance of the decision taken at the Stockholm Conference on Human Environment in June 1972. The Parliament through Articles 51, 253 and Entry 13 of List I of Indian Constitution has passed the law. Article 253 of the Constitution empowers Parliament to make laws implementing India's international obligation or agreements.

Article 253 provides that notwithstanding anything in the foregoing provisions of the Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Article 51 provides for states endeavour to-

- (a) promote international peace and security;
- (b) maintain just and honourable relation between nations and;
- (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and
- (d) encourage settlement of international dispute by arbitration.

Entry 13 of the Union List covers: 'Participation in International Conference, association and other bodies and implementing of decisions made thereat.' The Air Act was therefore enacted by the Parliament by using its powers under Article 253 read with entry 13 of the Union List. Article 253 gives the legislative competence as Article 253 shows the width of the treaty-making power. In implementing a treaty, agreement or convention the limitations imposed by Articles 245 and 246(3) are lifted and the total field of legislation is open to the Union Parliament. Article 253 was enacted to avoid difficulty, which Union Parliament would have felt in enacting different types of laws for the implementation of obligations under treaties etc. with respect to the subjects exclusively assigned to the States. Therefore, the Parliament has used its power under Article 253 read with Entry 13 of the Union list to enact the Air (Prevention and Control of Pollution) Act of 1986.

The preambles of both the Act provide that these Acts were passed to implement the decisions reached at the United Nations Conference on the Human Environment held at Stockholm in 1972. The scope of Parliament to legislate on environmental issues has been derived from Article 253.

The Constitution of India came into force on 26th January 1950. The idea of environment had not been in the minds of the founding fathers when the provisions of the Indian Constitution were debated and approved. At its initial

stage the provisions for safeguarding healthy environment could not be seen. The seed of such provision could be traced in Article 47 of the Indian Constitution. Article 47 of the Constitution, reads as follows:

“The State shall regard the raising of the level of nutrition and standard of living of its people and improvement of public health as among its primary duties.”

It is notable that besides Article 47, there are many items in the legislative lists, which enable the Centre and the States to make law in the field of environment. Thus, public health and sanitation, agriculture, land water and fisheries within the State territory are subjects on which the States have power to make a law. Atomic energy, oil fields and resources, inter-state rivers and valleys and fishing in territorial waters are subjects bearing on environmental protection. They come in the Union List where Parliament has power to enact laws. The Constitution (Forty Second Amendment) Act, 1976, moved forest, wildlife and population control from the State list to the Concurrent list. This enables both the State and the Centre to make laws on these areas.

In United Nations Conference on Human Environment, at Stockholm the then Prime Minister of India Mrs. Indira Gandhi while displaying the Nations commitment to the protection of environment, said:

“The natural resources of the earth, including the air, water, land flora and fauna and especially representative sample of the nature ecosystem must be safeguard for the benefits of present and future generations through careful planning or management, as appropriate.... Nature conservation including wildlife must therefore receive importance in planning for economic development.”

To comply with the principles of the Stockholm Declarations adopted by the International Conference on Human Environment, the Government of India, by the Constitution (42nd Amendment) Act, 1976 made the express provision for the protection and promotion of the environment, by the introduction of Article 48A and 51-A (g) which form the part of Directive

Principles of State Policy and the Fundamental Duties respectively. The amendment provided for the following:

(1) Article 48A:

By the Constitution (42nd Amendment) Act, Section 10 (w.e.f. 3.1.1977)

Protection and improvement of environment and safeguarding of forests and wild life:

“The State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country.”

(2) Fundamental Duty

Article 51-A (g): By Constitution (42nd Amendment) Act, 1976, Section 11 (w.e.f. 3.1.1977)

“It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.”

Thus the Indian Constitution makes two fold provision- (a) On the one hand, it gives directive to the State for the protection and improvement of environment (b) On the other hand the citizens owe a constitutional duty to improve and protect natural environment.

In protecting the natural environment Article 48-A is of immense importance today. Because with the activist approach of judiciary in India the legal value of Directive Principles jurisprudence has constantly grown up in the Indian Constitutional set up. Hence the above provisions are pivotal significance.

Purity of air we breath-in and the water we drink is absolutely essential for good health. Equally important is the environment in which we live and work.

3.2. Right to clean Air: An evaluation as a Fundamental Right

Air is the most important constituent of man's environment. It is calculated that a man breath about 22,000 times a day inhaling about 16 kgs of

air by weight. Clean and pure air is very essential for his health and survival. Life subsists as long a breath last. Unfortunately, with the spectacular scientific discoveries and developments, we tend to forget that we live in a world where pure air is at premium and this is just the tip of an iceberg. These dangerous dimensions of air pollution and other pollutions led the Supreme Court to derive that 'Right to live is a fundamental Right under Article 21 of the Constitution on and it includes the right to enjoyment of pollution free water and air for full enjoyment of life.'¹

Article 21 guarantees to every person the protection of Right to life and personal liberty. The importance the 'due process' clause by the activist approach of the Supreme Court in *Menaka Gandhi's* case² has revolutionized the ambit and scope of the expression 'right to life embodied in Article 21 of the Constitution. The right to life in healthy environment is one more golden feather of Article 21.' The Supreme Court of India, in 1980, indirectly conceived this right in a monumental judgement in the case of *Rattam Municipality vs. Vardhichand*.³ Where Justice V.R.Krishna Iyer and Justice O.Chinnappa Reddy observed:

"Even as human rights under Part III of the Constitution have respected by the State regardless provision. Decency and dignity race non-negotiable facts of human rights and are a first charge on local self governing bodies."

The Court's decision was founded on its earlier decision in *Govind v. Shanti Sarup*⁴, where Section 133 of the code of Criminal procedure was used by the Court to preserve the environment in the interest of "healthy, safety and convenience of public a large."

In the judgement the Supreme Court has no-where referred to Article 21 of the Constitution. But it is simply clear that, the judgement is based on the right to live with decency and dignity as provided in the right to life.

¹ *Subhash Kumar vs State of Bihar*, AIR 1991 SC 420

² AIR 1978 SC 597

³ AIR 1980 SC 1622

⁴ AIR 1957 SC 1943

The Court continued, its hidden approach of not referring to Article 21 directly, in another landmark case, *Rural litigation and Entitlement Kendra vs. State of Uttar Pradesh*⁵, where the Court considered the hardship caused to the lessee but thought 'it is a price to be paid for protecting and safeguarding the right of people to live in healthy environment with minimal disturbance to ecological balance.'⁶ In this case, the Apex Court converted a letter into written petition alleging that the operation of unauthorized and illegal mining in the Mussorie-Dehradun belt affected the ecology of the areas and led to environment disorder. The Bench consists of Chief Justice P.N. Bhagwati (as he then was), Justice A.N. Sen and Justice Ranganath Misra ordered closing down of mining operations on the ground that limestone quarries operation causing ecological imbalance and a hazard to healthy environment.

Article 21 guarantees to every person the protection of life and personal liberty. The Right to life though the most fundamental of all is one of the most difficult terms to define. The term cannot be confined to taking away of life. In an American case,⁷ it was pointed out that by the term life something more is meant than a mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg or by pulling out an eye or the destruction of any other organ of the body through which the soul communicates with the outer world. This statement has been upheld by the Supreme Court,⁸ where it was observed that- Article 21 means not merely the right to the continuance of a person's animal existence, but a right to the possession of his organ his arms, legs, etc.

Thus it would include all aspects of life that go to make a man's life meaningful, complete and worth living. Elements, which alone can make it possible to live, should be declared to be an integral component of the right to

⁵ AIR 1985 SC 652

⁶ Ibid. p 656

⁷ *Munn vs. Illinois*, 94 US 113

⁸ *Karak Singh vs. State of U.P.*, AIR 1963 SC 1295.

life, e.g. his tradition, culture, heritage and protection of that heritage in its full measure.⁹

The right to an environment free of smoke¹⁰ and other pollutants follows from the quality of life, which is inherent in guarantee offered by Article 21.

Encouraged by an atmosphere of freedom and articulation in the aftermath of the emergency, the Supreme Court entered into one of the most creative period. Specifically the Court fortified and expanded the scope and object of the fundamental Rights enshrined in Part III of the Constitution. In the process environmental protection (though not mentioned explicitly in Part III of Constitution) was drawn within the expanding boundaries of the fundamental right to life and personal liberty guaranteed by Article 21 of the Constitution.

The Supreme Court strengthened Article 21 in two ways. First, it required laws affecting personal liberty to also pass the tests of Article 14 and Article 19 of the Constitution in the matter of reasonability. Thereby ensuring that the procedure depriving a person of his personal liberty be reasonable, fair and just. Second, the Court recognized unarticulated liberties that are implied by Article 21. It is by this second way that the Supreme Court interpreted the Right to life and Personal Liberty envisaged in Article 21 of the Constitution to include the Right to clean and healthy environment within its boundaries of jurisdiction.

At this particular juncture, it would be unavoidable and imperative to mention the ramifications of the Directive Principles of State Policy found in Part IV of the Constitution and the aid taken by the courts in interpreting the various fundamental rights enshrined in the Constitution, particularly Article 21 in this Chapter.

The Articles (Article 36 to Article 51) envisaged in Part IV of the Indian Constitution consists of certain directives and guidelines of policy and it shall be the duty of the State to adhere them both in the matter of administration as

⁹ *Ram Sharan v. Union of India*, AIR 1989 SC 549.

¹⁰ *Shantistar v Narayan*, AIR 1990 SC 630.

well as in the making of laws. These directives embody the aims and objects of the State under a Republican Constitution i.e., of a Welfare State.

The Directives however differ from the fundamental rights in matters of enforceability. A fundamental right is enforceable and justifiable in the court of law, especially the Supreme Court and the High Courts, and against the State¹¹ but Directive principles of State policy does not create any justifiable rights in favour of an individual and as such cannot be enforced in the courts having writ jurisdiction.¹²

Thus Article 13(2) prohibits the State from enacting any law, which takes away or abridges the fundamental rights conferred by Part III of the Constitution and the Directive principles cannot override this categorical limitation upon the legislative power of the State.¹³

The directives are required to be implemented by legislation as long as there is no law carrying out the policy laid down in the Directive Principles. Neither the State nor an individual can violate any existing law or legal right under the colour of a directive.¹⁴

The earlier decisions of the Court paid comparatively scant attention to the Directives enshrined in Part IV of the Constitution on the ground that the Courts had a little to do with them by virtue of their not being justifiable or enforceable in the Courts of law, unlike that of the fundamental rights. The duty of the Courts in regard to the enforceability and justifiability of the Directives came to be emphasized in the later decisions, the trend which reached its culmination point in a 13 member bench in *Keshavananda's Case*¹⁵, which laid down (by a consensus opinion) certain broad propositions for far reaching effects in future cases before all courts. The propositions were as follows:

¹¹ A fundamental Right enforceable only as against the 'State' as defined in Article 12 of the Constitution.

¹² The Supreme Court, under Article 32 and the High Courts under Article 226 of the Constitution.

¹³ *Henif Qureshi vs. State of Bihar*, AIR 1958 SC 731.

¹⁴ *Mangru v. Commissioner of Budge Budge*, (1951) 87 Cr. LJ. 369.

¹⁵ *Keshavananda Bharti v. Union of India*, (1973) 4 SCC 225.

- (i) There is no disharmony between the Directive principles and the Fundamental rights because they supplement each other in aiming at the same goal of bringing a social restoration and establishment of a welfare state, which is envisaged in the Preamble¹⁶. Constitution aims at the synthesis of the two and the Directive principles constitute 'Conscience' of the Constitution and together with the fundamental rights they form the core of the Constitution. They are not exclusionary of each other but complementary to each other¹⁷.
- (ii) Even the conditions for the exercise by each individual of his fundamental right cannot be ensured unless and until the directives implemented.
- (iii) The Parliament is competent to amend the Constitution to override or abrogate any of the fundamental rights in order to implement the directives so long as the basic feature of the Constitution is not affected.

Applying the doctrine of harmonious construction the courts have applied the directives to adjust the ambit of the fundamental right themselves to give a liberal interpretation of a legislative entry¹⁸

In *Akhila Bharatiya Soshit Karmachari Sangh v. Union of India*¹⁹, the Supreme Court pointed out that fundamental rights are intended to foster the ideal of political democracy and to prevent the establishment of authoritarian rule, but they are of no value unless they can be enforced by resort to courts. The directives cannot in the very nature of things be enforced in a court of law, but it does not mean that directive principles are less important than fundamental rights.

In *Francis Mullin's Case*²⁰, the Court held that right to life includes right to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of state policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42. It must include protection of the health and strength of workers, men and women; and children of tender age against abuse;

¹⁶ See *Keshavananda's Case and Minerva Mills v. Union of India*, AIR 1980 SC 1789.

¹⁷ *Markandaya v. State of A.P.* AIR 1987 SC 1308.

¹⁸ Supra note. 13.

¹⁹ (1981) 1 SCC 246.

²⁰ AIR 1980 SC 849.

opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity; educational facilities; just and humane conditions of work and maternity relief. These are the minimum requirements, which must exist in order to enable a person to live with human dignity. No State, neither the Central Government nor any State Government, has the right to take any action which will deprive a person of the enjoyment of these basic essentials.

In much recent cases, even though the courts per se cannot enforce directives nor can the courts compel the state to undertake legislation to implement a directive, the Supreme Court has been issuing various directions to Government and administrative authorities to take positive action to remove the grievances, which have been caused by non-implementation of the Directives²¹.

In a recent case²², the Supreme Court upheld that pollution caused by smoking has been considered as violation of the right to life enshrined in Article 21. The right includes the right to health and the right not to be afflicted by diseases. In *M.C.Mehta v. Union of India*²³, the Court, keeping in view the mandate of Article 47 and 48-A of Part IV of the Constitution²⁴, held that the law casts an obligation on the State to improve public health and protect and improve the environment and as such directions were issued to tackle the problem arising out of chaotic traffic conditions and Vehicular pollution. And such directions were given treating such problems as a legal issue and proceeded to examine the impact of the right flowing from Article 21 of the Constitution vis-à-vis declaim in the Environment quality.

Article 48-A of the Constitution enjoins that the State shall endeavour to protect and improve the environment. The right to breath, thus, inheres the Directive Principles of State Policy, but merely because the right to breath has found a place in the Directive Principles, it cannot be spelt that it would not fall

²¹ *Comptroller v. Jaganathan*, AIR 1987 SC 537.

²² *Murali S Deora v. Union of India*, AIR 2002 SC 40.

²³ (1998) 6 SCC 60 para 1.

²⁴ Duty of State to improve public health and protect and improve the environment.

within the scope of the right to life guaranteed under Article 21 of the Constitution. Breath is life itself, yet the context of limitations with which the right to life has been set in Article 21, makes right to breath pure clean air a right distinct from mere right to life.

Thus, the most remarkable feature of this expansion of Article 21 of the Constitution has been the resurrection of the many non-justifiable and non-enforceable rights. This makes the Directive principles enshrined in Part IV of the Constitution as enforceable fundamental right as a result of the utilization of the magic wand of Judicial Activism. And the Right to a clean healthy environment including the right of clean air being one of such Directives as found in Article 48-A of the Constitution.

The genesis of the fundamental right to a wholesome environment may be traced to the *Dehradun Quarrying* case²⁵ in which the Rural Litigation and Entitlement Kendra, Dehradun challenged illegal lime stone mining in the Mussoorie-Dehradun region which, it alleged, was devastating the fragile ecosystems in the area. Over the years the litigation grew increasingly complex. By the time the court issued its final judgement in August 1988. It had heard lengthy arguments from the Central and State Governments, government agencies and mine lessees; appointed several expert committees; and issued at least five comprehensive, interim orders. None of these orders, however, specified that fundamental right infringed. Since the exercise of jurisdiction under Article 32 of the Constitution presupposes the violation of fundamental right, people had to deduce the fundamental right(s) that the Supreme Court had in view when it issued those orders.

Though one cannot say that the recognition was clear and explicit the right to human and healthy environment is seen indirectly approved in the *M.C.Mehta* group cases, decided subsequently by the Supreme Court. In the first *M.C.Mehta case*²⁶, the court had to deal specifically with the impact of activities concerning manufacturing of hazardous products in a factory, as well

²⁵ AIR 1988 SC 652.

²⁶ *M.C.Mehta v. U.O.I.*, AIR 1987 Sc 985.

as members of the general public living outside. It was alleged that the leakage of oleum gas from the factory resulted in the death of a person and affected the health of several others. The question was, whether or not the plant should be closed down. Many conditions were laid down under which industries of hazardous products should be allowed to restart. In doing so the court found that the case raised 'some seminal questions concerning the scope and ambit of Articles 21 and 32 of the Constitution'. Enlarging the scope of right to live, the Supreme Court held that the State had power to restrict hazardous industrial activities for the purpose of protecting the right of the people to live in a healthy environment.

The clearest and most important enunciation of the right by the Supreme Court is possibly in the case of *Virendra Gaur and others v. State of Haryana*²⁷ in which the Court held:

Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including the right to live with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance, free from pollution of air and water sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water pollution etc, should be regarded as amounting to violation of Article 21²⁸.

In addition, virtually all the State High Courts have explicitly recognized an environmental dimension to Article 21. For example, in *Damodar Rao v. Municipal Corporation of Hyderabad*²⁹ while considering a writ petition to enjoin the life Insurance Corporation and the Income Tax Department from building residential houses in a recreational zone, the Andhra Pradesh High Court held that- It would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without (which) life cannot be enjoyed. There can be no reason why practice of violent

²⁷ 1995 (2) SCC 577

²⁸ Ibid

²⁹ AIR 1987 A.P. 171.

extinguishments of life alone should be regarded as violative of Article 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and poisoning should also be regarded as amounting to violation of Article 21 of the Constitution.³⁰

In the case of *D.D.Vyas v. Ghaziabad Development Authority*³¹, the petitioners challenged the failure of the G.D.A. to develop an area reserved for public park in the Master Plan. The Allahabad High Court directed the G.D.A. to develop the area as a park, and also held: "Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life"³².

The judgement of the Andhra Pradesh High Court³³ served as a leap to the future development of law. It was rendered at a time when the apex court had not openly declared right to life in Article 21 includes right to healthy environment. This was based on the slogan found in European Economic Community directive the need to make an impact study before the development project is accepted for implementation. The Supreme Court in *Bangalore Medical Trust v. B.S.Mudappa*³⁴ supported this slogan, where a balance between environment values of an open space and the attempt to construct hospital therein was done. It is interesting to note here that both an open space and a hospital are necessary to solve the problems of health. In this case, the scheme for the residential complex envisaged by the Bangalore Development Authority (BDA) had the green signal from the State Government. The scheme envisaged an open space reserved as a park. Subsequently, on pursuance of orders of the State Government, BDA allotted the open space in favour of the appellant medical trust for the purpose of constructing a hospital.

The issues raised in this case were can an open space reserved for a park or a play ground in a formally approved and published development scheme be allotted to a private person or body of persons for the purpose of constructing a

³⁰ Ibid.

³¹ AIR 1993 All 57.

³² Ibid.

³³ Supra note 29.

³⁴ AIR 1991 SC 1902.

hospital? Do the residents of the locality have a right to object to such a conversion? Are they in law aggrieved by such conversion and allotment?

The Supreme Court held that- Protection of the environment, open spaces for recreation and fresh air, play grounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. The public interest in the reservation and preservation of open spaces for parks and play grounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens. Reservation of open spaces for parks and playgrounds is universally recognized as legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill effects of urbanization.

The Judge held that it was not open to the Government to give a direction to the BDA to defy the very object of the law. The orders evidence a colourable exercise of power and are contrary to the legislative intent to safeguard the health, safety and general welfare of the people of the locality. The action of the BDA in allotting to private persons areas reserved for public parks and playgrounds and permitting construction of buildings for a hospital thereon are declared to be null and void. Justice Sahai also wrote a separate judgement on similar lines. He observed that- Public Park as a place reserved for beauty and recreation was developed in 19th and 20th century and is associated with growth of the concept of equality and recognition of importance of common man. Earlier it was a prerogative of the aristocracy and the affluent either as a result of royal grant or as a place reserved for private pleasure. Free and healthy air in beautiful surroundings was privilege of few.

But now it is a, 'gift from people to themselves'. Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it occupies an important place in social ecology. A private nursing home on the other hand is essentially a commercial venture, a profit oriented industry. Service may be its motto but earning is the objective. Its utility may not be undermined but a park is a necessity not a mere amenity. A private nursing home cannot be a substitute for a public park. No town planner would prepare a blue print without reserving space for it. Emphasis on open air and greenery has multiplied and the city or town planning or development acts of different States require even private house-owners to leave open space in front and back for lawn and fresh air.

It was held, therefore the orders of the Government to convert the site reserved for public park to civic amenity and to allot it for private nursing home to Bangalore Medical Trust and the resolution of the Bangalore Development Authority in compliance of it were null, void and without jurisdiction.

Earlier in *M.C.Mehta v. Union of India*³⁵, where oleum gas leaked from Shriram Fertilizer's Plant which resulted in the death of an advocate and affected a large number of persons, the Supreme Court, observed that the case did raise some seminal question concerning the true scope and ambit of Article 21 and 32 of the Constitution, but it could not be held to have precisely cut and carved out the definitive scope of the right to breath clean air, nor was this aspect discussed and fully argued as right to life.

*Subash Kumar v. State of Bihar*³⁶, signifies an important milestone in the development of environmental law in India. It heralds the emergence the right to clean and unpolluted environment as an integral part of the fundamental right enshrined in Article 21 of the Constitution. The Supreme Court in this case was considering a petition under Article 32, seeking the issuance of writ or direction to the concerned authorities and the Tata Iron and

³⁵ (1986) 2 SCC 176: AIR 1987 SC 965.

³⁶ AIR 1991 SC 420.

Steel Ltd, to stop forthwith the discharge of slurry/ sludge from its washeries into Bokaro river. Justifying its exercise of jurisdiction under Article 32, the Court held that- Right to life is a fundamental right under Article 32 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has a right to have recourse to Article 32 of the Constitution for removing the pollution of water or air, which may be detrimental to the quality of life³⁷.

However, on facts, the petition was dismissed for failing to establish a prima facie case in favour of the averments made therein. The decision clearly articulated the right to a wholesome environment, which though the Supreme Court earlier implicitly recognizing it, had failed to expressly articulate³⁸. Thereby the Supreme Court approved the earlier decisions of the High Court of Rajasthan in *Koolwal's case*³⁹, Andhra Pradesh in *Damodar's case*⁴⁰ Kerala in *Madhavi's case*⁴¹ and Himachal Pradesh in *Kinkri Devi's case*⁴², to the same effect.

Aftermath *Subash Kumār's*⁴³ *Case*, the Right to a clean and healthy environment was said to be found explicitly in Article 21 of the Constitution, specifically from the right to life.

Thus, the enjoyment of life fully began to include the right into clean air without pollution and thus, came to be a fundamental right and this shows that the activism of the judiciary can go to any extent in aiding an individual to exercising his fundamental right in the desired perspective.

This affords a clue to the proposition that the right to breathe though in Article 21 of the Constitution cannot be narrowed down simply as right to

³⁷ Ibid., p.424.

³⁸ AIR 1988 SC 187: M.C.Mehta v. Union of India , AIR 1988 Sc 1037

³⁹ AIR 1988 Raj 24.

⁴⁰ AIR 1987 AP 171 (180)

⁴¹ 1988 (2) Ker.L.T. 730-31.

⁴² AIR 1988 H.P. 4(9).

⁴³ Supra note 36.

breathe but a right to breathe clean and pure air. The positive content of the right breath has its negative counterpart in the right not to breathe filthy air.

In 1985 a Writ petition⁴⁴ was filed by Shri M.C.Mehta (Chairman of Environment Protection Cell), lawyer cum environmental activist, who had applied for the Supreme Court's interference in solving a lot of Environmental issues, popular of them being the *Tanneries case*⁴⁵ or the *Ganga Pollution case*, against pollution in Delhi caused by increasing number of petrol and diesel driven vehicles in the city. The petition was filed as public interest litigation under Article 32 and the most probable fundamental right considered to be violated was Article 21 of the Constitution, the right to life.

In *M.C.Mehta v. Union of India*⁴⁶, the Court observed that the problem of environmental pollution was global concern. All countries irrespective of their size, level of development and ideology, and further quoted from the Declaration of the United Nations on Human Environment held in Stockholm on June, 1972, which stated that-Man is both creature and moulder of his environment, which gives him physical substance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of mans ENVIRONMENT, THE NATURAL AND THE MANMADE, ARE ESSENTIAL TO HIS WELL BEING AND TO THE ENJOYMENT OF THE BASIC HUMAN RIGHTS, EVEN THE RIGHT TO LIFE ITSELF.⁴⁷

This application was relied under Article 32 by Shri M.C.Mehta asking the court to issue directions for closing down of hazardous industries located in the densely populated areas of Delhi and for regulation of air

⁴⁴ M.C.Mehta v. Union of India (1991) 2 SCC 137.

⁴⁵ M.C.Mehta v. Union of India (1987) 4 SCC 463.

⁴⁶ (1991) 2 SCC 353.

⁴⁷ Ibid.

pollution caused by vehicles operating in the area as also the thermal units generating power for the Delhi Electric Supply Undertaking (DESU).

Another factor, which is important and is related to Vehicular pollution, is traffic jams and as such Management control of traffic has been regarded as a matter of public safety and is said to fall within the ambit of Article 21 of the Constitution. The Supreme Court held that the control and regulation of traffic is matter of paramount public safety and therefore, is evidently within the ambit of the Right to life, in *M.C.Mehta v. Union of India*⁴⁸.

In *M.C.Mehta v. Union of India*⁴⁹ the court taking into consideration both chaotic traffic conditions and vehicular pollution stated that it was not satisfied with the response evoked by the erstwhile order passed on November 20, 1997. The order stated that the Management and control of traffic is a matter of public safety and thus comes within the purview of Article 21 of the Constitution, had issued certain directions. Such directions had included the implementation of the provisions of the Motor Vehicles Act, 1988 in addition to existing laws, such as, the Police Act and the Code of Criminal Procedure which conferred ample powers to the authorities to take necessary steps to control and regulate traffic to the extent of suspending cancellation the registration and permit of a motor vehicle if it posed a threat or hazard to public safety. And as a result of such unresponsiveness of the concerned authorities to the said order the Court held that when those directions were issued by the court it had treated the matter as a legal issue and proceeded to examine the impact of the right flowing from Article 21 of the Constitution vis-à-vis decline in environmental quality⁵⁰. The court in the earlier portion of the order, observed that such directions had been issued by the court from time to time with a view to tackle the problem arising out of chaotic traffic conditions and vehicular pollution, keeping in view the mandate of Articles 47⁵¹ and 48-A⁵² of the Constitution. Here the Directive Principles of State Policy was given life

⁴⁸ AIR 1998 SC 186.

⁴⁹ (1998) 6 SCC 60.

⁵⁰ Ibid., p. 69.

⁵¹ Duty of the State to Improve Public Health.

⁵² Duty of the State to protect improved environment.

and blood through Article 21 of the Constitution by the judicial activism of the Supreme Court.

The Supreme Court confirmed that vehicular pollution being detrimental to the environment and poisoned the surrounding atmosphere was a violation of Article 21 of the Constitution, after it perused the Bhure Lal Committee's Report submitted on April 1, 1999⁵³.

The Report revealed that private (non commercial) vehicles comprised 90 percent of the vehicles plying in Delhi. As per the report more than 90 percent of nitrogen oxide and respirable particulate matter from vehicular exhaust over Delhi was due to diesel emission since it was noticed that more and more and more private vehicles were turning to diesel as the fuel of choice. The reason primarily was due to price differentiation between diesel and petrol. Further Impairment of visibility and haze-like conditions were also attributed to the tiny suspended particulate matter, which was declared by the California Air Resource Board, based on the report of its scientific panel, that it had potential to cause cancer. The report also estimated that chronic exposure to such toxic air contaminant would lead to 300 additional cases of lung cancer per million people. Thus the court holding it to be a matter of serious concern said the very right to life of the citizens was at stake⁵⁴.

This latest decision of the Supreme Court in *M.C.Mehta v. Union of India*⁵⁵ has included vehicular pollution to be one of the problems which can be remedied by virtue of exercising an individual's right to life as has been laid down in Article 21, enshrined in Part III of the Constitution of India.

In *A.P.Pollution Control Board-II v. Prof. M.V.Nayadu*⁵⁶, the Supreme Court held that healthy environment and sustainable development are fundamental human rights implicit in the right to life. The Court observed that- In today's emerging jurisprudence, environment rights which encompass a group of collective rights are described as 'third generation rights'. The first

⁵³ *M.C.Mehta v. Union of India* (1999) 6 SCC 9.

⁵⁴ *Ibid.*, p. 10.

⁵⁵ *Supra* note 53.

⁵⁶ AIR 1999 SC 812: 2000 SCW 4573.

generation rights are generally political rights such as those found in the International Convention on Civil & Political Rights while 'second generation rights' are social and economic rights as found in the International Covenant on Economic, Social and Cultural Rights.

Discussing several decisions and also Covenants on Human Rights, the Supreme Court ultimately held that the concept of a healthy environment as a part of the fundamental right to life developed by our Supreme Court is finding acceptance in various countries side by side with the right to development.

3.2.(i). INFRINGEMENT OF RIGHT TO LIFE BY SMOKING

The Courts in the process of judicial interpretation have expanded the scope of Article 21 to bring within its fold the right to health care⁵⁷. A right is a right only when it is not offensive to anyone, when it is not embarrassing and when it contributes to human flourishing. The fundamental rights provided to us by our sacred Constitution are not absolute. They can be restricted upon reasonable conditions so as to prevent their taking draconian shape. These restrictions are essential and even justified as 'the liberty of an individual can be taken for securing the equal liberty to others'. By restricting smoking in public places, the rights of non-smokers are secured. These rights of non-smokers are the fundamental right under Article 19(1)(g) of Right to movement, so that they can move freely without fear of compulsive passive smoking and also the Right to a pollution free and decent environment under Article 21.

Smoking, its implication⁵⁸

There are two types of smoke: (i) Mainstream Smoke- It is inhaled and consists of large particles that are deposited in the larger airway of lungs. (ii) Side-stream Smoke- It is generated from the burning end of cigarettes, cigars and pipes during the smouldering between puffs.

⁵⁷ AIR 2000 Journal 140.

⁵⁸ Ibid.

A puff of tobacco gives us: Nicotine, Carbon-Monoxide among other fatal gaseous and particulate matter which may cause serious health problems like Cancer (of lungs, larynx, oesophagus, mouth bladder, pancreas, stomach and uterine cervix), Chronic Obstructive Pulmonary Diseases (COPD), Cardiac Arrest, Unstable Angina and Acute Respiratory Illnesses. Tobacco smoke is also dissolved in the saliva and it is swallowed, exposing the upper gastrointestinal tract to carcinogens. Thus, smoking affects virtually every organ of the body.

Smokers have a 70% higher mortality rate than non-smokers. Smoking kills more than 4 million people every year and by the year 2020, it is expected to cause more pre-mature deaths and disabilities than any other single disease, globally.⁵⁹ In India alone one million people die every year from tobacco related diseases. This is more than the number of deaths caused due to Motor Accidents, AIDS, and Alcohol and Drug abuse put together.

When someone smokes actively, the non-smokers besides him also smoke passively. If the smokers would realize that when they smoke, they also pollute the air for others, passive smoking would not have been the 3rd leading preventable cause of death in this world, ranking behind active smoking and alcohol. Scientists have found a 30% increase in the risk of death from heart attack among non-smokers living with smokers due to passive smoking.⁶⁰ Estimates from the U.S. have suggested that 3,000 to 5,000 deaths per year from lung cancer can be attributed to passive smoking.

Environmental Tobacco Smoke (ETS) is created by anyone who smokes. ETS differs from "Mainstream Smoke" in several ways as it contains more than 4000 chemicals and at least 40 known carcinogens. Thus, ETS is a very serious health hazard for the non-smokers.

The recent judgment of the Kerala High Court⁶¹ regarding smoking at public places has now analyzed the controversy between smokers and non-smokers from a legal viewpoint. It has aptly restricted the rights of smokers and

⁵⁹ AIR 1999 Ker 385.

⁶⁰ Ibid.

⁶¹ *Ramakrishnan v. State of Kerala*, AIR 1999 Ker 385.

established those of the non-smokers. The judgment has ascertained many ill effects of smoking and it has also enunciated the Executive's powers in this regard. The Court has also held that "smoke" is "Air pollution" under the Air (Prevention and Control) of Pollution Act, 1981.

In *Murli S Deora v. Union of India*, it was held that Fundamental right guaranteed under Article 21 of the Constitution of India, *inter alia*, provides that none shall be deprived of his life without due process of law. A non-smoker is afflicted by various diseases including lung cancer or of heart, only because he is required to go to public places. It is indirectly depriving of his life without any process of law. Undisputedly, smoking is injurious to health and may affect the health of smokers but there is no reason that health of passive smokers should also be injuriously affected. In any case, there is no reason to compel non-smokers to be helpless victims of air pollution.

The Court considered and opined the adverse effect of smoking in public places. It would be in the interest of the citizens to prohibit the smoking in public places till the statutory provision is made and implemented by the legislative enactment. The persons not indulging in smoking cannot be compelled to or subjected to passive smoking on account of acts of the smokers.

It is alleged that three million people die every year as a result of illness related to the use of tobacco products of which one million people belong to developing countries like India. The World Health Organisation is stated to have estimated that tobacco related deaths could rise to a whopping seven million per year. According to this organization, in the last half century in the developing countries alone smoking has killed more than sixty million people. Tobacco smoking also adds to the air pollution. Besides cancer, tobacco smoking is responsible for various other fatal diseases to the mankind.

Statutory provisions are being made for prohibiting smoking in public places and the Bill introduced in the Parliament is pending consideration before a Select Committee. The State of Rajasthan has claimed to pass Act No. 14 of 2000 to provide for prohibition of smoking in place of public work or use and

in public service vehicles for that State. It is stated that in Delhi also there is prohibition of smoking in public places.

In this case Learned Attorney-General for India submits and all the counsel appearing for the other parties agree that considering the adverse effect of smoking in public places it would be in the interests of the citizens to prohibit the smoking in public places till the statutory provision is made and implemented by the legislative enactment. The persons not indulging in smoking cannot be compelled to or subjected to passive smoking on account of acts of the smokers.

Realising the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers, the Court directs and prohibit smoking in public places and issued directions to the Union of India, State Governments as well as the Union Territories to take effective steps to ensure prohibiting smoking in public places namely:

1. Auditoriums
2. Hospital Buildings
3. Health Institutions
4. Educational Institutions
5. Libraries
6. Court Buildings
7. Public Office
8. Public Conveyances, including Railways.

3.2.(ii). RIGHT TO LIFE *VIS-À-VIS* FREEDOM OF TRADE OR BUSINESS

As environmental regulation grows more stringent and its enforcement becomes more vigorous, industrial challenge to agency action is likely to increase. Courts will then need to balance environmental interests with the Fundamental Right to carry on any occupation, trade or business guaranteed in Article 19(1)(g). For example, effluent discharge standards prescribed by the Pollution Control Boards may be challenged under Article 19 for being

excessive (too stringent to comply with, dispute using the best available technology). Whether the Courts will adopt a pro-environment stance in resolving such future disputes remains to be seen. Almost invariably, industry's money power is able to secure the services of better lawyers than those who typically represent environmental agencies and government departments. In such cases, judicial compassion for environmental issues might help balance the scales. Indeed, public concern for environmental issues and the vigour with which the government promotes environmental protection in both word and deed might have a greater bearing on the outcome of future industry-enforcement agency disputes than the narrow questions of law involved.⁶²

In *Obayya Pujari v. Member Secretary, K.S.P.C.B. Bangalore*⁶³, it was held that Right to freedom enshrined in Article 19 of the Constitution through fundamental, is not an absolute right and is always subject to reasonable restrictions which may be imposed in the larger interests of the society. Freedom of profession, trade and business as contemplated by cl (1)(g) of Article 19 of the Constitution is always subject to the limits as may be imposed by the State in Constitution is always subject to the limits as may be imposed by the State in the interests of public welfare.

The Supreme Court in *Cooverjee v. Excise Commissioner*⁶⁴, has held that though a citizen has a right to carry on any business of his choice, there is no right to carry on business inherently dangerous to the society. No citizen has a fundamental right to carry on business wherever he chooses and such a right can be subjected to reasonable restrictions in the interests of general public.

The Supreme Court in *State of Maharashtra v. H.N.Rao*⁶⁵ held that reasonable restriction imposed has to be adjudged in the light of the nature of the right, danger or injury which may be inherent in the unbridled exercise of the right and the necessity of protection against danger which may result to the public by exercise of the right. It was further held that- in adjudging the

⁶² Shyam A. Divan, "Environmental Protection And Fundamental Rights", Indian Bar Review, Vol. 16 (1): 1989, p.25.

⁶³ AIR 1999 Kant 157.

⁶⁴ AIR 1954 SC 220 : 1954 SCR 873.

⁶⁵ AIR 1970 SC 1157.

reasonable restriction imposed upon the holding of disposal of a carcass, which is noxious, maintenance of public health, is the paramount consideration. Restriction imposed upon the right of an owner of a carcass to dispose it of in the manner indicated in the Act, being solely in the interest of the general public cannot be deemed to be arbitrary or excessive merely because they involve the owner in a small financial burden. Under the Constitution a proper balance is intended to be maintained between the exercise of the right conferred by Article 19(1)(f) and (g) and the interest of a citizen in exercise of his right to acquire, hold or dispose his property to carry on occupation, trade or business. In striking that balances the danger, which may be inherent in permitting unfettered exercise of right in a commodity, must of necessity influence the determination of the restrictions, which may be placed upon the right of the citizen or commodity.

Therefore, the Supreme Court in various judgments held that there were certain activities, which were inherently pernicious that nobody could be considered to have a fundamental right to carry them on as trade or business.

3.2.(iii). NOISE POLLUTION AND FUNDAMENTAL RIGHTS

The pollution of air includes noise pollution. Every citizen has right to freedom of speech till the right does not disturb another. The judiciary through judicial activism established a nexus between right to life and problem of noise. In this respect in *Rajni Kant v. State*⁶⁶, the petitioner, the leader of a political party was not allowed to use a loudspeaker in the public meeting he wanted to organize. In the petition he raised, the question of the validity of certain bylaws framed by the municipality, under which the license for the loudspeaker had to be given. The contention was that the restriction was violative of his right to freedom of speech under Article 19(1)(g). The court held that the impugned byelaws do not infringe Article 19(1)(a) of the Constitution.

⁶⁶ AIR 1958 ALL 36.

Kerala High Court decided another landmark case through its judgment in *P.A.Jacob v. Superintendent of Police, Kottayam*⁶⁷. In this case the petitioner sought to restrain respondents from interfering with the use of a loud speaker by him. He claims that the right to use loudspeaker at public meeting to voice his views is a fundamental right. Rejecting the contention of the petitioner the court held that the use of a loud speaker might be a incidental to the exercise of the right to species to expression. But its use is not a matter of right, or part of the right. Broadening the scope of Article 21 Justice *Chettur Sankar Nair* Observed that- Apart from the right to be let alone,- freedom aural aggression- Article 21 guarantees freedom from tormenting sounds. What is negatively the right to be let alone, is positively the right to be free from noise. It is proved to cause biochemical changes in man, elevating levels of blood catecholamine, cholesterol, with cell counts and lymphocytes. Laboratory studies made by monitoring electro-encephalographic (EEG) responses and changes in neurovegetative reactions during sleep, show that disturbance of sleep becomes increasingly apparent as ambient noise levels exceeds 35 db (A) leg. Noise produces different reactions along the hypothalamo hypophyseal- adrenal aixs including on increase in a democrat-cottropic hormone (ACTH), affecting sympathetic division of the automatic nervous system. Eye dilation, brady cardiac and increased skin conductance are proportional to the intensity of noise above 70 db. Incidence of peptic ulcer is high among noise-exposed groups. Noise caused contradiction of the flexor muscles of the limbs and the spine and is reckoned as an environmental stress that could lead to non-specific health disorders Exposure to high noise everyday life may contribute to eventual loss of hearing (Socio-accusis), and this in turn can affect speech communication⁶⁸

After analyzing these effects of noise, the learned judge categorically stated that- Compulsory exposure to unwilling persons to dangerous and disastrous levels of noise, would amount to a clear infringement of their

⁶⁷ AIR 1993 Ker.1.

⁶⁸ Id. at 8.

constitutional guarantee of right to life under Article 21. Right to life, comprehends right to safe environment, including safe air quality, safe from noise⁶⁹.

In our Constitution Article 19(1)(a) guarantees freedom of speech and expression but the use of mechanical appliances is not guaranteed by Article 19(1)(a). Use of mechanical instruments like loudspeakers and amplifiers is not covered by the guarantee of freedom of speech and expression.

The right to use loudspeakers came up for consideration before the United States Supreme Court in *Saia v. People of the State of New York*⁷⁰. A municipal ordinance prohibited the use of amplifying devices casting sound upon streets and public places, except with the permission of the chief of police, without prescribing standards for the exercise of his discretion.

The court held by majority that, the ordinance violated the constitutional right of free speech. Four learned judges of the court gave dissenting opinions. Jackson J, was of the opinion that, society has the right to control as to place, time, and volume, the use of loud-speaking devices for any purpose, provided the regulations are not unduly arbitrary, capricious, or discriminatory.

The majority of the Supreme Court of America took a different view in a subsequent case *Kovacs v. Cooper*⁷¹. In that case, a city ordinance prohibited the operation upon the streets of sound amplifiers of other instruments emitting 'loud and raucous noises'. It was held by a majority of the court that sound amplification in streets and public places is subject to reasonable regulation.⁷²

In *Madhavi v. Thilakan*⁷³ the Kerala High Court stated that- the right to live in peace, to sleep in peace and the right to repose and health are part of the right to live. We recognize every man's home to be his castle, which cannot be involved by toxic fumes, or tormenting sounds⁷⁴.

⁶⁹ Id. At 9.

⁷⁰ (1948) 92 Law Ed 1574 (B).

⁷¹ (1949) 93 Law Ed 513 (C).

⁷² P Leelakrishnan, Environmental Law Case Book, Butterworths, 2004, p.277.

⁷³ (1988) 2KLT 730.

⁷⁴ Id., at 731.

In *Burrabazar Fire Works Dealers Association v. Commissioner of Police, Calcutta*⁷⁵, Hon'ble Justice Bhagabati Prosad Banerjee maintained that A citizen of this country must be allowed to live in a society which is peaceful, free from mechanical and artificial sounds which creates a tremendous health hazards and adverse effect on the citizen. Citizens have a right to live in a society, which is free from pollution. If pollutants are encouraged, in that event that would be beginning of the end of the civilisation⁷⁶.

Under the wave of judicial activism the learned Judge observed that- if a citizen has a right it is equally a duty on the part of this court to see that such rights are preserved and not allowed to be destroyed. Legislature may not rise to the occasion but that does not mean the court will keep its hand folded in the absence of any legislative mandate. The courts are the custodian of the rights of the citizens and if the court is of the view that citizens' rights guaranteed under the Constitution of India are violated, the court is not powerless to end the wrong. Principle of judicial activism confers powers upon the court to be active and not to remain in active for the purpose of protecting rights, duties and obligations of the people⁷⁷.

Hon'ble Justice Banerjee further stated that- excess noise is certainly pollution in the society. In India no effective and elaborate law has been made for controlling the noise creator. But under Article 19(1)(a) read with Article 21 of the Constitution of India, the citizen have a right of a decent environment and they have a right to live peacefully, right to sleep at night and to have a right to leisure which are all necessary ingredients of the right to life guaranteed under Article 21 of the Constitution. There are various other sources where the noise is created or generated but which offend citizens' right guaranteed under Articles 19(1)(a) and 21 of the Constitution⁷⁸.

While commenting on this case Prof. C.M.Jariwala opined that- the Calcutta High Court in its present judgement has evolved another method to

⁷⁵ AIR 1998 Cal 121.

⁷⁶ Id., at 134.

⁷⁷ Id. At 136

⁷⁸ Id. At 136.

legally regulate activities where no effective and elaborate law exists. The court has pinned down Article 19(1)(a) read with Article 21 of the Constitution of India as a source to regulate the law less noise pollution from use of fire works⁷⁹.

The survey of the above cases shows that absence of specific laws controlling problem of noise is no more hurdle to curb noise pollution. Disastrous effects of noise make it clear that emission of noise at high volume is really violation of right to life and this has been recognized by the judiciary. Now emission of noise not only cause pollution rather it cause violation of the fundamental rights guaranteed under Articles 21 and 19(1)(a) of the Constitution. In cases of noise pollution the judiciary will no more remain silent or mere spectator but declare it to be violative of fundamental rights in order to curb noise pollution and thereby ensure fundamental right to decent and noise free environment.

2.2.(iv). RIGHT TO RELIGION AND NOISE POLLUTION

The Right to Religion includes the right to profess, practice and propagate religion. Article 25 of the Constitution of India provides for freedom of religion. Right to propagate religion means the right to communicate a person's belief to another or to expose the tenets of his faith. In fact the freedom of religion under Article 25 and that of speech and expression under Article 19(1)(a) are inseparable as the former cannot be enjoyed without the exercise of latter. Thus if any one wishes to propagate his religious ideas as guaranteed under Article 25, it could only be possible through the exercise of the right of speech and expression under Article 19(1)(a). The conflict between these two rights arises when the exercising of right to religion leads to aural aggression. Thus for propagating religious ideas through the use of loudspeakers can create the problem of noise pollution, should it be allowed to

⁷⁹ C.M.Jariwala, "A Judicial Approach in the fire works' Noise pollution: A critical overview", AIR 1999 Journal 72.

continue within the enjoyment of the right to freedom of religion is a question which has been raised several times before the Courts in India.

The Supreme Court in *Bedi Gurcharan Singh v. State of Haryana*⁸⁰ took up this question. In this case applicants were refused the permission to use the loudspeaker under the Punjab Instrument (Control of Noise) Act 1956, which was challenged on the ground that it violated Articles 19 and 25 of the Constitution. The court while expressing the opinion about the freedom of religion, observed that- the fundamental rights guaranteed under Articles 19(1)(a) and 25 of the Constitution are not unfettered and absolute. The right to propagate religion freely is subject to the condition that it does not violate similar fundamental rights of the followers of other religions. It cannot be said that my person has the right to address a congregation of another religion in order to propagate his own, if it is likely to be resented by the congregation and which may lead to the breach of peace⁸¹.

Even before the decision of the Supreme Court the controversial question relating to the use of loudspeakers for propagating religious ideas came up before the Calcutta High Court in *Masud Alam v. Commissioner of Police, Calcutta*⁸². In this case the petitioners used microphone for calling the *Azan* (Call for prayer) five times a day from a Mosque situated at No.38/A, Brabourne Road in Calcutta, commonly known as Murgihatta Mosque. Several residents of the locality complained against the practice and the Commissioner through the local *thana* officers countermanded the use of it. Applications were thereafter made to the Commissioner by some through the General Secretary of the West Bengal Pradesh Congress Committee and the *Mutwali* of the mosque for permission to use a loudspeaker in connection with the *Azans*. But the Commissioner refused to accord permission. Then the petitioner approached the High Court. It was argued for the *Mutawali* of mosque that India is a secular State and under Article 25 of the Constitution, all persons are at liberty to freely practice their religion. It was further argued that the liberty has been

⁸⁰ 1975 Cr.LJ 917.

⁸¹ *Id.*, at 917, 918.

⁸² AIR 1956 Cal 9.

curtailed by the suppression of the use of loudspeakers to propagate the *Azan* in very crowded and noisy locality, where the *Azans* cannot be heard, unless magnified by some such device as a loudspeaker.

While rejecting this argument the Calcutta High Court relied on the findings of Bombay High Court given in *State of Bombay v. Narasu Appa Mali*⁸³ where Chagla C.J. said that- Now a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health, then religious practices must give way before the good of the people of the State as a whole.

In this instant case* Justice Sinha while making comment on modern discovery of science said that it has helped to create not merely a heaven but also hell. He further observed that- the indiscriminate use of the electric loudspeaker in connection with religious festivals in the city is a standing grievance of every peace-loving citizen. The most offending instances are the uses to which it is put in connection with Hindu festivals, when the city is racked with the raucous cacophony of a thousand loudspeakers, doling out cheap jazz or cinema music, which is not only singularly inappropriate to such occasions, but to my mind, destructive of public health and morals⁸⁴.

In *Om Birangana Religious Society v. State of West Bengal*⁸⁵ the question was whether the right to propagate religion includes the right to use loudspeakers and microphones for the purpose of chanting religious tenets or religious texts and or the indiscriminate use microphones or loudspeakers during religious performance in the society. The Hon'ble Justice Bhagabati Prosad Banerjee delivering judgement said that- the religion that has been performed by the petitioner and others, is nothing new, but the same is there for several centuries. It cannot be said that the religious teachers or the spiritual leaders who laid down these tenets, had any way desired the use of microphones as a means of performance of religion. Undoubtedly, one can

⁸³ AIR 1952 Bom. 84.

⁸⁴ AIR 1999 Cal 10.

⁸⁵ (1996) 100 CWN 617.

practice, profess and propagate religion, as guaranteed under Article 25 of the Constitution, but that is not an absolute right. The provision of Article 25 is subject to the provisions of Article 19(1)(a) of the Constitution. On true and proper construction of the provisions of Article 25(1) read with Article 19(1)(a) of the Constitution, it cannot be said that a citizen should be coerced to hear anything which he does not like or which he does not require⁸⁶.

This case is the clear authority for the proposition that while exercising right under Article 25 no person can interfere with, take away or abridge the right of citizen guaranteed under Article 19(1)(a) of the Constitution, it cannot be said that a citizen should be coerced to hear anything which he does not like or which he does not require.

In addition to that the Court imposed certain restrictions and conditions on the use of microphones. One of the important conditions that was laid down that there would be no user of any microphones between 9 p.m. to 7 a.m. except by the public authorities for discharging their emergent public duties and / or obligations. The West Bengal Pollution Control Board was directed to maintain noise level register indicating the level of noise, which could be permitted by use of microphones on any occasion or in any area. It was also directed that (i) The District Magistrate and other officers would issue permission regarding use of microphone loudspeakers subject to conditions and restrictions imposed by the West Bengal Pollution Control Board and (ii) the person or persons or any business houses dealing with or letting or parting with or selling microphones / loudspeakers, shall be bound to seal the volume of Noise level according to the directions of the Pollution Control Board before letting or parting with or selling such apparatus for any purpose and in default thereof, they should not be permitted to deal with such items. So far as use of microphones and / or loudspeakers by any religious society or at any religious function is concerned, it could be used solely for the purpose of communicating the speeches and religious teachings and tenets to the persons who have

⁸⁶ Id., at 621, 622.

attended such functions and it should not be operated in such manner so as to give reasonable cause for annoyance to any person in the vicinity.

The principle laid down in *Om Birangana's* case was made applicable to all religions, all functions, private or public, public meetings and so on and not confined to one or two religions only.

Pursuant to the direction given in *Om Birangana Religious Society's* case restrictions and conditions were imposed by which the petitioners in *Moulana Mufti Syed Md. Noorur Rehman Barkati v. State of West Bengal*⁸⁷, the writ application has been filed for a declaration that Rule 3 of the Environment (Protection) Rules, 1986 vis-à-vis Schedule III of the said Rule do not apply in case of mosques more particularly at the time of call of *azan* from the mosques. It sought for a further declaration that Schedule III of the Environment (Protection) Rules, 1986, is ultra vires Articles 14 and 25 of the Constitution. The petitioners prayed for withdrawal of all conditions and restrictions notified by the police and other authorities pursuant to the order in the case of *Om Birangana Religious Society v. State of West Bengal*⁸⁸.

The petitioners' case is as follows. *Namaz*, the second pillar of Islam, occupies a permanent position among the practical duties of the Muslims. Muslims offer obligatory prayers in congregation in mosques five times a day. *Azan* is essential for all obligatory prayers and is called by muezzin in loud voice to summon all believers in Islam to prayers. When Prophet Mohammed introduced *azan*, a person called it from mosque in loud voice. By the enhancement of population, the expansion of industries and changes in the environment it was not possible to reach the voice of *azan* called by a person to the believers of Islam. It was felt that a system should be introduced to invite the believers in Islam to the congregational prayers by calling *azan* through any instrument. Use of microphones for the purpose of *azan* is part of the religious right guaranteed under Article 25 of the Constitution. The right to perform religious practice acquired by custom would have the protection of Article 25

⁸⁷ Supra note 75 at 15.

⁸⁸ Supra note 76.

in respect of all religious rites, practices, observances, ceremonies and functions which are customarily performed by the members of the petitioners' community and not according to the version of the person who opposes. It is the duty of the citizens also to have a degree of tolerance, patience for the purpose of respecting other religion and custom.⁸⁹

The ratio of *Om Birangana*⁹⁰ was made applicable to all religions, all functions, private or public, public meetings and so on and not confined to one or two religions only, but to all religions.

Imams of some mosques filed an application for modification of the original order passed in *Om Birangana*'s case. The court quoted the views from this order of its own to decide whether or not the right to use microphones for the purpose of *azan* is an integral part of Islam. The sum and substance of the view taken by the court is that according to Article 25(1) of the Constitution read with Article 19(1)(a) of the Constitution, it cannot be said that a citizen should be coerced to hear anything, which he does not like of which he does not require. Amplifier and microphone create tremendous noise and sounds, which may travel at least half to one kilometer away. Having regard to the provisions of Article 19(1)(a) of the Constitution, it cannot be said that the authorities can issue permission to use microphones without having any regard to the fundamental rights of the fellow citizens.

The court remarked that *Azan* is definitely an integral and essential part of the Muslim religion, but use of microphones is certainly not an integral part of *azan*. The court then examined the rights of the citizen in India guaranteed under Article 19(1)(a) of the Constitution and other aspects incidental thereto vis-à-vis the provisions of Article 25(1) of the Constitution as laid down in *Om Birangana*'s case.⁹¹

The court further went on to direct that- if anybody is found violating the restrictions imposed on Microphone / loud speaker, the police authorities are hereby directed to immediately seize and confiscate microphones from

⁸⁹ Supra note 63 at 280.

⁹⁰ Supra note 76.

⁹¹ Supra note 63 at 280-281.

are hereby directed to immediately seize and confiscate microphones from whatever place it would be found and report it to the court for taking drastic action against the violators who are violating willfully and deliberately.⁹²

The order further directed the Officer in-charge of all police station in State of West Bengal to keep watch on all the Mosques in State of West Bengal to find out whether any of the Mosques are using Micro phone in the early hours before 7 a.m. and that they are maintaining the decibel limits available to them on the basis of situation of the Mosques and if any infraction is made they should take steps as directed in the order.

Therefore, public order, morality, health and other restrictions of Part III of the Constitution intend to control all the freedom including the use of loudspeaker for the good of the people. However, among them public order and public health have been the main grounds of the refusal to use loudspeaker as a means of expression. Public order as a ground of refusal to use loudspeaker has been discussed in *Bedi Gurcharan Singh*⁹³. In this case Sikhs were refused the permission to use loudspeaker for holding *dewan* on particular day of the Hindu *mel:* of *bawand:vadsi*, as it was necessary for maintaining peace and harmony among different communities.

Similarly public health has been another ground to restrict the use of loudspeaker. The question that how far the right to use loudspeaker hit public health, came up for consideration before the Supreme Court in *State of Rajasthan v. Chawla*⁹⁴. In this case respondents were prosecuted under section 3 of the Ajmer (Sound Amplifiers Control) Act, 1952⁹⁵ for committing the breach of conditions of the permit by way of using the sound amplifier as to be audible beyond 30 yards and by putting it at the height of more than 6 feet from the ground. The respondents challenged the legislative competency of Azmer Legislative Assembly before the Judicial Commissioner of Ajmer, who declared to be it in excess of the legislative power of the State Legislature. An

⁹² Supra note 75 at 28.

⁹³ Supre note 71

⁹⁴ AIR 1959 SC 544.

⁹⁵ Act No. 3 of 1958.

appeal was preferred by the State of Rajasthan. The Supreme Court, while allowing the appeal, held the Act to be interviewers of the State legislature. The court also expressed its opinion about the legislative powers of the State Legislature to enact the rules for the control of amplifier under the subject of public health as- 'It cannot be said that public health does not demand control of the use such apparatus by day or by night or in vicinity of hospitals or schools or offices or habited localities. The power to legislate in relation to public health included the power to regulate the use amplifiers as producer of loud noises, when the right of such user by the disregard of comfort of and obligation to others emerges as a manifest nuisance to them'⁹⁶.

In *Bajayananda Patra v. District Magistrate, Cuttack*⁹⁷ the Orissa High Court maintained that since right to religion is subject to health, the noise caused by loudspeakers could be prohibited in the interest of health but than again, the nexus between noise and health will have to be established.

A perusal of the aforesaid decisions of various courts reveals that the use of loudspeaker and amplifier cannot be claimed as a matter of right under Articles 19(1)(a) or 25. However, its use is not restricted unless it creates any problem to public order, morality or health or violates any restriction mentioned under Articles 19(2) or 25(1).

It shows that the right to use loudspeaker is not an absolute right and the same can be restricted on several justifiable grounds as discussed above. However, any restriction, if imposed arbitrarily on the use of loudspeaker would be treated unconstitutional. Such issue has seen discussed by the Supreme Court in *Himat Lal v. Police Commissioner of Ahemdabad*⁹⁸ under the Bombay Police Act, 1951⁹⁹. Under these rules the Police Commissioner refused the petitioner the permission of holding public meeting with a direction that holding meeting with or without loudspeaker would amount to an offence. The petitioner challenged it on the ground that such direction violated Articles

⁹⁶ AIR 1959 SC 544 at 546.

⁹⁷ AIR 2000 Ori 71.

⁹⁸ 1973 Cr. LJ 204.

⁹⁹ Act No. 22 of 1951.

19(1)(b) and (d). It was said that 33(1)(a) of the Act which enabled the Police Commissioner to make rules to regulate the assemblies and processions, was not violative of rights under this Article. But Rule 7 of Section 33(a) which conferred arbitrary powers on the Commissioner without giving any guidance as to circumstances in which permission could be refused, was struck down as it afforded no guidance and gave arbitrary power to him.

3.2.(v). RIGHT TO INFORMATION

The environmental awareness and transparency still remain a mirage in Indian environment. Lack of information and extremely uncooperative attitude of the concerned Government authorities is a stumbling block in environmental cases. In pollution cases, the problem is more of collusion of the government authorities with polluters. Under the prevailing special environment enactments the concerned citizens or activist has no right to information. A limited provision for dissemination of information is to be found in the Factories (Amendment) Act and Insecticides Act.

The British Raj saw much legislation protecting the components of environment but the environment education and information could hardly see the dawn of environmental knowledge. This was due to Britishers' one-way traffic of exploitation of Indian resources to their benefit. The capitalist approach did not allow even the Constituent Assembly to give any place to the environment and what to talk of the environmental education and information. It was unfortunate that the constituent power was activated number of times but could not do justice in this regard and the right to education and information did not find any place in the Constitution of India.

It was the judicial concern for the fundamental right and the *Maneka Gandhi* tonic which activated the expansion of the frontiers of Articles 19(1)(a) and 21 to include, for example, the right to education¹⁰⁰ right to know¹⁰¹ and to reply¹⁰² and right to information¹⁰³. This way what was left out

¹⁰⁰ Mohini Jain v. State of Kar. AIR 1992 SC 1858.

¹⁰¹ S.P.Gupta v. Union of India, AIR 1982 SC 148; Prabha Dutt v. Union of India, AIR 1982 SC 6.

¹⁰² Manubhai Shah v. L.I.C., AIR 1993 SC 171.

of the Constituent Assembly was brought in the Constitution of India by the judiciary.

The right to Information has been read into the fundamental rights to free speech and expression. The first observation of any court regarding the right of information in environmental cases is found in *L.K.Koolwal v. State of Rajasthan*.¹⁰⁴ In this case public interest litigation was initiated by the petitioner for acute sanitation problem of Jaipur city. In n this case the Court observed that a citizen has a right to know about the activities of the State, the instrumentalities, the departments and the agencies of the State. The privilege of secrecy, which existed in olden times that a state is not bound to disclose the facts to the citizens or the State cannot be compelled by the citizens to disclose the facts, does not survive now to a great extent. Under Article 19(1)(a) of the Constitution there exists the right of freedom of speech. Freedom of speech is based on the foundation of the freedom of right to know. The State can impose and should impose the reasonable restrictions in the matter like other fundamental rights where it affects the national security and any other allied matter affecting the nation's integrity. But this right is limited and particularly in the matter of sanitation and other allied matters every citizen has a right to know how the State is functioning and why the State is withholding such information in such matters.

In *Bombay Environment Action Group v. Poona Cantonment Board*¹⁰⁵ upheld a citizens group rights to inspect the documents of government agency. In appeal the Supreme Court was confronted with the freedom of information advocated by the environmental action group and on the other hand, the cantonment board, the secrecy jurisprudence, supported vehemently. In this case, the Board gave permission to construct 'sterling centre' building thus taking away the open green land. The petitioners, a watchdog on the environment of Pune, moved the High Court of Bombay to direct the Board to

¹⁰³ Ramesh v. Union of India ; Odysay Commu. Pvt Ltd. v. Lakvidayan Sangathan, AIR 1988 SC 1642.

¹⁰⁴ AIR 1988 Raj 2.

¹⁰⁵ AIR 1992 SC 382.

make available to them necessary documents connected with the building permission for their inspection, a right available under Article 19(1)(a). But it was refuted that such plea would impose an "extra-constitutional or extra-legal authority" to supervise and control the working of the Cantonment Board. The High Court, though partly allowed the writ petition, warned that the right of inspection should be sparingly used and it should be made available to 'recognised social action groups' which was not 'against public interest'. But the Supreme Court did not adopt such constricted approach. It was of the opinion that 'any person residing within the area of a local authority, or any social action group or interest group or pressure group' was entitled to avail the right to information. And secondly, the 'public interest' was substituted by the expression 'in the interests of security' so as to limit the exception to the above right. The present ruling attracts some important questions: Can the environment, which does not recognize the territorial limit, be confined to citizens only? How can the court exempt the application of Article 19(2) when the enforcement of Article 19(1)(a) is claimed? Article 19 (2) specifically provides nine exceptions to the freedom in 19(1)(a). Can the Supreme Court's Order confine it to 'security' - without saying anything about whose security? It may include security of not only the nation or state but also the locality and even person or persons. It may be pointed out that in the present case what the petitioners were asking from the Cantonment Board was not against either the public interest or the security of state, rather it was to protect the environment of Pune.

It would be useful to advocate the argument that right to clean air, water, environment also includes the right to information that is absolutely necessary to exercise this right. High Court and Supreme Court have observed that right to clean air, water and wholesome environment also is a part of the right to life under Article 21.

In *M.C.Mehta v. Union of India*¹⁰⁶, the Supreme Court held that the State owned media should broadcast environment programmes and the State should consider including environment subjects in schools and curriculum. To be aware of environment issues and to be aware of how government decisions in management of hazardous substance projects affect lives is a very important part of the right to information. Factors associated with issues of right to information are many. The most important right belongs of the residents of an area where hazardous substances are brought in or moved out. Hazardous substances and processes continuously pose a danger to the health of local populations. This is of course besides the rights of the workers in these establishments to be fully aware of the potentiality of these processes to cause fully undue harm to the health. Coupled with the issues of the recipient of information is also the issue of nature of information to be released to such recipient to exercise his democratic right. Should this information only be about the procedure to be adopted in case of an accident or should it in general about the hazardous processes and substance that are being used in them. The mode of dissemination of information is particularly important. Keeping in view that the vast majority of people who normally reside in the vicinity of these processes are poor illiterate and, therefore, the mode of dissemination to be used should specially cater to the needs of the local people.

3.3. ARTICLES 32 AND 226

The jurisdiction of Supreme Court under Article 32 is more limited than the jurisdiction of the High Courts under Article 226. Article 32 guarantees the right to seek the Supreme Court's enforcement of fundamental rights. Moreover, Article 32 is itself a fundamental right and, therefore, cannot be abridged by legislation. An indispensable condition for invoking the Supreme Court's jurisdiction under Article 32 is the violation of a fundamental right conferred in Part III of the Constitution.

¹⁰⁶ AIR 1992 SC 382.

Although Articles 32 and 226 give the courts wide latitude to grant relief, the courts have imposed restraints on their own writ power. Neither Article 32 nor Article 226 describes who may seek redress from the courts. The rules of *locus standi* in relation to writs are judicial policies. Traditionally, *locus standi* was restrictive: Only an “aggrieved person” could petition the courts for a writ of certiorari, prohibition or mandamus. Prior to *S.P.Gupta v. Union of India*¹⁰⁷ only the person directly affected by the administrative action in question could challenge it.¹⁰⁸ According to this view, a person could assert a public right or interest only by showing that he or she had suffered an injury not suffered by others. Recently, the Supreme Court has recognized that where a public wrong or public injury is caused by the state, any member of the public acting in good faith can maintain an action for redress.

When a fundamental right, including the right to a wholesome environment, has been violated, relief through Articles 32 and 226 is fully appropriate. Where no fundamental right is involved, a High Court will decline to exercise its jurisdiction if an equally effective remedy is available and has not been used. The writ is an extraordinary remedy, and courts are reluctant to encourage petitioners who circumvent prescribed statutory procedure for correcting administrative action.¹⁰⁹

3.3.(i). PUBLIC INTEREST LITIGATION

World is becoming more and more conscious about the protection of environment. The Indian Judiciary is also taking deep interest in protection of the environment keeping pace with the international trends in the field of Environmental law.

Public Interest Litigation or PIL in the Constitutional jurisprudence is a major example of Supreme Court’s judicial activism. It is a process of epistolary jurisdiction of the Supreme Court. The Court has entertained the

¹⁰⁷ AIR 1982 SC 149.

¹⁰⁸ *Calcutta Gas Company (Prop.) Ltd. v. State of West Bengal*, AIR 1962 SC 1044, 1047.

¹⁰⁹ E.g., the High Courts are reluctant to entertain disputes arising under the Income Tax Act of 1961, as the statute creates a hierarchy of authorities from which a person may obtain redress.

complaints made through letters addressed to it by public spirited citizens of the violation of the rights of disadvantaged, disposed and deprived persons or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. The traditional rule of *locus standi* has been dispensed with. It is designed to widen the judicial horizons in the achievement of the basic vision of the constitutionally desired social order.

The evolution of Public Interest Litigation has liberated the doctrine of *locus standi* in India. It allows a public conscious individual to file a suit under extraordinary writ jurisdiction of High Court and Supreme Court. It has been extended to embrace all interests of public-minded citizen and organizations or associations. Since 1985, Public Interest Litigation has played an important role in majority of environmental pollution cases and it has significantly contributed to the development of the law relating to environmental compensation.

The meaning of 'PIL' has been deeply surveyed, explored and explained not only by various judicial pronouncements in many countries. Even eminent judges, jurists activist lawyers, outstanding scholars, journalists and social scientists etc. with a vast erudition have explained PIL. Basically the meaning of the words 'Public Interest' is defined in the Oxford English Dictionary¹¹⁰, as "the common well being... also public welfare.

A matter of public or general interest "does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected"¹¹¹.

In Black's Law Dictionary¹¹², 'Public interest' is defined as Some thing in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular

¹¹⁰ Vol XII 2nd Edition.

¹¹¹ Per Cambell C.J., R. v. Bedfordshire, (1855) 24 LJQB 81 (84).

¹¹² Sixth Edition.

localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government....

The expression 'litigation' means a legal action including all proceedings therein initiated in a court of law with the purpose of enforcing a right or seeking a remedy. Therefore, lexically the expression 'PIL' means a legal action initiated in the court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights and liabilities are affected.

The term PIL was coined in America, but the expanded form of the term was public interest law and not public interest litigation. If we look to the historical background of PIL we find many movements, which contributed in the shaping of PIL in USA. This takes us as back as to 1876 when the first legal aid office was established in New York City. There the movement of PIL came into instance to provide help to those who were not able to bring the cases because of illiteracy and funding problems. In America, the use of the term PIL to cover the efforts to provide legal representation goes back no further than mid 1960s and the funding by private foundations led to the rapid development of PIL and activities associated with it during the last 1960s. During 1972-75, the foundation and private (individual) contributions provided 74 percent of PIL funding, while 22 percent came from government and one percent from free awards.¹¹³

The concept of PIL though had its origin in USA, over the march of years it has passed through various changes and modification in their common law based systems. The PIL movement in India is a later development. It is a development of seventies only. The PIL jurisdiction forged by Supreme Court of India is an extension of its jurisdiction under Article 32 of the Constitution.

In no time PIL became very popular and it started crowding the courts—sometimes in the form of letters and sometimes as skimpy petitions based on newspaper reports. All these led the judges to evolve new procedures and

¹¹³ S.K. Agarwal, *Public Interest Litigation in India*, (1985) 3.

techniques to facilitate this new type of litigation. Broadly speaking, judicial innovation was required to adopt the following procedures:

- (i) secure detailed facts, since the petitioner's information was usually sketchy;
- (ii) receive expert testimony in cases involving complex social and scientific issues; and
- (iii) ensure the continuous supervision of prospective judicial order.

To construct a complete framework of the facts, a judge often requires the concerned public officials to furnish detailed, comprehensive affidavits. Sometimes, where a swift, impartial assessment of the facts is needed and the official machinery is unreliable, slow or biased, an affidavit may be helpful. In such cases, the courts appoint special commissions together facts and data. The power to appoint commission is an inherent power of the Supreme Court under Article 32 of the Constitution and the High Courts under Article 226.

The Commissioner is a responsible person and hence his report is always treated as *prima facie* evidence of the facts and data gathered. After the report is received by the court, copies of the same are supplied to the parties, who may choose to dispute the contents of the report in an affidavit. The court then considers the report in light of the affidavits and proceeds to decide the issues involved.

In *L.K.Koolwal v. State of Rajasthan*¹¹⁴, a public interest litigation was initiated by the petitioner for acute sanitation problem of Jaipur city. The Court opined Mr. Koolwal has approached the Court in exercise of rights vested in him under Article 51A, though it is said to be a duty that the court should issue directions against the respondent to implement the law, the Municipal law and to perform the obligatory duties cast on the State maintenance of health, preservation of sanitation and environment fall within the purview of Article 21 of the Constitution as it adversely affects the life of the citizen and it amounts to slow poisoning and reducing the life of the citizen because of the hazards created, if not checked. The Rajasthan High Court appointed a commissioner to

¹¹⁴ AIR 1988 Raj 2.

report on insanitary conditions in various part of the city. Here the commissioner discharged the task assigned to hi to the satisfaction of the court. The cases give the reflection of new procedures and techniques in PIL.

In *M.C.Mehta v. Union of India*¹¹⁵, Court felt that the case raised certain questions of seminal importance and high constitutional significance; it referred the matter to a larger Bench¹¹⁶. These questions related to the true scope and ambit of Articles 12, 21 and 32 of the Constitution; the principles and norms for determining the liability of large enterprises engaged in manufacture and sale of hazardous products; the basis on which damages in case of such liability should be quantified and whether such large enterprises should be allowed to continue to function in thickly populated areas and if they are permitted so to function, what measures must be taken for the purpose of reducing to a minimum the hazard to the workmen and the community living in the neighbourhood.

To be treated as a writ petition under Article 32, the case had to fulfil two preliminary requisites. First, the petitioner had to show there was an infringement of a fundamental right and second; the infringement was by the 'State' under Article 12. Possibly, the Court felt that the first requisite had been fulfilled as the leakage had infringed the right to life and personal liberty under Article 21 as many persons were affected by the leakage and one person died.¹¹⁷ As to the issue whether a private corporation like Shriram could come within the purview of Article 12, the Court declined to answer. Although the Court advocated a reassessment of the entire doctrine of State action in the light of the growth of private power and also the growth of human rights jurisprudence after reviewing all previous cases on the ambit of Article 12; referred to the American Doctrine of State Action and indirectly favoured its

¹¹⁵The law laid down by the Court is covered by two judgements (1986) 2 SCC 176 and (1987) 1 SCC 395: AIR 1987 SC 1086.

¹¹⁶(1987) 1 SCC 395. (The Bench consists of P.N.Bhagwati, C.J and R.N.Mishra, G.L. Oza, M.M.Dutt and K.N.Singh, JJ).

¹¹⁷ Id, at 405.

adoption so as to include even a private activity within the ambit of Article 12, it ultimately backed out from doing so.¹¹⁸ The Court reasoned:

“we have not had sufficient time to consider and reflect on this question in depth. We are of the view that this is not a question on which we must make any definite pronouncement at this stage. But we would leave it for a proper and detailed consideration at a later stage if it becomes necessary to do so”¹¹⁹.

The Supreme Court observed that the Supreme Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the Court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed. If the Court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. It must therefore, be said that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. Of course the infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons,

¹¹⁸ Id, at 409-418.

¹¹⁹ Id, at 419.

or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity.

PIL is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice, which is the signature tune of our Constitution. The government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and downtrodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become meaningful reality for them or it has remained merely a teasing illusion and a promise of uncertainty, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements. When the court entertains public interest litigation, it does not do so in a caviling spirit or in a confrontational mood or with a view to titling an executive authority or seeking to usurp it but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their

basic human rights, which is also the constitutional obligation of the executive. The court is thus merely assisting the realization of constitutional object.¹²⁰ Some of the special features of PIL in India have been deduced as follows:

1. It is not a peoples' movement like American PIL. It has been initiated or originated from the Constitutional Amendment. Section 8 of the Forty-second Constitutional Amendment (1976) introduced Article 39A entitled equal justice and free legal aid. This idea of equal justice and free legal aid was the main force, which culminated into PIL.
2. In India, there is no public funding or collection of data by some voluntary groups as done in America. Some public-spirited individuals or voluntary organizations without proper and scientific assessment of the complained act of the government have initiated PIL cases in India.
3. Since its inception, it has been movement of the judges of the Supreme Court. Its basic concept, forms, underlying principles have been developed and shaped by judges themselves. In some instances, the judges of the Supreme Court and High Courts have initiated the PIL cases.¹²¹

The growing volume of public interest environmental litigation (PIEL) in India has been strongly natured by the understanding that judges do not merely find the law. This did give jolt to the traditional Anglo-Saxon myth that judges do not make law. In fact some of the judges pondered over the role of a judge in a traumatically changing society such as India. Former Chief Justice of India P.N.Bhagwati has, in fact, argued that judges do take part in the law-making process and regarded judicial activism as a necessary and inevitable part of the judicial process. The Supreme Court of India and the State High Courts have often deliberately jettisoned apologist postures in this regard. Krishna Iyer, J., initially sowed the seeds of the concept of PIL in India in 1979 (without assigning the terminology) in *Mumbai Kamgar Sabha v. Abdulbhai*¹²².

¹²⁰ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 803.

¹²¹ Satish Shastri, *Pollution and the Environment Law*, (1990)

¹²² AIR 1976 SC 1455.

He while disposing an industrial dispute in regard to the payment of bonus, has observed:

“Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical misdescriptions and deficiencies in drafting, pleading and setting out the cause-title create a secret weapon to non suit a part. Where foulplay is absent, and fairness is not faulted, latitude is grace of processual justice. Test litigations, representative actions, *pro bono publico* and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural shortcomings. Even Article 226, viewed on wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights although the traditional view backed by precedents has opted for the narrower alternative. Public interest is promoted by a spacious construction of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualization of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law”¹²³

After the germination of the seeds of the concept of PIL in the soil of our judicial system, this rule of PIL was nourished, natured and developed by the Apex Court of this land by a series of outstanding cases, but a clear and definite shape was given in *Fertilizer Corporation Kamgar Union v. Union of India*¹²⁴. The declaration of the Chief Justice in this case was an approval of PIL in unequivocal terms. Thus this case is one of the pioneer cases relating to PIL. But Justice Krishna Iyer had already made a declaration of the rights of individual to file PIL in *Municipal Council, Ratlam v. Shri Vardhichand*¹²⁵. This case relates to section 133 of the Code of Criminal Procedure to abate a public nuisance which was caused by discharge of big factory of the nearby

¹²³ Id., at para 7.

¹²⁴ AIR 1981 SC 344.

¹²⁵ AIR 1981 SC 1622.

area and unhygienic condition of the area. Shri Vardhi Chand, a resident of the ward, filed the case against Municipal Council. Justice Krishna Iyer while directing the municipality to remove the public nuisance observed that:

“If the center of gravity of justice is to shift, as the preamble of the constitution mandate, from the traditional individualism of *locus standi* to the community orientation of public interest litigation, these issues must be considered. In that sense, the case before us between the Ratlam Municipality and the citizens of a ward, is path finder in the field of people’s involvement in the justing process¹²⁶

With the judgement of this case the field of environmental pollution was covered by Public Interest Litigation.

3.3.(ii). PIL & RULE OF STANDING

The Indian Supreme Court has played the role of judicial activism with great finesse. In deciding the environmental cases (e.g. Sriram Gas Leakage case) the apex court has gone beyond some of the common law precedents (e.g. *Rylands v. Fletcher*). The Court has liberalized the rule of *locus standi* to enable concerned persons to seek the Court’s indulgence under its power of judicial review (Article 32) for violation of fundamental rights. In the process the Court has not confined itself to preventive remedies. It has issued directions for remedial justice too. Through the variety of techniques of judicial activism, the Supreme Court of India has converted much of the constitutional litigation into public interest litigation (PIL). The PIL in India has been primarily judge-led and even to some extent judge-induced.

As far as the issue of locus is concerned the courts have taken the brand view that:

- (a) they should broaden and expand the categories of persons who may be considered ‘interested’ or ‘affected’ persons and who may therefore bring legal action against the State to compel it to perform its duties.

¹²⁶ Id., at 1624.

- (b) The poor enforcement of law and policy by administration often forces individuals and groups to come to the courts with public interest litigation of one kind or another.
- (c) Persons who under take such litigation are actually rendering a public service and should be encouraged to do so, rather than be repelled on narrow and technical rules of standing.

The liberal use of PIL does not mean that the courts, even if it is tainted with bias, ill will or intent to black mailing will entertain every allegation. Of course, implicit in this approach is the understanding that the litigant is acting bona fide in the pursuit of his cause. The courts have often rejected petitions, which are actuated by malice or motivated by some personal gain, regardless of the 'public interest' in question. The Supreme Court in a landmark decision in *S.P. Gupta and others v. President of India and others*¹²⁷, summed up the approach where the Supreme Court held:

"Today a vast revolution is taking place in the judicial process. The theater of law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and device new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining Writ Petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or legal injury or whose constitutional or legal right has been violated, but who, by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. It is in this spirit that the court has been entertaining letter for judicial redress and treating them as writ petitions and we hope and trust that the High Court of the country will also adopt this preactive goal-oriented approach.

But we must not hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind much be acting bonafide with a view to vindicating the cause of justice and if the acting is for personal gain or out of political motivation or other oblique consideration, the court should not allow itself to be activated at the instance of such person and must reject his

¹²⁷ AIR 1992 SC 149.

application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in the Court”.

Giving stress on the fact that great care and caution is needed on the part of court in entertaining PIL, the Supreme Court further stated:

Public interest litigation has now come to stay. But one is led to think that it poses a threat to court and public alike. Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If court does not restrict the free flow of such cases in the name of public interest litigation, the traditional litigation will suffer and the court of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions. This does not mean that traditional litigation should stay put. They have to be tackled by other effective methods, like decentralizing, the judicial system and entrusting majority or traditional litigation to village courts and Lok Adalats without the usual populist stance and by a complete restructuring of the procedural law, which is the villain in delaying disposal of cases.

3.3.(iii). PROTECTION OF AIR POLLUTION THROUGH PIL

The first public interest litigation to be filed in the area of Environmental law came to be known as the *Lime Stone Quarries case*¹²⁸. An innocuous letter dated July 14, 1983 by a voluntary organization complaining of unauthorized and illegal mining in the Musoorie-Dehradun belt which adversely effected the ecology of the area and led to environmental disorder, directed by the Court to be registered as a writ petition under Article 32, set the ball rolling for a prolonged litigation. The Court directed the immediate closure of certain lime quarries on a permanent basis as they were proved to be hazardous to the health of workers and persons staying in the surrounding areas. While recognizing the hardship likely to be caused by its order, the Court observed that “it is a price that has to be paid for protecting and safeguarding the right of the people to live in a healthy environment with minimal

¹²⁸ *Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P.*, AIR 1985 SC 652.

disturbance to ecological balance and without avoidable hazard to them and their cattle; homes and agricultural land and undue affection of air, water and environment”¹²⁹.

In an effort to mitigate the effect the closure, the Court directed the State to give priority to the displaced lessees in the matter of granting lease for limestone or dolomite quarrying in other areas and also to give priority to the displaced workers for employment in the afforestation and soil conservation programmes.¹³⁰ Further, the Court appointed the Bandyopadhyay Committee, which would look into schemes submitted by the quarries, which were not ordered permanent closure.

In the *Second Lime Stone Quarries*¹³¹ case, the Court brought into shape focus the conflict between development and conservation and emphasizing the need for reconciling the two in the larger interest of the country, the Court strangely enough left the Government free to choose between environment or development by observing: “It is for the Government and the nation and not for the Court to decide whether the deposits should be exploited at the cost of ecology and environmental considerations or the industrial requirements should be otherwise satisfied”. However, its basis for ‘reconciliation’ was clear in the words that followed: “it may be perhaps possible to exercise greater control and vigil over the operation and strike a balance between preservation and utilization”¹³².

In the case of *D.D. Vyas v. G.D.A.*,¹³³ an open space was preserved for public park. The authorities were found to be negligent in constructing public parks, which contribute towards improvement of social ecology. The Allahabad High Court observed that in crowded towns where a resident does not get anything but atmosphere polluted by smoke and fumes emitted by endless vehicular traffic and the factories, the efficacy of beautifully laid out parks is no less than that of lungs to human beings. A public park is a gift of modern

¹²⁹ Id at 656.

¹³⁰ Id at 657.

¹³¹ *Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P.*, AIR 1987 SC 359.

¹³² Id at 363.

¹³³ AIR 1993 All 57.

civilization, and is a significant factor for the improvement of the quality of life. The Court, further, held that open space for a public park is an essential feature of modern planning and development, as it greatly contributes to the improvement of social ecology.

In the case of *M.C.Mehta v. State of Orissa*¹³⁴, it was held that today, the State and the citizens are under a fundamental obligation to protect and improve the environment.

In *Ajay Singh Rawat v. Union of India*¹³⁵, PIL by Dr. Rawat, member of Social Action Group called 'Nainital Bachao Samiti' alleging water, air, noise and VIP pollution in Nainital and seeking directions from the court for preserving the pristine beauty of Nainital. Court-appointed Commissioner confirmed that in Nainital there was widespread construction of unauthorized buildings, hill-cutting and destruction of forests going and that the lake water was full of human waste, horse dung and other waste.

Directions issued by Supreme Court regarding preventive and remedial measures to be taken on war footing so that Nainital may regain its unsoiled beauty and attract tourists.

A PIL highlighting environment pollution in Doon valley was initiated in *A.R.C. Cement Ltd. v. State of Uttar Pradesh*¹³⁶. The court passed an order injuncting the carrying on of any mining activity in the Doon valley and same being declared as a non-industrial area. A cement factory was operating despite the court's directions.

In this case the petitioners directed to offer alternative sites within two weeks and the State Government directed to give a positive response in the matter within four weeks. In *Indian Council for Enviro legal Action v. Union of India*¹³⁷, PIL was filed before the court by an environmental organization highlighting the woes of people living in the vicinity of chemical industrial plants in India. A writ petition filed by an environmentalist organization, not

¹³⁴ AIR 1992 Orissa 225.

¹³⁵ (1995) 3 SCC 266.

¹³⁶ 1993 Supp (1) SCC 57.

¹³⁷ (1996) 3 SCC 212.

for issuance of writ, order or direction against private units but against Union of India, State Government and State Pollution Board concerned to compel them to perform their statutory duties on ground that their failure to carry on such duties violated rights guaranteed under Article 21 of the residents of the affected area is maintainable.

The court can, after ascertaining that the alleged industrial units were responsible for causing ecological damage in the area, direct the authorities concerned to perform their statutory duties under the Environment (Protection) Act, 1986 and the Water (Prevention and Control of Pollution) Act, 1974.

In this case the Court held that the contention that the respondents being private corporate bodies and not 'State' within the meaning of Article 12, a writ petition under Article 32 would not lie against them, cannot be accepted. If the Supreme Court finds that the Government/ authorities concerned have not taken the action required of them by law and that their in action is jeopardizing the right to life of the citizens of this country or of any section thereof, it is the duty of the Supreme Court to intervene. If it is found that the respondents are flouting the provisions of law and the directions and order issued by the lawful authorities, the court can certainly make appropriate directions to ensure compliance with law and lawful directions made thereunder.

If an industry is established without obtaining the requisite permission and clearances and if the industry is continued to be run in blatant disregard of law to the detriment of life and liberty of the citizens living in the vicinity, the Supreme Court has power to intervene and protect the fundamental right to life and liberty of the citizens of this country.

Once an activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The matter can also be looked from the angle of "Polluter Pays" principle viz., the responsibility of repairing the damage is on the offending industry.

In this case the Central Government was directed to consider and examine the advisability of treating chemical industries as a category apart for scrutinizing their establishments and functioning more rigorously and allowing these industries to be established in arid areas.

Other directions to be considered and examined by the Central Government are in respect of establishment of environment courts; strengthening the environment protection machinery both at the Centre and the States and providing them more teeth; personal accountability of the industrial units for their lapses and negligence and formation of environmental audit.

Central Government also directed to recover the costs of the remedial measures from the industries concerned. At the same time to encourage voluntary bodies to take up actions in furtherance of public interest, respondents directed to pay Rs. 50,000 by way of costs to the petitioner.

In *M.C.Mehta v. Kamal Nath*¹³⁸, the Supreme Court took *suo moto* notice of a news item in the Indian Express that a motel owned by Mr. Kamal Nath (former Minister for Environment) had encroached substantial forestland and altered the course of river Beas. The Court held that Public at large is the owner of natural resources and the same cannot be subjected to private ownership or commercial exploitation to the detriment of the public at large. The executive holds natural resources of the country in public trust. The executive cannot allow them to be converted to private ownership or commercial use. The Himachal Pradesh Government acted in patent breach of public trust by leasing ecologically fragile land to motel management. The motel management has interfered with the natural flow of the river and anyone who pollutes the environment must pay to reverse the damage caused by his acts.

The Court directed NEERI to inspect the area and give an assessment of cost likely to be incurred in reversing the damage. In addition the Court instructed Motel to pay such costs and to show cause why it should not also be liable for a pollution fine.

¹³⁸ (1997) 1 SCC 388.

The degradation of the Taj Mahal due to environmental pollution was initiated through PIL¹³⁹ by Mr. M.C.Mehta alleging yellowing and blackening of the Taj Mahal due to Industrial/ Refinery emissions, generator sets, etc., and seeking directions of the Court for appropriate preventive measures. The Court held that Taj Mahal is part of national and international culture heritage and must be preserved and protected from damage due to environmental pollution. Even though development of industry is essential, at the same time environment and ecosystem must be protected. Sustainable development must be the answer. The Court was also of the opinion that the environmental measures must anticipate, prevent and attack the causes of environmental degradation. This is the "precautionary principle". In every case, the onus of proof is on the industry to show that its project is environmentally benign.

At the end the Court directed the 292 polluting industries must change over to natural gas as an industrial fuel and the industries which are not in a position to obtain gas connections shall stop functioning and re-allocate themselves beyond the Taj Trapezium Zone.

PIL¹⁴⁰ was filed against the rapid detonation of air quality in Delhi, which was becoming health hazard besides being an environment enemy. However, on 28th July, 1998 (AIR 1998 SC 2463) directions were issued fixing a time schedule after taking a note of recommendations made by Bhurelal Committee. Thereafter, number of applications were filed requesting the extension of dealing to convert the entire city bus fleet to single mode of CNG beyond 31st March 2001. The Court held that mitigate the sufferings of commuter public relaxation given to schools, DTC, Contract Carriage operators, other buses operators and owners of commercial vehicles including autos by allowing them to operate vehicles equal to number of vehicles for which steps for conversion has been taken by them by 31st March, 2001. Further the Court directed that after 1-4-2001 no commercial vehicle will be registered in Delhi, which does not conform to the orders dated 28th July, 1998

¹³⁹ *M.C.Mehta v. Union of India*, (1997) 2 SCC 353.

¹⁴⁰ *M.C.Mehta v. Union of India*, AIR 2001 SC 1948.

and no other commercial vehicle shall ply in Delhi unless converted to single fuel mode of CNG w.e.f 1-4-2001, except for the relaxation given above. The Court also directed Bhurelal Committee to examine whether low sulphur diesel should be regarded as a clean fuel. Directions given for safeguarding the health of the people, a right provided and protected under Article 21 of the Constitution would override the provisions of every Statute including Motor Vehicles Act if they mitigate against the constitutional mandate of Article 21.

3.3.(iv).PIL and Control of Noise Pollution

In *M.C.Mehta v. Union of India*¹⁴¹, Mr. M.C.Mehta, an Environmentalist lawyer, filed a public interest petition under Article 32 of the Constitution seeking direction to the Haryana Pollution Control Board to control the pollution caused by stone crushers, pulverisers and mine operations in the Faridabad Balabgarh area. The core question to deal is whether to preserve environment and control pollution, the mining operation should be stopped within the radius of 5 k.m. from the tourist resorts of Badkal lake and Surajkund in the State of Haryana. For the purpose of mining, explosives are being used for rock blasting. Because of unscientific mining operations, overburden materials (top soils and murmur remains) were observed to be lying haphazardly. Deep mining for extracting silica and lumps is causing ecological disaster and these mines lie unreclaimed and abandoned. As a matter of fact mining site reveals total lack of environmental planning. The mining operations within the radius of 5 k.m. from Badkal lake and Surajkund were stopped by the Haryana Government on the basis of the recommendations made by the Board. The operators through their learned counsel raised serious objections to the recommendations of the Board seeking closure of the mining operations within the radius of 5 k.m. The Supreme Court sought the Expert opinion from the National Environment Engineering Research Institute on the point whether the mining operations in the said area are to be stopped in the interest of the environmental protection, pollution control and tourist development. If so,

¹⁴¹ AIR 1996 SC1977.

whether the limit should be 5 kms. The Court held: "the two expert opinions by the Board and by the NEERI have no doubt in our mind that the mining activity in the vicinity of the resorts are bound to cause severe impact on local ecology. We are of the view therefore, that in order to preserve environment and control pollution within the vicinity of the two tourists resort it is necessary to stop mining activity within two kms radius of the tourist resorts of Badkal lake and Surajkund. 200 meters green belts be developed at 1 km radius all around the boundaries of the two lakes. Further, it is directed that no further construction of any type shall be permitted now onwards within 5 kms radius of the Badkal lake and surajkund. All open areas shall be converted into green belts.

In *Smt Ved Kaur Chandel v. State of H.P. and others*¹⁴², a social worker filed a public interest petition (writ) in Himachal Pradesh High Court against the establishment of a retreading unit adjacent to the State Highway, apprehending the likelihood of air and noise pollution. The State Pollution Control Board had given the Tyre retreading unit 'No objection certificate (NOC)' on certain conditions. No final consent for production was granted. An affidavit filed by Pollution Control Board and respondent unit showed that they have undertaken to follow cold retreading process with electricity instead of boiler and water at process stage which according to them will not cause any water and air pollution. Heavy responsibility was put on the State Board to ensure that the respondent unit commences production only after fulfilling all conditions mentioned in the consent letter.

The Himachal Pradesh High Court while disposing of the writ petition made following directions:

1. the respondent No. 5 may apply to the Himachal Pradesh State Pollution Control Board to obtain consent to operate after fulfilling all the conditions applicable to it as laid down in the letter of consent to establish its unit.
2. On receipt of the application of respondent No. 5 for consent to operate, complete in all respects, the Himachal Pradesh State Pollution Control

¹⁴² AIR 1999 HP 59.

Board will make recommendations after inspection and issue Inspection Report within a period of four weeks from the date of receipt of the application.

3. Thereafter respondents No. 5 may apply to this Court for getting the stay order dated 24.12.1998 vacated for commencing production.
4. The collector Ghumarwin, District Bilaspur is directed to decide the complaint of Superintending Engineer, 10th Circle, H.P., P.W.D., Bilaspur, against respondent No. 5 for violation of Roadside land control Act 1968 expeditiously.

In *Bijayananda Patra and Others v. District Magistrate, Cuttack*¹⁴³, the Public Interest Litigation relates to noise pollution in different parts of State of Orissa caused due to use of high standing explosive, fire works and blaring sound producing devices. It was submitted on behalf of the State Pollution Control Board that the State of Orissa has the Fire works and Loud Speaker (Regulation) Act 1958 for the purpose of regulating display of explosive fire works and use of loud speaker. Section 4 of the Act prescribes the restricted zones and time period for the use of loudspeaker and display of explosive fire works within permissible time and also provides that permission for the same had to be obtained for its use within the restricted area. Contravention of any of the provision of the Act invites penalty by way of imprisonment and fine. The enforcing authority under the said Act is the District administration and the Pollution Control Board has no power to intervene in the matter.

The High Court after discussing the intension of the enactment of specific pollution control legislation observed that noise code regulating all aspects of noise pollution should be the immediate concerns of the Government. As the problem of noise pollution has already crossed the danger point and noise like a smog is threatening as a slow agent of death. The Court directed the State Government to take some measures in curbing the Noise Pollution:

¹⁴³ AIR 2000 Orissa 70.

- (i) The prescribed standards regarding noise by Government of India may be enforced strictly in letter and spirit.
- (ii) Separate Courts regarding Noise pollution may be established.
- (iii) The cases should be decided within a prescribed limit.
- (iv) All District Magistrates and Sub Divisional Magistrates should be empowered to issue prohibitory orders under section 144 of the Code of Criminal Procedure, 1973 limiting the hours of loudspeakers in religious places and for other social gatherings and functions.
- (v) The subject of environment protection may be made compulsory at school, college and University levels.
- (vi) The press and media should play a constructive role to highlight disastrous effects of noise pollution and its remedy.
- (vii) The District Administration and State Pollution Control Board shall work out the modalities to prevent catastrophic effect of noise pollution by ensuring strict compliance with the statutory provisions, scanty though they are.
- (viii) Both Central Government and State Government should consider the desirability of having adequate legislative measures to prevent this fast growing menace, which, though it appears to be 'silent' has in fact, potentialities of producing a future generation of deaf persons.
- (ix) Permanent monitoring bodies should be appointed to make periodic review of the situation and suggest remedial measures. The composition of such a body has to be determined by the State and Central Government.¹⁴⁴

3.3.(v). Advantages of Public Interest Litigation

In India, Supreme Court has evolved the strategy of Public Interest Litigation based on massification phenomenon. Due to massification

¹⁴⁴ Id., at 77.

phenomenon in our existing society, human actions and relationships assume a collective rather than merely individual character. Declaration of human rights, the collective social rights, and duties of groups, classes and communities are the basic concerns of modern society. But we should not ignore the individual's right in that context.

The most important thing in Public Interest Litigation is that it provides help to the individual who alone probably cannot move efficiently to the court for his protection. Moreover, expressive costs may obstruct his legal action in court; he may fear the powerful violator or he may be unaware of his rights. It is necessary for Indian judicial system to overcome the problem to access justice for the people beyond rules of 'standing'.

Public Interest Litigation checks the Government authorities to exercise their power within their periphery. If they try to exceed powers beyond their limits then any person on behalf of the public can file a writ petition under the umbrella of public interest litigation to keep them in check.

Any aggrieved person can write a postcard to any judge of the Supreme Court for public interest litigation. But this right ought not to be misused for any personal or political motivation.¹⁴⁵ Public interest litigation has also heightened the confidence in judicial process and the new approach of the court:

- (a) The public interest litigation has widened the scope of *locus standi*.
- (b) The public interest litigation has encouraged the poor to raise their voice before the courts for their protection of fundamental and legal rights.
- (c) The public interest litigation has made the individuals confident to make collective actions for effective remedy.
- (d) The public interest litigation has made aware the ignorant of their rights.
- (e) The public interest litigation shows the courts of their role as guardian and protector of the Constitution.
- (f) The public interest litigation has led to the abolition of several legislations, which provide to be big threat to public interest.

¹⁴⁵ Report of Legal Aid Implementation Committee: Government of India, 1980.

(g) The public interest litigation has proved to be democratic obligation.

Public interest litigation involves collaboration and co-operation between the Government and its officers, the Bar and the Bench, for the purpose of making human rights meaningful for the weaker sections of the community.¹⁴⁶

3.3.(vi). Public Interest Litigation—A Critique

Public interest litigation has been criticized on number of grounds viz. that it can be misused for private motive or political ends that would result in tremendous increase in the litigation; that it would develop uncertainty as to the admission of the petition for hearing.

The practice of the affected person addressing directly in the name of Judges of the Supreme Court has been criticized on the ground that there would be danger of litigants choosing a judge and in turn judges choosing their litigants. The *suo motu* action by judges based upon news reports is criticized as thereby the judges assume the role of advocates as well and this acts against the judicial precept 'no body should be judge in his own case'.

To avoid these defects, the Supreme Court has framed certain guidelines for entertaining letters / petitions as public interest litigation¹⁴⁷-- such as (a) neglected children, (b) bonded labours matters, (c) non-payment of minimum wages to workers and exploitation of casual workers and violation of labour laws, (d) petition from prisons, (e) speedy trial, (f) petition against atrocities on women, (g) petition against police excesses, (h) petition against atrocities on SC, ST's and OBC, (i) petition from riot victims, (j) petition relating to family pension, (k) petition pertaining to the environmental pollution, disturbance of eco-balance, maintenance of forests and wildlife, maintenance of heritage and culture, and (l) other matters of public importance.

The Hon'ble Chief Justice of the Supreme Court Mr. J.S.Verma viewed that it is necessary to avoid the misuse of Public Interest Litigation rather than criticizing the process. Any attempt to curb it would be to throw baby with the

¹⁴⁶ Dr.B.L.Wadehra, *Public Interest Litigation*, Universal, 2003, p.34-35.

¹⁴⁷ P.B. Menon, "PIL—A Study", AIR 1993 Journal 17.

bath water. It is primarily for the courts which devised this process to practice self-restraint and to also devise proper checks and balances to ensure that even persons who went to misuse it are not able to do so. Time has come to make revision of the Supreme Court Rules.¹⁴⁸

During the 1990's the Supreme Court and High Courts were flooded with public interest litigations ranging from child labour to environmental issues, which forced the Government to do some rethinking, but the Government's approach was in curbing the Court's power¹⁴⁹. This gives us an impression that Government has at times tussled with the judicial independence with regard to Public Interest Litigation.

The recent trends of the judiciary towards the violation of human rights are quite surprising because public interest litigations are diverted to the National Human Rights Commission. The commission does not have powers like Supreme Court and High Courts. It can play a fact-finding role. One cannot deny that the effort of the highest court in environmental pollution control through Public Interest Litigation is laudable, particularly when the legislature remains passive. Judiciary also through the machinery of PIL protects the weakest persons from the oppressive acts of either executive or legislatures. Even when the legislature is lagging behind in bringing the lacunae in the existing legal system and the administration is not well equipped to meet the challenges; it is only the judiciary, which can render its help to do justice.

¹⁴⁸ J.S.Verma, "Constitutional Obligation of the Judiciary", AIR 1997 Journal 165.

¹⁴⁹ 82 nd Constitution Amendment Bill—PIL (Regulation) Bill 1996.

AIR POLLUTION AND ITS CONTROL UNDER OTHER LAWS

Law has played effective roles in controlling and regulating the human conduct. To prevent and control air pollution there has been legal principles and provisions in Indian jurisprudence. Initially the efforts made in India were haphazard and fragmented. The earliest legislative measures taken in India can be traced from the Bengal Smoke Nuisance Act, 1905 and Bombay Smoke Nuisance Act, 1912. There are scores of legislations, which have been laying down measures to control air pollution. The various other laws scattered in the statute books having direct or indirect relation with the control of Air pollution are being discussed hereunder.

4.1. INDIAN PENAL CODE, 1860

The First Law Commission of India headed by McCauley (who drafted the Indian Penal Code) included chapter 14 consisting of 28 sections (sections 268 to 294 A) dealing with public nuisance in the Penal Code as long as 1860. The sole object in including chapter 14 is to safeguard the public health, safety and convenience by causing those acts that make environment polluted threatening the life of the people punishable.

The Penal Code in chapter 14 (sections 268 to 294A) deals with public nuisance, i.e., the offences relating to public health, safety, convenience, decency and morals.

Before any finding can be arrived at that a public nuisance has been committed under Indian Penal Code must be the necessary consequence of the nuisance feisor.

Section 268 defines 'Public nuisance' as, a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause, injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. The section further explains that a common nuisance is not excused on the ground that it causes some convenience and advantage. Thus, an act which tends to or causes interference with the health, safety, comfort, convenience of public at large will be considered as public nuisance. It covers all types of pollutions including air pollution.

The offence constituted by section 278 Indian Penal Code is making atmosphere noxious to health. It provides whoever vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine that may extend to five hundred rupees.

This section applies to trade producing noxious and offensive smells such as making candle in a town by boiling stinking stuff, a manufactory for making spirits of Sulphur, vitriol and aquafortis.¹

This section is directed against public nuisance and not a private nuisance. The act done must be noxious to health of person in general dwelling or carrying on business in the neighbourhood. It is not necessary that the alleged nuisance should produce smell injurious to health; it is sufficient if they are offensive to the sense. Thus allowing a large stock of bones to remain uncovered in the open for a long time so as to become rotten and to emit smell noxious to people living in or passing by the vicinity, is a public nuisance.²

Public smoking of tobacco in any form cigarettes, cigars, beedis or otherwise falls within the mischief of the penal provisions relating to 'public

¹ St. Helen's Co. Vs Tippings 35 L.J.Q.B.(H.L.) 66, see Hari Singh Gaur, p. 24.

² Bereckfield (1906) 34 Cal 73.

nuisance' and held illegal, unconstitutional and violative of Article 21 of the Constitution.³

The negligent blasting of stone in a quarry so as to endanger safety of persons living in the vicinity is public indictable nuisance.⁴ The erecting of buildings and making fire which set forth noisome, offensive and stinking smokes and making great quantities of noisome offensive and stinking liquors near the common highway and near to the dwelling-houses of several of the inhabitants, whereby the air was impregnated with noisome and offensive stink and smells was held to be a common nuisance.⁵ Section 287 deals with negligent handling of machinery, it provides that whoever does with any machinery any act so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take sufficient care of any machinery in his possession, to guard against any probable danger to human life from such machinery, shall be punished with imprisonment of either description for a term which may extend to six months, or with a fine which may extend to one thousand rupees, or with both.

This section intends to deter the companies involved in handling of machinery, which may lead to calamity if the machinery is not handled with due care. The gravity of offence has increased with the modern industrialization but the term of punishment is meagre.

An analysis of all these provisions under the Indian Penal Code proceeds upon the assumption that every one has the right pure and fresh air but since the punishments provided are meagre, compared to the gigantic problem of air pollution. Therefore, in the present scenario most of the provisions are ineffective and are not helpful in curbing the problem of pollution.

³ K.Ramakrishanan Vs State of Kerala, AIR 1999 Ker 385.

⁴ Mutters 34 L.J. (N.C.) 22.

⁵ Vithoba (1884) Unrep Cri. C. 203.

4.2. THE CRIMINAL PROCEDURE CODE, 1973

Chapter X-B and C of the Criminal Procedure Code 1973, deals with the procedural aspect of the problems of public nuisance. Wherein the problem of air may be covered to some extent. Provisions therein provide for a speedy and summary remedy for public nuisance in case of emergency, where there is danger to public interest. Section 133 of the Criminal Procedure Code 1973 is also invoked for the control of air pollution.

Section 133 (1) of the code of 1973 provides that whenever a District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) he thinks fit, considers that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place or that the conduct of any trade or occupation or the keeping of any good or merchandise is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such good or merchandise should be removed or keeping thereof regulated or that the construction of any building or disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped.

Such Magistrate may make a conditional order requiring the person causing obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods to desist from carrying on, or to remove or regulate in such manner as may be directed.

The condition precedent to section 133 is the imminent danger to property and consequential nuisance to the public. In *Vasant vs. Baburao*⁶ the Supreme Court has observed that the object and purpose behind section 133 is to prevent

⁶ 1995 Supp 4 SCC 54.

public nuisance and that if the Magistrate fails to take immediate recourse to sec 133 irreparable damage will be done to the public.

Section 133 of the Criminal Procedure Code 1973 is rarely being used for the purpose of the pollution control. In *Krishna Gopal vs. State of M.P.*⁷, the court has made use of the section as a potent provision for control of noise pollution. In this case the Court was recognizing the position that a nuisance resulting in actual or potential pollution would attract the provision of section 133.⁸

In *Ganesh vs. State*⁹, it was held that section 133 of Cr.P.C. is not inconsistent with the provision of the Pollution Acts; rather the provision under 133, Criminal Procedure Code 1973 is an emergency provision and can be called in aid to remove public nuisance caused by effluents of the discharge and air discharge causing hardship to the general public. In this case the High Court refused to quash the proceeding initiated by the Magistrate under section 133 by holding that the Air Pollution Act and the Water Pollution Act which prescribe overriding effect of the special Act, clearly gives an impression that by virtue of promulgation of the Pollution Act, the provision of other Act will not be effected and only those portions will not be applicable which are inconsistent with the provisions of the special Act.

If the person creating nuisance, even after being ordered by the Magistrate, does not perform as ordered or does not appear and show cause, he is liable to the penalty under section 188 of the Indian Penal Code and the order is made absolute.¹⁰ The question whether section 133 Cr.P.C. has a mandatory import came up for consideration before the Supreme Court in *Ratlam*

⁷ (1986) Cri.L.J. 396.

⁸ Leelakrishnan P. : Law of Public Nuisance: A tool for Environmental Protection. JILI vol 28:2 1986, pg 229.

⁹ (1997) Cri. L.J.396.

¹⁰ Section 136 of Cr.P.C. if such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code(45 of 1860) and the order shall be made absolute.

Municipality vs. Vardhichand,¹¹ and the Supreme Court held that section 133 Cr.P.C. is categorical although read discretionary. Judicial discretion when facts for its exercise are present has a mandatory import. Therefore, when Magistrate has before him, information and evidence, which disclose the existence of a public nuisance and on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place, he shall act. Thus his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance triggered by the jurisdictional fact. The Magistrates responsibility under section 133 Cr.P.C. is to order removal of such nuisance within a time to be fixed in the order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by section 188 I.P.C. The imperative tone of section 133 Cr.P.C. read with the punitive temper of section 188 I.P.C. make the prohibitory Act a mandatory duty.¹²

Further under section 144 of Criminal Procedure Code the Executive Magistrate can make an order in urgent cases of nuisance. Such order can be issued to prevent any annoyance or injury to any person or danger to any human life, health or safety, disturbances of public tranquility, riot or any affray. The object of such order is to face the problem of law and order temporarily as the duration of such order is merely of two months.

It shows that the aforesaid provision of Cr.P.C. deal with the procedural aspect of the problem of public nuisance. Wherein air may be covered to some extent, the object of the provision is just to ensure the maintenance of law and order or to prevent any nuisance in stead of providing any substantive relief to the victims.

¹¹ AIR 1980 SC 1623.

¹² Ibid.

4.3. INDIAN EASEMENT ACT, 1882

The Indian Easement Act is one of the oldest Legislative enactments dealing with two important topics of easements and licenses. The law of easements is basically the law of neighbours and concerns itself with defining rights of an owner for the beneficial enjoyment of his land against his neighbour. These rights are in addition to those which an owner possess by virtue of his ownership of the property and to that extent diminish those of the other owner. These rights have also a unique feature in that they are neither proprietary nor possessory.

The law of easement guarantees beneficial enjoyment to the owner of a land, free from air, water or noise pollution without disturbing the natural environment.¹³ An analysis of section 7 of the Act¹⁴ along with the Illustrations¹⁵ appended to the section makes it clear that an owner of a land inhabiting has a few rights which have direct bearing upon the right of an owner not to be annoyed unreasonably by his neighbour. These rights are (i) Right to pollution free passage of air and (ii) Right to comfortable living. Every person has a natural right to enjoy the air pure and free from noxious smells or vapours, and anyone who sends on to or over his neighbour's land, anything which makes the air impure commits a nuisance.¹⁶

Commission of a nuisance on the property of another person cannot be claimed by way of an easementary right¹⁷, as "No easement arises where the nuisance is a common or public nuisance".¹⁸

¹³ The Indian Easement Act 1882, S. 7 illustrations (b)-(f) and (h).

¹⁴ Section 7(b) declares the right of every owner of immovable property (subject to any law for the time being in force) to enjoy without any disturbance by another the natural advantages arising from the situation.

¹⁵ Illustrations(b) to section 7- the right of every owner of land that the air passing thereto shall not be unreasonably polluted by the other persons.

¹⁶ *Chastley vs. Ackland* (1892) 2 Ch 389.

¹⁷ *Kailash Chand vs. Gudi* AIR 1990 (H.P) at p.17

Gale states the legal position thus:

“There can be no prescription to make a public nuisance, which is a prejudice to all people, because it cannot have a lawful beginning by license or otherwise, being against common law”, which was also been upheld by the High Court in *Bhurelal vs. Mohan Singh*.¹⁹

4.4. THE POLICE ACT 1861

The Bill providing for regulation of Police was introduced in the legislature with an object to reorganize the Police and make it a more effective instrument for the prevention and detection of crime. The Police Act was passed on 22nd March 1861.

The word “police” is generally applied to the internal regulation of large cities and towns; whereby the individuals of the states, generally members of a well-governed family are bound to conform their general behavior to the rules of property and good neighbourhood.

It is a department of the state charged with the preservation of public peace, law and order, the safety and health of the community. It may, therefore, be said that the control of air pollution too is one of the aspects relating to the safety and health of the community and therefore its prevention must also come under the objects of the Police Act. Though there is no specific provision directly dealing with the problem of Air Pollution, mention may be made of section 34, where powers of police officer for punishing for certain offences on roads etc. have been laid down. This section provides that any person who, on any road or in any [open place or]²⁰ street or thoroughfare within the limits of any town to which this section shall be specifically extended by the [State Government]²¹ commits any of the following offences, to the obstruction

¹⁸ *Weld vs. Horney* (1806) ER 75.

¹⁹ AIR 1966 (Raj) at 122.

²⁰ Ins. By Act 8 of 1895, Sec 13.

²¹ Subs by the A.O. 1950 for “Provincial Government”

inconvenience, annoyance, risk, danger or damage of the [residents or passengers]²² shall on conviction before a Magistrate, be liable to a fine not exceeding fifty rupees, or to imprisonment [with or without hard labour]²³ not exceeding eight days, and it shall be lawful for any police officer to take into custody, without a warrants, any person, who, within his view, commits any of such offences, namely :-

(i) Throwing dirt into street- Any person who throws or lay down any dirt, filth rubbish or any stones or building materials, or who constructs any cowshed, stable or the like, or who causes any offensive matter to run from any house, factory, dung-heap and like.

(ii) Indecent exposure of person- Any person who willfully and indecently exposes his person, or any offensive deformity or disease, or commits nuisance by easing himself, or by bathing or washing in tank or reservoir, not being a place set apart for the purpose.

(iii) Neglect to protect dangerous places any person who neglect to fence in or duly protect any well tank or dangerous structure.

No doubt by the aforesaid provision, the spreading of obnoxious smell by throwing filth or dirt in public place may be controlled and the spreading of air borne diseases by indecent exposures etc. may be checked, but there are no provisions for smokes released by the use of wood or coal fires for cooking and heating in the places where the shops and residents often create a thick pall or air pollution, this kind of nuisance should be included in section 34 which ought to be another aspect of public nuisance within the Police Act 1861.

Today noise is also one of the biggest problems, and has been included in the definition of air pollutant. It comes from many sources. Among many, one of the aspects of noise pollution is the problem of noise arising from music because use of loudspeakers and sound magnifying devices has become part of festival and ceremony. This aspect is covered under the Police Act.

²² Ins. By Act 8 of 1895, Sec 13.

²³ Ins. By Act 1 of 1903 Sec 3 and Sch II.

Noise arising from music may be effectively dealt with by recourse to section 30(4) of the Act. This section authorizes the Superintendent of Police to regulate the extent to which music may be used in streets on occasions of festivals and ceremonies. No doubt the Act intends to control the extend of the musical sound; the ultimate cause of noise pollution may also be covered. However, the aforesaid provision of the Act is quite inadequate as it merely meets the problem of musical noise on occasions of festival or ceremonies in public places, but it is silent if the musical noise arises from private premises on occasions other than festival or ceremonies.

Similar are the provisions of section 34, Police Act where the punishment is that it shall not be a fine exceeding fifty rupees and such a punishment will not have any effect to deter the people from throwing dirt, filth, rubbish or stones and the person neglecting to protect dangerous processes etc. as these persons can escape liability only by paying a fine accounting to rupees fifty only.

4.5. WORKMENS'S COMPENSATION ACT 1923

The Workmen's Compensation Act 1923 falls in that category of legislation which has it roots in the theory that a State cannot be mute spectator to the suffering of the working class engaged in factories or establishments who are exposed to the various risks to their limbs and lives. Due to the technological innovations and automation introduced in industries the working class operating sophisticated mechanical devices or handling hazardous industrial activities are invariably exposed to the risks involved in accidents or in cases of occupational diseases, invalidating them temporarily or permanently and also involved in fatal accident for no fault of theirs. The object of the Act cannot better be explained than what was stated by the Royal Commission, which observed:

The Workmen's Compensation Act was framed with a view to provide for compensation to a workman incapacitated by an injury from accident. But compensation is not the benefit following from the Act it has importance in furthering work on prevention of accident in giving workmen greater freedom from anxiety and in rendering industry more attractive. There are also effective provisions in the Act which provides for maintaining an atmosphere free from pollution in the place of work for the workers in industries etc.

Section 3 of the workmen's Compensation Act, 1923 creates the liability of employers to pay compensation to their workers in case of injuries caused in the course of employment.

Schedule III²⁴ of the Act contain a list of diseases. These diseases are peculiar to the occupation of a person; most of these diseases are caused due to the presence of pollutant in the atmosphere of the work place. These pollutants affect the health of worker and lack of health denudes his livelihood.

Schedule III is divided in three parts, namely Part-A, Part-B, Part-C. The workman is entitled to compensation only if the condition contained in this sub-section is satisfied with regard to disease mentioned in Part-B, of Schedule III there is a further requirement to be satisfied namely that the workman contracting the disease must have been in the service of the employer concerned for a continuous period of not less than six months. With regard to diseases mentioned in Part-C of Schedule III the workman must have been in the continuous service of one or more employer for such period as the Central Government may specify. Section 3(2) deals with compensation to be paid in cases of occupational diseases.

Section 3(2A) of the Act gives power to the Commissioner to fix the extent of liability of the employer in cases where the workman has worked in establishment belonging to different employers because all the employer shall be liable to pay compensation. The Act under section 3(3) authorize the State

²⁴ Workmen's Compensation Act 1923

Government in case of employment specified in Part A and Part B of Schedule III and the Central Government in the case of employment specified in Schedule III indicating in the case of employments added the diseases which shall be deemed for the purpose of this section to the occupational disease.²⁵

Section 3(4) of the Act speaks of disease which is not specified in the Schedule III and puts limits on the payment of compensation. Section 3(5) of the Act speaks of alternative remedies. The workman who is entitled to claim compensation under the provision of the Act or he may file a suit in the Civil Court for damages in respect of the injuries against the employer or any other person but he can not avail both.²⁶

In *Consumer Education and Research Center vs. Union of India*,²⁷ the Court pointed out the importance of clean air at work place and directed all the asbestos industries to be bound by rules regarding "safety" in the use of asbestos issued by International Labour Organisation. The elimination of air borne particles of asbestos and respirable asbestos from the working environment in appropriate concentration as recognized by the competent authority was directed by the Supreme Court to be followed by the employers.

The Court further held that the employer is vicariously liable to pay damages in case of occupational diseases here in this case asbestosis. The Employees State Insurance Act, 1948(?) and The Workman's Compensation Act, 1923 provide for payment of mandatory compensation for the injury or death caused to the workman while in employment. The Act does not provide for the payment of compensation after cessation of employment. It is therefore becomes necessary to protect such person from the respective dates of cessation of their employment.²⁸

²⁵ V.G.Goswami: Labour and Industrial Laws (seventh edition) Pg.140.

²⁶ Id at 418.

²⁷ AIR 1995 SC 922.

²⁸ AIR 1995 SC 922 at 942.

4.6. FACTORIES ACT 1948

The Factories Act 1948 was enacted to consolidate the law relating to labour working in factories. The Act is social piece of legislation meant to achieve reforms among workers working in factories and to protect workers employed therein against industrial and occupational hazards. For this purpose it seeks to impose upon owners or occupiers certain obligations to make the right to life of workers meaningful to prevent pollution at work place; protection of environment; protection of the health of the workman or keep the water and air free from pollution for the safety and health of the people.

Smoky factories often create air pollution at the work place. The various provisions regarding measures to be adopted by the occupier of the factory to maintain proper environment of work in factory have been provided under chapter III of the Factories Act 1948.

Section 12 of the Factories Act 1948 provides for the regulation of disposal of wastes and effluents from the factories. It authorizes the State Government to make rules for this purpose sub-section(1) provides that there shall be effective arrangements made in every factory for treatment of wastes and effluents due to the manufacturing process carried on therein, so as to render them innocuous, and for their disposal. Under sub-section(2) the State Government may make rules prescribing the arrangements to be made under sub-section(1) or requiring that the arrangements made in accordance with sub-section(1) shall be approved by such authority as may be prescribed. It appears that although section 12 was an effective provision for regulating the wastes and effluents from the factories. Still there have not been cases reported. This gives an impression that the section has not been invoked to give relief to the persons aggrieved.

In factories generally the environment remains full of dust and fume and there runs excessive temperature which affects the health of the workers engaged therein. In order to deal with this tiresome problem the Factories Act, 1948 under its section 13 provides that:

(I) Effective and suitable provision shall be made in every factory for securing and maintaining in every work room-

- (a) Adequate ventilation by the circulation of fresh air, and
- (b) Such temperature as will secure to work therein reasonable conditions of comfort and prevent injury to health;...

The State Government has been empowered to prescribe a standard of adequate ventilation and reasonable temperature for any factory or class of factories or description of factories or any part thereof and it has been given power to direct that (proper measuring instrument at such places and in such positions as may be prescribed shall be maintained).²⁹

The Factories Act under its section 14 requires effective measures to be adopted to prevent inhalation and accumulation of any dust or fume or other impurity of such a nature in any work room given off by reason of the manufacturing process carried in the factory as is likely to be injurious or offensive to the workers employed therein.

If any exhaust appliance is necessary for the purpose, it shall be applied as near as possible to the point of origin of the dust or other impurity and such point shall be enclosed so far as possible.³⁰

In order to avoid dust and fume and other impurity of such nature it has been provided that in any factory no stationary internal combustion engine shall be operated unless the exhaust is conducted into the open air and no other internal combustion engine shall be operated in any room unless effective measures have been taken to prevent such accumulation of fumes therefrom as are likely to be injurious to workers employed in the room.³¹

²⁹ Subs by Act 20 of 1987 for Sec 13(2) w.e.f. 1-12.1987

³⁰ The Factories Act 1948 sec 14(1)

³¹ The Factories Act 1948 sec 14(2)

In order to provide more effective arrangements for health and safety of the workers engaged in work places where dangerous substance are likely to be present, in 1987 new provision has been substituted by an amendment in section 36 which provides that no person shall be required or allowed to enter any chamber, tank, vats, pit pipe or other confined space in any factory in which any gas vapour or dust is likely to be present to such an extent as to involve risk to persons being overcome thereby, unless it is provided with a manhole of adequate size or other effective means of egress.³²

The analysis of the provision section 36(2) would entail that any person may be required or allowed to enter any such confined space in which any gas, fume vapor or dust is likely to be present to such an extent as to involve risk to persons in the following conditions:

- 1) If all practicable measures have been taken to remove such risky substance up to permissible limits and to prevent any ingress of such gas or dangerous substance; and
- 2) If certificate in writing has been given by a competent person on the basis of test carried out by himself that space is free from dangerous gas, fume, vapors or dust; or
- 3) If no such certificate has been obtained a person may be required or allowed to enter any such confined space if such person is wearing suitable breathing apparatus and a belt securely attached to a rope the free end of which is held by a person outside the confined space.

The precaution must be taken to avoid any risk to life of the workers who is to enter such confined space. The provision of the section are based on the philosophy that precaution is better than cure.³³

In order to avoid chances of explosions wherein any manufacturing process produces gas, dust, fume or vapor section 37³⁴ requires effective and proper measures to be adopted to avoid explosions which are

³² The Factories Act 1948 sec 36(1)

³³ V.G.Goswami: Labour and Industrial Laws (seventh edition) Pg 310

³⁴ The Factories Act 1948

likely to occur where any manufacturing process produces dust, gas, fume or vapor of such character and to such extent as to be likely explode to ignition.

After Bhopal disaster the public opinion emerged to the effect that industries involved hazardous process should not be allowed to function causing environmental pollution. Such factories should not be allowed to be installed in the residential areas of the cities and towns. If such factories are already installed and working, effective measures should be taken to control their working as far as practicable to minimize atmospheric pollution or avoid chances of dangerous industrial accident causing adverse effect on the society. In such state of affairs the amendment in the Factories Act were made in 1987.

The provisions relating to hazardous process have been inserted in chapter IV A. Section 41-A(1) provides that for the initial location of a factory or the expansion of a factory involving a hazardous process; the State Government may appoint a Site Appraisal Committee and the purpose of such committee is to advise the State Government in process of granting permission to such factories. The section also deals with the Constitution and Power of the Site Appraisal Committee. Under section 41-B, some statutory duties have been imposed on the occupier of every factory involved in hazardous process and all these statutory duties of the occupier aim to ensure safety and security of the workers and general public which may be in peril in absence of effective and proper precaution. It may be noted that not only these duties have been imposed on the occupier but the sanction has also been attached for proper compliance thereof. In order to determine as to which process are hazardous process, the list of industries involved in hazardous process has been also inserted by the Amendment act 20 of 1987 which is contained in the first schedule that has come into force with effect from 1st December 1988. For example coal industries, power generating industries, fertilizer industries etc are involved in hazardous processes.³⁵ The schedule first contains as many as 29 industries at present and the schedule may be amended as and when

³⁵ Supra note 33 at Pg 319

necessary. Section 41-F provides that maximum permissible threshold limits of exposure of chemical and toxic substance in manufacturing processes (whether hazardous or otherwise) in any factory shall be of the value indicated in the second schedule.³⁶

The Central Government may at any time for the purpose of giving effect to any scientific proof obtained from specialized institution or expert in the field by notification in the Official Gazette, make suitable change in the Second Schedule.³⁷ Section 41-G provides that the occupier shall in every factory where a hazardous process take place, or where hazardous substance are used or handled, set up a Safety Committee consisting of equal number of representation of workers and management to promote co-operation between the workers and the management in maintaining proper safety and health at work and to review periodically measures taken in that behalf.³⁸

Section 41-H contain the provision that the workers have right to bring to the notice of the occupier, agent, manager or the person in charge of the factory any imminent danger reasonably apprehended by them. In such a situation the person concerned must take remedial action without any delay to ensure security.

It sometime happens that workers engaged in manufacturing process in any factory contract occupational diseases the problem of occupational diseases due to air pollution in the workplace has been covered in a list of diseases notified in the Third Schedule of the Factories Act which has been substituted by the Amendment made in 1987.

The Central Government has been further empowered to add or alter the Schedule. It is the statutory duty of the Manager to send notice to the prescribed authorities if any worker contracts any diseases notified and the medical practitioner attending the patient is under duty to send report in writing without delay to the office of the Chief Inspector. If he fails to comply with this

³⁶ The Factories Act 1948

³⁷ Id. Section 41-F(2)

³⁸ Id. Section 41-G(1)

provision a fine up to one thousand rupees may be imposed under section 89 as amended in 1987.³⁹

Section 87 provides that where the State Government is of the opinion that any manufacturing process or operation carried on in a factory exposed any person employed in it to a serious risk of bodily injury, poisoning or disease, it may make rules applicable to any factory or class or description of factories in which manufacturing process or operation is carried on. The Rules should:

- (a) Specify the manufacture process or operation declaring it to be dangerous;
- (b) Prohibit, restrict the employment of women, adolescents or children in the manufacturing process or operation;
- (c) Provide for periodical medical examination of person employed or seeking to be employed in the manufacturing process or operation and prohibit the employment of person not certified as fit for such employment and requiring the payment by the occupier of the factory of fees for such medical examination;
- (d) Provide for protection of all person employed in the manufacturing process or operation or in the vicinity of the places where it is carried on;
- (e) Prohibit, restrict or control the use of any specified material or process in connection with the manufacturing process or operation;
- (f) Require the provision of additional welfare amenities and sanitary facilities and the supply of protective equipment and clothing, and laying down the standard thereof, having regard to the dangerous nature of the manufacture process or operation.

³⁹ V.G.Goswami: Labour and Industrial Laws(seventh edition) at Pg 358.

A new provision section 87-A confer powers upon the Inspector to prohibit employment on account of serious hazard. Under section 88-A,⁴⁰ it is provided that where in a factory any dangerous occurrence of such nature as may be prescribed occurs whether any bodily injury or disability or not, the manager of the factory shall send notice thereof to such authorities and in such form as within such time as may be prescribed. Section 90 authorises the State Government to direct inquiries regarding accident, causes of disease or any other occurrence, which is required to be notified. Section 90 also lays down procedure of such inquiries directed by the State Government.

Another new provision relating to safety and occupational surveys has been inserted by Act no. 94 of 1976⁴¹ which authorizes authorities specified therein to undertake safety and occupational health surveys in accordance with the provision of the section.

In order to make the compliance of the provision of the Act more effective penalties for offence has been laid under section 92 of the Act. For violation of any provision of the Act, rules made there under or by an order made under the Act the occupier and the Manager both shall be guilty of an offence and shall be punished with imprisonment up to two years or with fine up to one lakh rupees or both and with a further fine up to one thousand rupees if the violation is continued after conviction each day there after now for contravention of any provision of chapter IV or any rule made under section 87 resulting in an accident causing death or serious bodily injury, the minimum fine shall be rupees 25 thousand for death and 5 thousand rupees in case of an accident causing serious bodily injury.

The offences under the Act are not a part of general penal law but arise from the duty provided in a beneficial social defence legislation, which creates absolute or strict liability without proof of any mens rea. The offence are strict statutory offences the omission or commission of the statutory

⁴⁰ A provision inserted in 1976

⁴¹ The Factories Act 1948, section 91-A

breach is itself the offence.⁴² Seven Judges bench of the apex court in *R.S. Joshi vs. Ajit Mills Ltd*⁴³ observed :

“even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no fault liability but must be preceded by mens rea. The classical view that ‘no mens rea, no crimes’ has long ago been eroded and several law in India and abroad especially regarding economic crimes and departmental penalties, have created severe punishments even where the offence have defined to exclude mens rea.”

The rule of strict liability is attracted to offence committed under the Act and the occupier is held vicariously liable along with the Manager and the actual offender as the case may be. The ‘passing on’ is provided under section 101 of the Act and is an exception to the principal of strict liability. Section 101, enables the occupier or manager of the factory, to extricate himself from punishment by establishing that the actual offender is someone else, provided he can give satisfactory proof of the facts required by section 101(a) and (b).

Section 94 of the Act says that any person who has been convicted of any offence punishable under section 92, is again guilty of an offence involving a contravention of the some provision, he shall be punishable on a subsequent conviction with imprisonment for a term which may extend to three years or with fine which shall not be less than ten thousand rupees but which may extend to two lakh rupees or with both.⁴⁴

But the Court may for any adequate and special reasons to be mentioned in the judgement, impose a fine of less than (ten thousand rupees).⁴⁵ But where contravention of any provisions of chapter IV or any rule made there under or under section 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than (thirty-five thousand rupees) in

⁴² Supra note 39 at Pg 362

⁴³ AIR 1997 SC 2279 at 2287

⁴⁴ The Factories Act 1948 section 94(1)

⁴⁵ I, Proviso to section 94(1)

case of accident causing death and (ten thousand rupees) in the case of an accident causing serious bodily injury.⁴⁶

For the purpose of the sub section (1) no cognizance shall be taken for any conviction made more than two years before the commission of the offence for which the person is subsequently being convicted.⁴⁷

The penalty for willfully obstructing an Inspector from exercising any power conferred on him by and under this Act⁴⁸ is provided under section 95 and which shall be a punishment with imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.⁴⁹

Section 96 makes provision for wrongful disclosure of the results of such substance sent to the Government analyst for the purposes of analysis and report thereon. It provides that whoever, except in so far as it may be necessary for the purposes of a prosecution for any offence punishable under this Act publishes or discloses to any person the result of an analysis under section 91 of the Act, shall be punishable with imprisonment up to six months or with fine up to ten thousand rupees or with both.⁵⁰

Section 96-A has been inserted in 1987 to deal with the penalty for contravention of the provision of newly inserted sections 41-B, 42-C and 41-H. Section 41-B deals with the compulsory disclosure of information by the occupier, section 42-C lays down specific responsibility of the occupier to maintain accurate and up to date health records of the workers and Section 41-H speaks of statutory duty of the occupier etc. to take immediate remedial action if the workers bring to the notice of occupier, the imminent danger to their lives or health.

⁴⁶ II, Proviso to section 94(1)

⁴⁷ The Factories Act 1948 section 94(2)

⁴⁸ The Factories Act 1948

⁴⁹ Supra note 39 at Pg 364

⁵⁰ Ibid

Section 96-A provides: (1) whoever fails to comply with or contravenes any of the provisions of section 41-B, 42-C and 41-H or the rules made there under, shall in respect of such failure or contravention be punishable with imprisonment for a term which may extend to two lakh rupees, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for everyday during which such failure or contravention continues after the conviction for the first such failure or contravention.

(2) If the failure or contravention referred to in subsection (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term, which may extend to ten years.

The penalty here is expected to have deterrent effect after the aforementioned sections have been newly inserted. Besides in these provisions, there are power given to the court to make orders to the occupier or manager to take some measures as may be so specified within a period specified in the order (which the court may, if it thinks fit and on application in such behalf, from time to time extend) for remedying the matters in respect of which the occupiers or manager of a factory is convicted of an offence punishable under this Act.⁵¹

The Factories Act 1948 further provides that where an order is made under the aforesaid matter and the order of the court has not been complied with, the occupier or manager, as the case may be, shall be deemed to have committed a further offence, and may be sentenced therefore by the court to undergo imprisonment for a term which may extend to six months or to pay a fine which may extend to one hundred rupees for everyday after such expiry on which the order has not been complied with or both to undergo such imprisonment and to pay such fine as aforesaid.

Under section 105 it is provided that (1) No court shall take cognizance of any offence under this Act except on complaint by, or with the

⁵¹ The Factories Act 1948 section 102

previous sanction in writing of, an Inspector and (2) No court below that of a Presidency Magistrate or of a Magistrate of the first class shall try any offence punishable under this Act.

Thus after going through these provisions it become clear that there have been changes in law brought after the year 1987, but is the changes sufficient to check air pollution from one of its main roots i.e. the industries? As India is one of the ten most industrialised countries in the world, it should have an effective monitoring system to check air pollution caused by the industries. The Factories Act can nip the spreading of pollution from one of its sources. The industries must also undertake social responsibility to mitigate pollution levels. In order to have effective control more effective provision are required on the following aspects:

A cleaner technology must be insisted in order to avoid dust and fume in the factories, where such pollutants are creating occupational diseases. There should be frequent monitoring to check that compliance with the regulations enacted by the statute is done.

In *Consumer Education and Research Centre v Union of India*,⁵² the Supreme Court observed: The Government of India issued model rule 123-A under the Factories Act for adoption. Under the direction issued by this Court from time to time, all the State Government has by now amended their respective rules and adopted the same as part of it but still there are yawning gaps in their effective implementations in that behalf.....

These gaps are to be looked into and measures must be taken for effective implementations of the provisions of law. The lists of the industries involving hazardous process have the responsibility of maintaining threshold limits of exposures to chemical and toxic substances in manufacturing processes and according to section 41-F these industries shall maintain the threshold limit of the value indicated in the Second Schedule. As these industries may lead to serious pollutions, some effective agency must

⁵² AIR 1995 SC 922 at 942

regulate and have vigilance on whether there is compliance with the value in Second Schedule. Besides the procedure for maintaining of health record of the workers up to a minimum period of 40 years from the beginning of the employment or 15 years after retirement or cessation of employment whichever is later shall have to be strictly adhered to as per the direction of the Supreme Court. By these industries in order to protect the workers from health hazards and the authorities undertaking safety and occupational health surveys must develop integrated information from such industries and make proposals to curb the problem by new regulatory instruments. Public disclosure should be encouraged to draw the attention of the Government to take precaution beforehand.

Section 96 provides for the penalty for wrongfully disclosing result of analysis under section 91 of the Factories Act 1948. This provision thus intends to maintain secrecy. Implementation of the provision makes it difficult to assess the pollution-taking place in the workplace. The fragmentary data on factory emissions and poor monitoring of the compliance with regulations enacted by the Statutes creates an hindrance to achieve one of the object, of the Act i.e., a pollution free work place for employees and the people of the vicinity where the plant is commissioned and functioning. Therefore, there is a need felt for more stringent laws for preventions of industrial air pollution.

The problem of industrial noise may indirectly be covered within section 11 of the Factories Act which provides that the factory shall be kept clean and free from effluent arising from any drain, privy or other nuisance where in the noise, being act of nuisance may also be covered.

The problem of industrial noise can be included within chapter IV⁵³ of the Act, which relates to health hazards and problem of environmental pollution in industries. It authorizes the Appraisal Committee, duly appointed by the State to examine the application for establishment of factories involving

⁵³ Dealing with power of certain diseases about the workers working in factories

hazardous process. The hazardous process under section 2(C)⁵⁴ of the Act means any process or activity in relation to an industry specified in schedule I⁵⁵ of the Act which produce two result viz.- (a) material impairment to health of person engaged or connected there with, (b) problem of general environment. Thus if the manufacturing process of the industries is such which produce the noise, it is bound to cause aforesaid two results. Hence the problem of noise has not specifically been included within the aforesaid definition of hazardous process. Once the noise is included with this definition a responsibility of the employers would be under section 41-(B)(1)(2).⁵⁶ To intimate the Chief Inspector and the local authority all the information regarding the danger of noise along with other health hazards and the measures to overcome such hazards.

The Act creates the duty of the occupier of the factory for maintaining accurate and up-to date health records including medical care about the workers in factories. Such as periodical "audible test" of the workers should be properly maintained.

It may be pointed out that the employees should be protected from noise pollution by making some statutory provision in the industrial law. It is also very amusing that under section 35 of the Act, protection of eyes of an employee is given but protection of ears is nowhere given.

Thus after the aforesaid discussion it is clear that the Act should be amended in order to effectively deal with the hazards from industrial noise.

4.7. THE MINES ACT 1952

The existing Mines Act, which relates to the regulation and inspection of Mines, was passed in 1923. This Act has been amended in certain

⁵⁴ Dealing with the definition of "hazardous process"

⁵⁵ Dealing with the list of industries involving hazardous process

⁵⁶ Dealing with compulsory disclosure of information by occupier regarding the dangers to the health of the workers in hazardous process

respects and the Mines Act, 1952 was passed with a view to amending and consolidating the law relating to the regulating of labour and safety in mines. The Act does not contain stickiest provisions like the Factories Act 1948 that contains provision which are considered to be more liberal provisions.

The Act however has been affected by subsequent legislation⁵⁷ and the provisions mainly relate to (a) the removal of certain practical difficulties experienced in the enforcement, (b) provisions for additional safety regulations, (c) closure association of workers with safety measures, (d) provision for a minimum penalty in case of gross negligence or recklessness, and (e) increase in the levy of cess for administration of central rescue stations.

There are provisions similar to the provision relation to the safety and health of workers like the Factories Act. The Act also has provisions for the notice of certain diseases connected with mining operations such as silicosis; Pneumoconiosis, Manganese poisoning etc, as notified by the Central Government and measures to be taken by the authorities concerned.

Protection against environmental degradation due to mining is to some extent regulated by the Mines and Minerals (Regulation and Development) Act, 1957. Its purpose is to regulate mines and development of minerals. Section 4 of the Act prospecting or mining operations in any area, except under and in accordance with the terms and condition of a prospecting license or a mining lease granted to him under the Act and rules made there under.⁵⁸ The conditions for obtaining a Prospective license or mining are specifically dealt in section 5. The Act does not provide for refusing or canceling the certificate of approval. Prospecting licenses and mining leases are void and of no effect if granted, renewed or acquired in contravention of the provisions of the Act or any rules or orders made there under. Penalty provided is imprisonment as well as fine under section 21.⁵⁹ Further no court can take

⁵⁷ Act 42 of 1983

⁵⁸ Section 19, The Mines Act

⁵⁹ See Paras Diwan (ed), Harpal Kaur Walia, "Air Pollution: A study of Indian enactments", Environmental Administration: law and judicial attitude, p-231.

cognizance of any offence punishable under this Act except upon complaint in writing made by a person authorized in this behalf by the Central or the State Government.⁶⁰

The provisions are made for the regulations of industries and mines. The Act is silent to the problem of environmental pollution but under the Rules, powers of the Government are utilized to restore the abandoned mines and to prevent pollution.

The polluting of the atmosphere by dust particles and noise, during blasting of mines, does not have any preventive provisions under the Act. Some effective provisions are required to exercise greater control and vigil on mining operations. Public hearings by the recent regulations have been made mandatory procedure for the mining operation.

4.8. THE BOILER ACT 1923

The Indian Boiler Act was passed to secure uniformity throughout India in all technical matter connected with boiler regulation-e.g.-standard or construction maximum pressure and to insist on registration and regular inspection of all boiler throughout India to maintain safety measures and avoid accident caused by the use of boiler.

Therefore the Act provides provision for registration of boiler, penalties for illegal use of boiler and provision for inspection by Chief Inspector, Deputy Chief Inspector and Inspectors. The penalties under the Act for violation of its provisions are minor. The increase in industrialization of the country in recent year has rendered the use of boiler of higher pressure and capacities inscrutable and the existing Act regulation are not quite adequate to meet the present day requirement. This is evident from some cases where the boilers are installed without considering environmental consequences.

⁶⁰ Ibid.

In an important case *Krishna Gopal vs. State of M.P.*⁶¹ a glucose saline factory obtained license to operate in residential area. The public authorities namely the Joint Director of Town and Country Planning Municipal Corporation and Chief Inspectors of Boilers, had given their approval for installation of the factory including boiler without considering objection from the local residents and the relevant factories that might help than to make a sound environmental decision. The boiler boomed round 12 O'clock at night and emitted smoke and ash and disturbed the sleep of a heart patient living next door. The Sub-Divisional Magistrate on getting a police report and taking evidence invoked section 133 of The Code of Criminal Procedure and passed an order for removal of the factory as well as boiler from the area. On Appeal the Sessions Judge held that only the boiler need to be removed. On Revision the High Court ordered removal of both the factory and boiler endorsing the order of the Sub-Divisional Magistrate.⁶²

The Court extended remedial measures and made the following observation: "Manufacturing of the medicines in a residential locality with the aid of installation of a boiler resulting in emission of smoke there from is undoubtedly injurious to health as well as the physical comfort of the Community."⁶³

Therefore the permission granting agencies should given due consideration, the views of the local public apply whether small or big, to decide the issue on environmental criteria *Krishna Gopal* shows the total apathy and indifference of the authorities in this respect.⁶⁴

Certain stringent provision are required to be implemented to meet the present day requirement especially in the matters and should have

⁶¹ (1986) Cr.L.J 396

⁶² Leela Krishnan P. : Law of public nuisance: A tool for environmental protection: JILI Vol 28:2 1986 at 229

⁶³ Supra note 61 at 399

⁶⁴ Supra note 62 at 230

adequate turning on environmental matters and should be required to have clear ability to comprehend the environmental criteria on which decisions are to be based.

4.9. THE INSECTICIDES ACT 1968

The Insecticides Act 1968 was brought into force with effect from 1st August 1971 with a view to regulate the import, manufacture, sale, transport, distribution and use of insecticides in order to prevent risk to human being or animal and for matter connected therewith. The Act deals with the provision for sale, distribution or use of insecticides in general and also prohibits the sale, distribution and use of insecticides without being registered or without license,⁶⁵ for reasons of public safety. The provision for registration,⁶⁶ Registration Committee⁶⁷ and other Committee⁶⁸ along with the establishment of Central Insecticide Board⁶⁹ and Central Insecticide Laboratory⁷⁰ are provided under the Act for the purpose of granting certificate of registration to persons desiring to import or manufacture insecticide.⁷¹ The Act provides for regulation of transport and storage of insecticide so as to prevent cases of accidental contamination of food with insecticides.

The provision for sale distributions or use of insecticides in general is ordinarily dealt with registration under section 9 of the Act. If after registration under Insecticides Act, the insecticides and chemical are found hazardous to health, the Central Government can exercise its power for cancellation certificate of registration under section 27(2) only in respect of any

⁶⁵ The Insecticides Act 1968, Section 18

⁶⁶ Id, Section 9

⁶⁷ Id, Section 5

⁶⁸ Id, Section 6

⁶⁹ Id, Section 4

⁷⁰ Id, Section 16

⁷¹ The Insecticides Act 1968

insecticides specified in sub clause (iii) of clause (e) of section 3 i.e. preparation or formulation of one or more of the substance specified in the Schedule, but the said power cannot be exercised in respect of any insecticides which is specified in the Schedule itself by the Parliament. In *Ashok vs. Union of India*,⁷² while upholding the decision the Supreme Court observed:

“Once a substance is specified in the Schedule as contemplated under section 3 (c) (i) then there is no power for canceling the registration certificate issued in respect of the same substance even if on scientific study it appears that the substance in question is grossly detrimental to the human health. This is the lacuna in the legislation itself, and therefore, steps should be taken for appropriate amendment to the legislation.”

The Act provides for the constitution of a Registration Committee under section 5. The Central Insecticides Board under section 4 and provision for appointments of other committees by the Board under section 6. There is provision for appointment of licensing officers by the State Government under section 12 of the Insecticides Act 1968. The Registration Committee will mainly scrutinize the formulae of the insecticides and verify the claims made by the importer or the manufacturer, as the case may be as regards the efficacy and safety of the insecticides to human beings and animal for granting the certificate of registration.

The Act also prohibits the sale, distribution and use of insecticides without obtaining certificate of registration under the Act or without obtaining license or for reason of public safety as provided under section 18 of the Insecticides Act 1968. Section 17 of the Act prohibits the import or manufacture of any misbranded insecticide, these provision help in checking poisoning or pollution of the environment by insecticides having higher toxicity. Beside section 25 lays down the provision for confiscation of

⁷² AIR 1997 SC 2298 at 2306

the stock of the insecticide in respect of which any person has been convicted for contravening any of the provision of this Act or rules made there under.

The Act also lay down provision for appointment of insecticide analyst under section 19 and Insecticide Inspector,⁷³ powers of Insecticide Inspector⁷⁴ and the procedure to be followed by Insecticide Inspector.⁷⁵

Penal action in the form of fine and imprisonment is provided under section 29, for any person contravening and provision of the Insecticides Act or any rule made there under or for importing manufacturing or selling or distributing any insecticides deemed to be misbranded importing or manufacturing without certificate of registration, without license or in contravention of section 27 or whoever obstructs the Insecticide Inspector shall for the first offence be punishable with imprisonment for a term which may extend to two years or with fine which shall be not less than ten thousand rupees but may extend to fifty thousand rupees or both. For second and subsequent offence with imprisonments which may extended for a term of three years or with fine which shall not be less than fifteen thousand rupees or both.

Section 36 of the Insecticides Act empowers the Central Government to make rule after consultation with the Board for the purpose of giving effect to the provisions of the Insecticides Act 1968. In exercise of this power, the Central Government has made the Insecticide rule 1971.

Transport and storage of insecticides and provision regarding protective clothing equipment and other facilities for workers during manufacture etc. of insecticides have been provided in the subsequent chapters. The last chapter deals with the rule relating to the miscellaneous provision.

These provisions can be applied to check the poisoning of the atmosphere by the use of toxic chemical like insecticides. Only those insecticides, which are environment friendly, need to be registered and those

⁷³ The Insecticides Act, 1968 section 20

⁷⁴ Supra note 73, section 21

⁷⁵ Supra note 73, section 22

that vitiate the atmosphere by exceeding the maximum permissible values need to be checked.

The Act is still not without lacuna as evident from some of the rule⁷⁶ laid down for e.g. the insecticides manufactured are at times extremely toxic and may result to the poisoning of atmosphere during transit. Under rule 35 (4) the transport agency shall be responsible to take measures urgently to prevent poisoning and pollutions of soil and water if any insecticides is found to have taken but the provision does not mention about the poisoning or pollution of air, which might cause health hazard due to inhalation if leakage occurs.

There are other precautionary provision provided under the rule for first ad-measure, protect clothing equipment and other facilities during manufacture etc of insecticides. Under rule 41 of the Act the manufacturer are required to keep sufficient quantities of antidotes and first aid medicines to treat poisoning cases arising from inhalation, skin contamination, eye contamination and swallowing.

These are provision laid down under rule 10(3A) for pest control operation where the person desires to undertake pest control operation with the use of aluminum phosphate, methyl bromide, ethylene dibromide or as notified shall apply for grant of license for undertaking pest control operation. Any person applying for pest control operation should be at least graduate in agriculture or in science with chemistry as a subject with a certificate minimum 15 days training from institute mention under the rule. For under taking fumigation the operator has to obtain special permission from the plant protection adviser to the Government of India to addition to license similar provision are provided for the commercial pest control operators. These measures are required to be ad heard to avoid environmental hazards. Rule 42 also provides for the training of worker to be arranged by manufacturers and distributors of insecticides in observing safety equipment provided to them the

⁷⁶ The Insecticides Rules, 1971

workers also should be educated regarding effect of poisoning and the first aid treatment to be given.⁷⁷

To check the hazards caused due to aerial application of insecticides certain precautions have been provided under rule 43,⁷⁸ aerial application of insecticide shall be subject to the following provision namely:-

- (a) Marking of the area shall be responsibility of the operators.
- (b) The operator shall use only approved insecticide and their formulation at approved concentration and height;
- (c) Washing decontamination and first aid facilities shall be provided by the operation;
- (d) All aerial operation shall be notified to the public at least twenty-four hours in advance through competent authorities;
- (e) Animals and person not connected with the operation shall be prevented from entering such areas for a specific period; and
- (f) The pilot shall undergo specialized training including clinical effect of the insecticides.

For preventing inhalation of the toxic dusts vapors or gases, the worker shall use any of the following types of respirators or gas masks suitable for the purpose, namely

- (a) Chemical-cartridge respirator;
- (b) Supplied-air respirator;
- (c) Demand flow type respirator;
- (d) Full face or half face gas masks with canister.

It is provided that in no cases the concentrates of insecticides in the air where the insecticides are mined exceed the maximum permissible value.

The rule provides the provision for segregation and disposal of date expired pesticide in an environment friendly manner as may be

⁷⁷ Ibid

⁷⁸ Supra note 76 rule 38

specified from time to time by the Central Government in consultation with the State Insecticides Board and all such stock shall not be used for remanufacture. Under rule 44 it is provided that it shall be the duty of the manufacturers, formulators of insecticides and operator to dispose packages or surplus materials washing in a safe manner so as to prevent environmental or water pollution.

Rule 37 provide for the medical examination of all person, who are engaged in the work of handling dealing or otherwise coming in contact with the insecticide during manufacture or formulation of insecticides being engaged in spraying during operation and rule 36 lays down condition for storage of insecticides separate rooms or premises to avoid contamination with other articles. The room or premises meant for storing insecticides shall be well built, dry, well lit and ventilated and of sufficient dimension.

Use of pesticide in order to achieve self-sufficiency in food grain, commercial crops and other agricultural product was felt in the twentieth century in our country. Abundant use of insecticides and chemicals in protecting the food grains and in increasing the agricultural production will bring insurmountable hazard to the countrymen. In most of the developed countries the use of hard pesticides on agricultural crops has been banned or restricted and other pest control programmed are adopted in order to maintain ecosystem and check global atmosphere pollution. But the developing countries are still using these pesticides without caring for side effect on environment. To check these maladies what is essential for the Government of India is to have a co-ordinate and sustained effort. In this age of computerization and interlinking of the countries through Internet it does not take more than a couple of minutes to gather the necessary information in respect of any particular insecticides or pesticide and now such commodities have been dealt with in other advanced countries. What is really essential is a genuine will on the part of the administrative machinery and a conjoined effort of all the ministries concerned.

Therefore effective measures have to be taken to prohibit the manufacture of such insecticides and pesticides in our country when its

deleterious effect on human health is alarming. In this regard the Supreme Court in *Ashok vs. Union of India*,⁷⁹ has made the following observation:

One thing is absolutely clear that in this country there has not been much study and research on the harmful effect of several such chemical and pesticides. There is no co-ordinate organization and the lack of co-ordination between different ministries of the Government who deal with different chemical and pesticides make the people of this country suffer it may be true that several such insecticides and chemical may be required in certain contingency when epidemic like plague and dengue break. But that cannot be ground for allowing the industrialist to manufacture such commodity when it is established that the use of commodity is grossly detrimental to human health. Take for example an insecticide called DDT. It acts as nerve poison paralyzing insects. DDT is residual poison that retains its effectiveness in a sprayed area for week although it may persist in the area for years.

After detailed discussion it becomes clear that the legal provision for regulating the manufacture and use of insecticides has been framed but the Act becomes ineffective until and unless proper step are taken to check the maladies caused by using pesticides without caring for side effect on environment. The Central Government has set-up the Pesticides Environment Pollution Advisory Board in the Ministry of Agriculture to review from time to time the environment repercussion and to suggest measure wherever necessary. This committee is required to work effectively to take suitable measure to check contamination of water and air by the use of pesticides because people can avoid large doses of insecticides but it is impossible to avoid exposure to contaminants in food, in the air and in the drinking water.

⁷⁹ AIR 1997 SC 2298 at 2303

4.10. THE INDUSTRIES (DEVELOPMENT AND REGULATION) ACT, 1951

This Act provides for the development and regulation of certain industries through licensing. The Central Government is empowered to make rule for regulating the production and development of the industries mentioned in the Schedule and for consulting with provincial government on these matter under this Act. Section 5 of the Act also provides the constitution of a Central Advisory Council, prior consultation with which is obligatory before the Central Government takes certain measure such as the revocation of a license or taking over the control and management of any industrial concern. It is important to note that under the Act the burden of proof lies on the polluter and note on the prosecution as can be seen from section 28, which runs: "where any person prosecuted for contravening any order made under section 18-G which prohibits him from doing an Act without a permit.....The burden of proving that unless he has such authority, permit shall be on him."⁸⁰

It may be pointed that the Industries (Development and Regulation) Act as such makes no direct or indirect reference to environment. Under the Act the planning of future development on sound and balanced lines is sought to be achieved by the licensing of all new undertakings by the Central Government. The imposing condition for issue of license can be stretched to serve the cause to environment [section 11(2)].⁸¹

4.11. THE ATOMIC ENERGY ACT, 1962

The Atomic Energy Act⁸² provides for the development control and use of Atomic Energy for the welfare of the people of India and for other peaceful purposes and for matter connected there with.

⁸⁰ Harpal Kaur Walia, Air Pollution: A study of the Indian enactment, published in Environment Administration Law and Judicial Attitude(Edited by Paras Diwan),pg 230.

⁸¹ Ibid

⁸² 1962 (33 of 1962)

In order to prevent radiation hazards from radioactive substance or radiation generating plant the Act empowers the Central Government⁸³ to provide control over radioactive substance or radiation generating plant in order to-

- (i) Prevent radiation hazards;
- (ii) Secure public safety of person handling radioactive substance or radiation generating

Plant;

- (iii) Ensure safe disposal of radioactive wastes.

To control radiation hazards section 15 empowers the Central Government with the right requiring that any substance containing uranium and plutonium or any their isotopes shall be delivered to the Government. The intention is to exact uranium plutonium or any of their isotopes not only because they are essential to the atomic energy programmed but also because they are strategic materials which have military potentialities and which constitute a radiation hazard. For similar reason the Central Government prohibits the manufacture possession use transfer by sale or otherwise export in any energy transport and disposal of any radioactive substance without its written consent.

The Act provides special provision for safety under section 17 of the Act. This section enable the Central Government to make rule to ensure that safety measure are taken in handling radioactive substance wherever they are manufactured produced mined treated stored transported or used.

The principle relating to payment of compensation where it is payable under this Act has been laid down under section 21. The relation protection rules 1971 are framed by the Central Government for providing further protection from hazards caused by radiation.

One widely publicized case⁸⁴ decided by the Supreme Court involved imported Irish butter that was alleged to have been contaminated by

⁸³ Section 3(c)

⁸⁴ *Dr Shivrao Shantaram Wagla vs. Union of India* AIR 1988 SC 952

the radioactive fall out from the Chernobyl (USSR) nuclear disaster. A three-person committee of expert was formed to determine whether the butter was safe for human consumption. The expert committee concluded that the butter was indeed safe. The Supreme Court relied on opinion of experts and the Atomic Energy Regulatory Board (AERB) and rejected the petitioners challenge and permitted distribution of the imported butter.

Another petition was brought by Union representing employees at Bharat Electronics, a public sector company, alleging that the company had failed to adequately protect the health and safety of workers who were exposed the x-ray radiation in the course of their work. In this case the employers the Bharat Electronics was directed to strictly comply with the safety rules and undertake various measure such as film badges indicator for radioactive levels primary and secondary lead shields, electrical inter locking devices etc and the Union Government was directed to carry bi-annual checks of safety devices.⁸⁵

The Court also required that the company should specially insure each exposed worker for Rs. One lakh and each exposed officer for Rs. Two lakh. However the Court while delivering the judgment found no proof of injury and therefore no entitlement of damages was directed at this stage.⁸⁶

Although decision in the above case have considered low levels radioactivity harmless but no one knows whether low-level radioactivity are in fact harmless. The decision of *Sharma vs. Bharat Electronics*⁸⁷ has imposed responsibility to compensate worker in event of further proof of injury resulting from present continuing employment. This is significant gain for workers. The implementation of occupational and health safety policies would restrict the atmosphere from being contaminated by the radioactive substance although it would not render total check on the hazards.

⁸⁵ AIR 1987 SC 1792.

⁸⁶ Ibid

⁸⁷ Ibid

4.12. THE EXPLOSIVE ACT, 1884

The main object of the Indian Explosive Act, 1884 is to protect the public against the dangerous nature of explosives. The Act is enacted to regulate the manufacture, possession, use, sale, transport, import and export of explosive.

Explosive as defined under section 4(d) of the Act⁸⁸ means gunpowder, nitroglycerine, nitroglycol, gun cotton, dinitro-toluene, tri-nitro-toluene, picric acid, di-nitro phenol, tri-nitro-resorcinol (styphnic acid), cyclo-trimethylene-tri-nitramine, penta-trythritol-tetranitrate, tetryl, nitro-guanidine, lead azide, lead styphynatè, fulminate of mercury or any other metal, diazo-dinitrophenol, coloured fires or any other substance whether a single chemical compound or a mixture of substances, whether solid or liquid or gaseous used or manufactured with a view to produce a practical effect by explosion or pyrotechnic effect; and includes fogssignals, fireworks, fuses, rockets, percussion-caps, detonators, cartridges, ammunition of all descriptions and every adaptation or preparation of an explosive as defined in this clause.

Under section 5 of the Act Central Government have been empowered to make rules as to licensing of the manufacture, possession, use, sale, transport and importation of explosives. Section 6 empowers the Central Government to prohibit the manufacture, possession and importation of any explosive which is so dangerous a character that, in the opinion of the Central Government its prohibitions are required for public safety.

Under the Act section 6C lays down the provisions for refusal of license in respect of any prohibited explosive⁸⁹ or where the license is required by a person whom the licensing authority has reason to believe to be prohibited by this Act⁹⁰ and the licensing authority can refuse licenses where

⁸⁸ The Explosive Act, 1884

⁸⁹ Section 6C (a), The Explosive Act, 1884

⁹⁰ Section 6C (b), The Explosive Act, 1884

the licensing authority deems it necessary for the security of the public peace or for public safety. This provision can be applied also to serve the cause of environment where the explosive is harmful for public.

4.13. Code of Civil Procedure, 1908

The Code of Civil Procedure is enacted to consolidate and amend laws relating to procedure of courts of the civil judicature. Generally the CPC contains procedural law, but it also contains some specific provisions of Substantive law. Resources like land, air, water and vegetation are the property of the public or State. The State or members of public in their representative capacity may approach Civil Court under this Code to seek relief against polluters of these resources. The Court may grant temporary or permanent injunction against the polluters.

Section 9 of the Code of Civil Procedure states that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

A civil action by the Advocate General or by two or more members of the public with permission of the court, for a declaration, an injunction, or both can be obtained under section 91 of the Code of Civil Procedure as a remedy for public nuisance. In the absence of special damage this is the only available civil remedy. A private action can be maintained against a public nuisance where the plaintiff has suffered particular damage beyond that suffered by all the other persons affected by the nuisance.

A plaintiff in a tort action may sue for damages or an injunction, or both. An injunction is a judicial process where a person who has infringed, or is about to infringe the rights of another, is restrained from pursuing such acts. An injunction may take either a negative or a positive form. It may require a party to refrain from doing a particular thing or to do a particular thing. Injunctions are granted at the discretion of the court.

Injunctions are of two kinds, temporary and perpetual. The purpose of a temporary injunction is to maintain the state of things at a given date until trial on the merits. It is regulated by sections 94 and 95 as well as Order 39 of the

Code of Civil Procedure of 1908. It may be granted on an interlocutory application⁹¹ at any stage of a suit. It remains in force until the disposal of the suit or until further orders of the court.

Rule 1 of Order 39 provides that temporary injunctions may be granted where it is proved:

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution, of a decree, or
- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors, or
- (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit...

The grant or refusal of a temporary injunction is governed by three well-established principles: (1) the existence of a *prima facie* case (a showing on the facts that the plaintiff is very likely to succeed in the suit); (2) the likelihood of irreparable injury (an injury that cannot be adequately compensated for in damages) if the injunction is refused; and (3) that the balance of convenience requires the issue of the injunction.

4.14. Specific Relief Act of 1963

Sections 37 to 42 of the Specific Relief Act of 1963 regulate perpetual injunctions. A perpetual injunction permanently restrains the defendant from doing the act complained of. It is granted at a court's discretion after judging the merits of the suit. A perpetual injunction is intended to protect the plaintiff indefinitely (so that he or she need not resort to successive actions in respect of every infringement), assuming that the circumstances of the case remain essentially unchanged.

⁹¹ An application made between the commencement and end of a suit.

SPECIAL LEGISLATIVE PROVISIONS

The environmental law appears to be a recent invention, but it is not a sudden creation. The references to various aspects of environment have been a tradition of Indian society. Worshipping nature as deity and revering the earth as mother shows the kind of conservation ethics that comes to us through our history, culture, religion and Vedic philosophy. There are certain general enactments, which provide provision for the prevention and control of environment pollution. Some of the general legislation where provision for environment protection may be traced are The Indian Penal Code 1860, The Criminal Procedure Code 1973, The Police Act 1861, The Easement Act etc. However, these codified laws have been typical of British Administrative System and may be regarded as Colonial vintage.

The United Nations Conference on Human Environment at Stockholm in June 1972 is a watershed in the history of environment policy-making in several nations who participated in the Conference. India being a signatory in the Conference was the only Country to include the policy of environment protection in its national Constitution. India has also witnessed the enactment of several legislations on environment. Among the Special legislation on environment the following legislations are dealing with air pollution: -

- 1] The Air (Prevention and Control of Pollution) Act, 1981 and Rules.
- 2] The Environment (Protection) Act, 1986 and Rules.
- 3] The Motor Vehicles Act, 1988 and Rules.

The Environment (Protection) Act mentioned above was enacted as a response to a widely felt need for a general legislation for environment protection. It is an umbrella legislation which was enacted to assume a lead role for studying, planning and implementing long term requirements of environment safety and to give direction to and co-ordinate a system of speedy and adequate response to emergency situations threatening the environment. Primarily, all power under this Act vest with the Central Government and the authorities constituted by the Central Government.¹ These include the power to take measures to protect and improve environment, power to lay down the standards of quality of air, water or soil for various purposes and areas, the maximum allowable limits of concentration of various environmental pollutants, prohibition and restrictions on location of industries. The Central Government also has the authority to make rule in exercise of any or all of these powers.² It is under the powers so delegated under the Environment Protection Act that the Central Government came up with the following Rules:

- 1] Noise Pollution (Regulation and Control) Rules, 2000.
- 2] Ozone Depleting Substances (Regulation and Control) Rules 2000.
- 3] Hazardous Wastes (Management and Handling) Rules;
- 4] Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989;
- 5] Hazardous Micro-organisms Rules, 1989;
- 6] Bio-Medical Waste (Management and Handling) Rules, 1998;
- 7] Municipal Solid Wastes (Management and Handling) Rules, 2000;
- 8] Environmental (Siting for Industrial Projects) Rules, 1999.

The portions relevant to Air Pollution under this Act shall be studied hereunder.

¹Section 3 (3) and 23

²Sections 6 and 25

5.1. The Air (Prevention and Control of Pollution) Act 1981

The environmental degradation is a result of modern technological development. Rapid industrialization and urbanization has affected nature's equilibrium. Besides poverty and population has also contributed to make the problem acute day by day in India. The alarming situation may be referred to the increasing ration of Carbon dioxide in the environment the depletion of Ozone layer and the global warning of atmosphere.

The early enactments were mostly colonial vintage and piecemeal legislations. These legislation did not have effective provisions of Indian Penal Code, 1860, Code of Criminal Procedure 1998, only some legal providing relating to the instances of essence had tooth and nail, but did not have comprehensive legislation to deal with the problem of air pollution.

The pressing problem of air pollution and to fulfill the obligation of parliament, which arose due to the resolution, passed at United Nation conference on Human Environment at Stockholm in June 1972 in which India was a signatory, led to the enactment of the Air (Prevention and Counter of Pollution) Act of 1981. Involving the Central Government's power under Article 253 to make laws implementing decisions taken at International Conference passed the Act. Although a Central Statute, executive functions under the Air Act are carried out in the states by State pollution Control Boards. This delegation of executive functions is permitted by Act 258 (2) of the Constitution. Act 258 (3) requires the Central Government to compensate the states for the post of carrying out these delegated functions.

The Air Act of 1981, as amended in 1987, contains several interesting features, which shall be discussed hereunder. This Act is applicable to the whole of India. The Act aims to achieve the following goals:

- (i) To provide for the prevention, control and abatement air pollution.
- (ii) to establish Boards for carrying out the abovementioned purposes;

- (iii) to confer on and assign to such Boards powers and functions relating their to; and
- (iv) to lay down standards to maintain the quality of air.

5.1.(i).Air Pollution: Definition and Causes

The Act defines "air pollutant" under section 2 (a). The term "air pollutant" means any solid, liquid or gaseous substance [(including noise)]³ Present the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment Sec 2(b) defines "air pollution" as it means the presence in the atmosphere of any air pollutant. Therefore, if the concentration of any substance on element in air to more than a certain value, it may appeal man, living creative and property, directly or indirectly may be termed as air pollution. The definition does not provide for the standard for the quality of air on the rules on which a person would embalm upon to ascertain the standard Para. The definition puts stress on two things (i) the high concentration of solid liquid or gaseous substance including sound at a very high pitch (known as noise) and (ii) the substance should tend to be injurious to human beings, flora, fauna, property or environment. Therefore, small quantities of pollutant as it is considered to be within the permissible are tolerable limit under the Act. It is interesting to note than most pollutant which are released in permissible limit to considered not to be deleterious or injurious to the health of human beings, fauna, flora, property or environment and keeping it in mind the legislation endeavors to maintain pollution only to outdoors i.e. ambient air Unfortunately it is seen that most of the people spend more than 90% time indoors in their homes, educational institutions, officers and theatres. Thus, fumes in kitchen smoking, in closed office rooms, malodorous emissions in an auditorium etc. are not covered under the definition of air pollution. Studies show that schools have problems lined to indoor air quality. Students are at greater risk because of

³ wef, 1.4. 1998

the hours spent in School facilities and because children are especially susceptible to pollutants. Common indoor plants may provide a valuable weapon in the fight against rising level of indoor air pollution. Those plants in the office or home are not only decorative, but scientists are finding them sweepingly useful in absorbing potentially harmful gases and cleaning the air inside modern building. There are other combination of factors (building design/energy conservation features, operating decision and maintenance procedures), coupled with a vast kind of contaminant sources found in modern buildings. Air conditioners and refrigerators are also the source of ozone depleting pollutants the CFCs. They cause many air borne diseases which frequently creates conditions in which contaminant are concentrated and inhaled by occupants. Indoor Air Quality (IAQ) complaint range from relatively minor complaints to debilitating respiratory diseases and even death. Nowhere are these problems more acute than in hospitals. ⁴These problems have not created any concern in the legislation of the Air Act. The studies by the National Institute of Occupational safety and Health have shown that more than 50 percent of the IAQ complaints can be related to various ventilation system problems that may divided into three categories: design, operation and maintenance. In India, the Factories Act⁵ covers the IAQ in workplace relating to industrial workers, but some steps through legislation should be taken for the other places where there is several Indoor Air pollution. There may be rules framed directing the municipal corporations and other authorities to look into this aspect when the administrative authorities that have been entrusted with the duty of passing the building plans. In order to have a pro active air quality monitoring programme to prevent Indoor Air Quality. The building plan should be permitted by keeping in mind the pure zone approach to indoor air quality which includes the following steps:

1. Provide adequate outdoor air while recovering minimum energy.

⁴ Purohit Kakruni, Air Environment and Pollution agrobios india at pg 144,130

⁵ Under chapter 4

2. Deliver proper mixture of percolated and fresh air to meet occupant requirement
3. Distribute air within spaces to insure proper air movement and eliminate stagnation and stratification.

Along with the aforesaid measures, some more air pollution monitoring programmed should be undertaken to reduce indoor air pollution and create general awareness among public. Public must be encouraged to avoid smoking as far as practicable, in closed rooms, should be encouraged. Use of Bleaching powder on cockroaches, because it is effective harmless to human being and rest, avoid spraying of pesticides or any type of aerosol in the house because children below the age of 5 years are easy victims of pesticide poisoning. Children's room and bed room, colour T.V. should be viewed eight feet away from the place of location, Air Conditioners and refrigerators should be checked to avoid leakage of CFC, Dry-cleaned clothes should be aired thoroughly outside the house before wearing or hanging in wardrobes. Stoves (kerosene/gas) should get regularly checked, paint and distemper on wall should be free from pesticide or fungicide. While using hair sprays eyes and mouth should be covered to check indoor pollution⁶. The issue of Indoor Air Quality is relatively recent, but is a matter that should receive considerable attention in India, in areas where there is rapid industrialization and urbanization. Not only the Urban Areas some planning is required in villages where people recede in sub human condition. The tendency to legislate only after crises like Bhopal takes place must be given up and some steps should be taken before there is rise in building related illness and other health hazards.

An analysis of air pollution clarifies that the problem of noise was also covered within the definition of air pollutants by subsequent amendment It suggests that besides substance sound the propagation of pressure wave has been included to Air pollutants. Include the exposure to radiations from radioactive substances causing health hazards presence of hazardous

⁶Supra note 3

microorganisms in the atmosphere causing harm to the Human beings fauna or flora and property needs to be included in the definition although the rules regulate it were issued under the Environment Protection Act. These need to be included as air pollutant to have a comprehensive definition. The other main definitions of the Act as follows:

(i) 'Emission according to the Act means 'any solid or liquid or gaseous substance coming out of chimney, duct or flue or any other outlet. (Section 2 'j')

(ii) 'Approved appliance according to sec 2 (c) has been defined to mean 'any equipment or gadget used for bringing of any combustible material or for generating or conceding any fume, gas or particulate matter and approved by the State Board for the purpose of this Act.'

(iii) 'Approved fuel has been defined under Sec 2 (d) as any fuel approved by the State Board for the purpose of this Act and

(iv) An 'automobile,' according to Sec 2(c) of the Air Act, means 'any vehicle powered either by internal combustion engine or by any method of generating power to drive such vehicle by burning fuel.'

(v) "Chimney" includes any structure with an opening or outlet from or through which any air pollutant may be emitted as defined under Sec 2(h) of the Act.

(vi) "Industrial plant" under 2 (I) means any plant used for any industrial or trade purposes and emitting may air pollutant into the atmosphere.

(vii) "Occupier", according to Sec 2 (m), in relation to any factory or premises, means the person who has controlled over the affairs of the factory or the premises, and include in relation to any substance, the person in possession of the substance.

Therefore the legal definition of air pollutant is the presence in the atmosphere (outdoors) any substances or contaminants put there by man in quantities or concentration⁷ and of duration as to cause any discomfort to of

⁷ Standards are prescribed in respect of noise emission of smoke vapour and such other things in environment

the inhabitants of a locality or which are injurious to public health or safety of human plant or animal life or property.

5.1.(ii).Authority of the Board under the Air Act.

The Air Pollution Control legislation envisage the setting up of Air Pollution Controlled Boards at Centre as well as in the state for the prevention and control of Air Pollution Chapter II, which runs from section 3 to 15, provides for the Constitution of a Board, qualification of its members, terms and conditions of their services, meetings, vacation of seats and temporary association of persons with the Board, etc. Section 3 empowers the Central Board for the Prevention and control of water (Prevention and control of pollution) Act, 1974 to exercise the powers and perform functions of the Central Board for the prevention and Control of Air pollution under this Act. This provision of the Act envisages an integrated approach for tackling the environmental pollution problems. Section 4 provides that the State Boards for the prevention and control of water pollution under the Water (prevention and control of pollution) Act, 1974, shall also exercise the powers and perform functions of State Boards for the prevention and control of air pollution under this Act.

The provision for the constitution of a state board for controlling air pollution for such State which do not have State Board for the prevention and control of water pollution under the water (Prevention and control of pollution/ Act 1974, have been provided⁸ under section 5. The section under sub section (2) further provides the state Board shall consist of the following members, namely:

- (a) a chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection, to be nominated by the State Government provided that the chairman may either whole time or part-time as the State Government may think fit.

⁸ Under section 5 of Air (Prevention and Control of Pollution) Act, 1981

(b) such number of officials, not exceeding five as the State Government may think fit, to be nominated by the State Government to represent that government.

(c) such number of persons, not exceeding five, as the State Government may think fit, to be nominated by the State Government from amongst the numbers of local authorities functioning within the State.

(d) such number of non-officials, not exceeding three, as the State Government may think fit to be nominated by the State Government to represent the interests of agriculture, history or industry or trade or labor or any other interest, which in the opinion of that Government, ought to be represented.

(e) two persons to represent the companies or corporations owned, controlled or managed by the State Government, to be nominated by that Government.

(f) a full-time number-secretary having such qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control as may be prescribed, to be appointed by the State Government.

Provided that the State Government shall ensure that not less than two of the members are persons having special knowledge or practical experience in respect of matters relating to the improvement of the quality of air or the prevention, control or abatement of air pollution.

Every State Board constituted under this Act shall be a body corporate with the name specified by the State Government in the notification issued under sub section (1) having perpetual succession and Common Seal with power, subject to provisions of this Act, to acquire and dispose of property and to contract, and may by the said name sue or be sued⁹. Thus, the Board has been declared as a 'legal person' under the Air Act.

The Air (Prevention and Control of Pollution) Rules 1987, was enacted by the Central Government in consultation with the Central Board for the Prevention and Control of water pollution in exercise of the powers conferred

⁹ Sec 5, Sub Sec (3)

by Sec 53¹⁰ of the Air (Prevention and Control of Pollution) Act, 1981. The rules provide the procedure for transaction of business of the Board and its Committees under Chapter II and the other rules for budget of the Central Board, Annual Report has also been provided under the rules. The Act¹¹ further provides that the Central Board shall also exercise the power and functions of State Boards in Union Territories; or it may delegate such powers and functions to any person or body of persons as the Central Government may specify¹².

The terms and Conditions of service of members is provided under Section 7 of the Act. This section runs as follows: -

(1) Save as otherwise provided by or under this Act, a member of a State Board constituted under this Act, other than the member secretary shall hold office for a term of three years from the date on which his nomination is notified in the official Gazettes;

Provided that a member shall, notwithstanding expiration of his term, continue to hold office until his successor enters upon his office.

(2) The term of office of a member of a State Board constituted under this Act and nominated under cl (b) or cl (e) of Sub section (2) of Section 5, shall come to an end as soon as he ceases to hold the office under the State Government or, as the case may be, the company or corporation owned, controlled or managed by the State Government, by virtue of which he was nominated.

(3) A member of a State Board constituted under this Act, other than the member-secretary, may at any time resign his office by writing under his hand addressed,

(a) in the case of Chairman, to the State Government, and

(b) in any other case to the Chairman of the State Board, and the seat of the chairman or such other member shall thereupon become vacant.

¹⁰ This sec empowers the Central Government to make rules.

¹¹ The Air (Prevention and Control of Pollution) Act 1981.

¹² Section 6.

(4) A member of a State Board constituted under this Act, other than member-secretary, shall be deemed to have vacated his seat, if he is absent without reason, sufficient in the opinion of the State Board, from three consecutive meetings of the State Board or where he is nominated under clause(c) of Sub-section (2) of Section 5, he ceases to be a member of the local authority and such vacation of seat shall, in either case, take effect from such date as the State Government may, by notification in the official Gazette, specify.

(5) A casual vacancy in a State Board constituted under this Act shall be filled by a fresh nomination and the person nominated to fill the vacancy shall hold office only for the remainder of the term for which the member whose place he takes was nominated.

(6) A member of a State Board constituted under this Act shall be eligible for re-nomination.

(7) The other terms and conditions of the service of the Chairman and other members except the member-secretary of a State Board constituted under this Act shall be such as may be prescribed.

The provisions provided under the Act shows an overdose of official representation in the composition of the Board. The rationale behind having members from agriculture, fishery, industry or other interests into an agency intended to make decisions on air quality standards cannot be understood, because public sector companies or corporations may themselves be polluters and potential polluters. There have been questions raised on their representation on the Board. Doubts have also been raised as to whether the Board would be in a position to function effectively and independently when it takes decisions against the interests of government as¹³ majority of the seventeen members are nominated by the State Government in the State Pollution Control Board and similar nominated member are there nominated by the Central Government in the Central Pollution Control Board.

¹³ VSChandrasekharan, 'Structure and Functioning of Environment Protection Agency: A Fresh look in P. Leelakrishnan, Environmental Law in India Butterworths India, New Delhi, 1999.

The various disqualifications of the Board's member is mentioned under Section 8, that provides: (1) No person shall be a member of a State Board constituted under this Act, who-

- (a) is, or at any time has been adjudged insolvent, or
- (b) is of unsound mind and has been so declared by a competent Court, or
- (c) is, or has been convicted of an offence which, in the opinion of the State Government, involves moral turpitude, or
- (d) is, or at any time has been convicted of an offence under this Act, or
- (e) has directly or indirectly, by himself or by any partner, any share or interest in any firm or company carrying on the business of manufacture, sale, or hire of machinery, industrial plant, control equipment or any other apparatus for the improvement of the quality of air or for the prevention, control or abatement of air pollution, or
- (f) is a director or a Secretary, manager or other salaried officer or employee of any company or firm having any contract with the Board, or with the Government constituting the Board or with a local authority in the State, or with a company or corporation owned, controlled or managed by the Government, for carrying out of programmes for the improvement of the quality of air or for the prevention, control or abatement of air pollution, or
- (g) has so abused, in the opinion of the State Government, his position as a member, as to render his continuance on the State Board detrimental to the interests of the general public

The State Government shall by order in writing, remove any member who is, or has become, subject to any disqualification mentioned in Sub-section (1)¹⁴. Provided that no order of removal shall be made by the State Government under this Section unless the member concerned has been given a reasonable opportunity of showing cause against the same. A member who has been removed under this Section shall not be eligible to continue to hold office until his successors enter upon his office, or, as the case may be, for renominate as a member.

¹⁴ Section 8(2)

If a member becomes subject to any disqualification mentioned above, his seat shall be vacated¹⁵. Section 13 of the Act provides that no Act or proceedings of a Board or any committee thereof shall be called in question on the ground merely of the existence of any vacancy in, or any defect in the constitution of the Board or such committee as the case may be. The Supreme Court in *State of Manipur v Chandram Manihar Singh*¹⁶ has made clear that a casual vacancy in a Board shall be filled by a fresh nomination and the person nominated and the person nominated to fill the vacancy shall hold office for the remainder of the term for which the member in whose place he was nominated was to hold his office.

The provision for meeting of Board has been laid down under Section 10 of the Air Act. It provides that the Board shall meet at least once in every three months, and shall observe such rules of procedure in its meetings as provided under the Air (Prevention and Control of Pollution) Rules, 1982. The Chairman may also convene a meeting at any time he thinks fit for an urgent work to be transacted¹⁷. Copies of the minutes of the meeting shall always be forwarded to the Central Board and to the State Government. The Board has also been empowered to constitute a committee consisting wholly or partly of members of the Board for any purpose or purposes as it thinks fit¹⁸. A committee so constituted shall meet at such time and at such place and shall follow the prescribed rules for its transaction of business¹⁹. Its members shall be paid such fees and allowances for attending the meetings as prescribed²⁰.

Authority of Board to have temporary association of person

A Board is also authorized to have temporary association of persons with Board for particular purposes Section 12 subsection (1) of the act

¹⁵ Section 9

¹⁶ AIR 1999 SC 3730, 3732

¹⁷ Section 10

¹⁸ Section 11(1)

¹⁹ Section 11(2)

²⁰ Section 11(3)

provides that a Board may associate itself with any person whose assistance or advice it desires to obtain, in performing any of its function, such manner and for such purposes as may be prescribed under this Act. Under subsection (2) it further laws down that such associated member shall have a right to vote at a meeting of the Board but shall not be a member for any other purpose. The associated member shall also be entitled to such fees and allowances as prescribed in the rules have been laid down under subsection (3).

The Board has, further been empowered to appoint such officers, employees as it considers necessary for its efficient functioning under this Act²¹. The method of appointment, the conditions of service and the scale of pay of the other officers 'other than the member secretary' and other employees of a state Board appointed under subsection (3) shall be such as may be determined by regulation made by the state Board under this Act²². Section 14 subsection (5) also provides that subject to be conditions as may be prescribed, a state Board may from time to time appoint any qualified person to be a consultant to the Board and pay him such salary and allowances or fees, as it thinks fit.

The provision for delegation of powers it provided under section 15. Under this section a state Board may by general or special order, delegate to the chairman or the member secretary or any other officers of the Board subject to such conditions and limitation, if any as may be specified in the order, such of its power and functions under this Act as it may deem necessary.

The procedure for transaction of business of the central Board and its committees has been laid down under chapter II of the Air (prevention and control of pollution) Rules, 1982. Sea 3 of the rules provides the provision for notice of the meeting. It requires fifteen clear day notices to be given to the member of an ordinary meeting and three day notice of a special meeting. The rules however do not provide for any provision for meeting to be held in

²¹ Section 14 Sub Section

²² Section 14 Sub Section (4)

extraordinary circumstances where immediate steps and decision of the Board is required, for some urgent necessity. There have been similar rules framed in the year 1982 and 1983 by different states for the prevention of control of Air pollution. Mention may be made as Andhra Pradesh Air (Prevention and control pollution) Rules, 1982, Gujrat Air (Prevention and control of pollution) Rules, 1983, Haryana Air (Prevention and control of pollution) Rules, 1983, Kerala Air (Prevention and control of pollution) Rules, 1982, Madhya Pradesh Air (Prevention and control of pollution) Rules, 1982, Maharashtra Air (Prevention and control of pollution) Rules, 1983, Tamil Nadu Air (Prevention and control of pollution) Rules, 1983, Uttar Pradesh Air (Prevention and control of pollution) Rules, 1983, The Air (Prevention and control of pollution) (Union territories) Rules, 1983, West Bengal Air (Prevention and control of pollution) Rules 1983. All the ten state rules mentioned above were passed through the sec. 54 of the Air (Prevention and control of pollution) Act, 1981 and these rules were passed by the Governors of the states mentioned above after consultation with their corresponding state pollution control Board. Most of these rules contain the service of the Member of the Board. Notification of Air pollution control Area, application for the consent of the Board. Manner of taking sample; Report of Analysts, State Air Laboratory.

Powers and Functions of Board

Chapter III of the Act deals with the powers and functions of Board. It consists of section 16, 17 and 18, which prescribe the power and function of the Central Pollution Control Board. Under section 16 the function of Central Board has been laid down as follows-

(1) The main function of the central Board shall be to improve the quality of air and to prevent control or abate air pollution in the country.²³

²³ Subject to the provision of this Act and with out prejudice to the performance of its function without under water (Prevention and control of pollution)

(2) causes (2) of section prescribe the following function which the control Board may perform –

(a) advice the central Government on any matter concerning the improvement of the quality of air and the prevention control or abatement of air pollution

(b) plan and cause to be executed nationwide programme for prevention control or abatement of air pollution

(c) co-ordinate the activities of the state Board and resolve disputes among them;

(d) provide technical assistance and guidance to the state Boards, carry out and sponsor investigations and research relating to problems of air pollution and prevention, control or abatement of air pollution

(dd) perform such of the functions of any State Board as may be specified in an order made under Sub-Section (2) of section 18;

(e) plan and organize the training of persons engaged or to be engaged in programmes for the prevention, control or abatement of air pollution on such terms and conditions as the Central Board may specify;

(f) Organize through mass media a comprehensive programme regarding the prevention, control and abatement of air pollution;

(g) collect, compile and publish technical and statistical data relating to air pollution and the measures devised for its effective prevention, control or abatement and prepare manuals, codes or guides relating to prevention, control or abatement of air pollution;

(h) lay down standards for the quality of air;

(i) Collect and disseminate information in respect of matters relating to air pollution;

(j) Perform such other functions as may be prescribed under clause (3) of section 16 the Central Board

The main functions of the Central Board under Sec 16 is to improve the quality of air and to prevent control or abate air pollution in the Country.²⁴ It

²⁴ It was observe by supreme Court in *M. C. Mehta Vs Union of India* Air 1997 sec 734 (Taj Trapezium case)

also specifies, in particular, certain functions of the Central Board, which inter alia, relate to laying down the standards for the quality of air and establishment of laboratories. These functions indicate that the legislation is directed against the polluting industries and the central Board has to discharge its function to prevent and control air pollution in all-possible manner.

Section 17 deals with the function of the State Boards which inter alia relate to laying down the standards of the air pollutants into the air and to plan for the prevention, control and abatement of air pollution. This section provides that subject to the provisions of this Act and without prejudice to the performance of its functions, if any under the Water (Prevention and Control of Pollution) Act, 1974, the functions of a State Board shall be-

- (a) to plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof;
- (b) to advise the State Government on any matter concerning the prevention, control or abatement of air pollution;
- (c) to collect and disseminate information relating to air pollution;
- (d) to collaborate with Central Board in Organising the training of persons engaged or to be engaged in programmes relating to the prevention, control or abatement of air pollution and to organize mass education programme relating there to;
- (e) to inspect, at all reasonable times any control equipment industrial plant or manufacturing process and to give, by order, such directions to such persons as it may consider necessary to take steps for prevention, control or abatement of air pollution.
- (f) to inspect air pollution controlled areas at such intervals as it may think necessary, assess the quality of air there in and take steps for prevention, control or abatement of air pollution in such areas;
- (g) to lay down, in consultation with the central Board and having regard to the standards for the quality of air laid down by the central Board, standards for emission of air pollutants into the atmosphere from industrial plants and

automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or air craft.

Provided that different standards for emission may be laid down under this clause for different industrial plants having regard to the quantity and composition of emission of air pollutants into the atmosphere from such industrial plants;

h) to advise the state Government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution;

(i) to perform such other functions as may be prescribed, or as may, from time to time, be entrusted to it by the central Board or the state government;

(j) to do such other things and to perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purposes of this Act.

A state Board may establish or recognise a laboratory to enable the state Board to perform its functions under this section efficiently

Therefore the primary function of controlling our pollution under the Air Act 1981 is reposed on the pollution control Boards and can be said to be the regulatory.

Administrative core of the controlling authority under section 3 of the Air (prevention and control of pollution) Act 1981, the Central Pollution Control Board constituted under section 3 of the water (prevention and control of pollution, Act of 1974 has also been entrusted to perform its functions for the prevention and control of air pollution. It is interesting to note that in the water Act of 1974 central Board was formed with the object of controlling water pollution. The chairman of the Board is required to have special knowledge or practical experience in respect of matters relating to the use and conservation of water pollution. The Board does not include any person having special or practical knowledge on the prevention and control of air pollution. Since the technical organization to control air pollution requires different technique it would be proper to include or add a person having

special knowledge relating to air pollution in the Board and similar provision is suggested for the state Board constituted under the water pollution Act.

Section 18 sub-sec (1) provides that the central Board shall be bound by such directions in writing as the control Government may give to it and every state Board shall be bound by such directions in writing as the central Board or the state Government may give to it where there is conflict between direction given by the state government and central Board the matters shall be referred to central Government for its decision

This section manifests that the state Board shall be bound by only such directions issued by the State Government, which pertain to, the discharge of functions assigned to the state Board under section 17. Therefore, the state Government cannot issue any direction in matters, which are not within the functions assigned to the Board, and the Board is not bound to follow any such direction. The parliament has not vested any discretion with the state Board to grant any exemption to any industrial plant or class of plants. Thus where the state pollution control Board on the basis of instruction issued by the state Government exempted rice milling industry from provisions of the air Act and certain rice mill continued to operate in spite of it and was found to emit air pollutant, notification issued by the state Board was arbitrary, exemplary damages were awarded against authorities to be paid to the aggrieved parties²⁵ In another case, ²⁶ the supreme court directed the Uttar Pradesh pollution control Board (UPPCB) to inspect the site of alleged air pollution industries and to take necessary action against the industries which were causing pollution by grinding stones into powder.

Where the central Board is of the opinion that any state Board has defaulted in complying with any direction given by the central Board and as a result of which a grave emergency has arisen and it is necessary and expedient to do so in the public interest. The central Government by order can direct the central Board to perform any of such functions of the state Board in relation to such

²⁵ *K.M Gowda V state of Karnataka AIR 1998 Kant, 281*

²⁶ *Navin chemical Manufacturing and Trading Co. V New Okhala Industrial development authority 1987 All.L.J.13*

area, for such period and for such purpose as provided in the order²⁷ If any expense is incurred by the central Board in performing such functions of the state Board, as directed by the central Government, the central Government can recover them from the person, with interest, as arrears of land revenue or of public demand provided the state Board is empowered to recover such expenses from such a person. It has also been clarified that if the central Board has been directed by the central Government to perform functions of the state Board in the specified area, the state Board will not be precluded from performing its function in other area of the state.²⁸

It can be pointed out here that the members of the Board represent the Government, local authorities, industries, government undertaking etc the composition of the Board neither includes persons from technical organization who could undertake suitable technique for control of the pollutants at source nor does it include legally trained persons who could bring the machinery into action. It may be further suggested that the increasing growth of pollution in India requires the Boards to be made more powerful this is possible only when the members are nominated in the Board through an honest endeavor such members must be persons having sufficient knowledge on sustainable development and also have an urge towards development by balancing it in terms of environment. There are situations when the state Board becomes reluctant to check air pollution in these circumstances there must be agencies formed through people representative to look into the function of the state Board and draw the attention of the central Board in such circumstances. Similar provision should also be incorporated for central Board if it fails to come forward to exercise its authority

The Board shall also have the function to inform the public about the rate of surface air pollution from time to time to enable people to protect the environment from being polluted more and more. Such information would enable people to take precautions by all possible means. The provisions of

²⁷ Sec 18 (2)

²⁸ Sec 18 (3) and (4)

freedom of Information Act, 2002 must be complied with. To enable every citizen to secure access to information under the control of public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration. One must keep in mind that the environment around is also another home where we live in and it would be a prime duty of every individual to keep it clean. In 'Stockholm Declaration' too it is mentioned that every individual bears a solemn responsibility to protect and improve the environment for present and future.

5.1.(iii). Air Pollution Control Area

One of the pivotal sections in the Air Pollution Act is section 19 of the Act²⁹. It contains provisions which deal with the major regulatory mechanism contemplated by the Act. Section 19 contains provision to declare any area to be "air pollution control area." Sub section (1)³⁰ empowers the 'state Government,' in consultation with the State Board, to declare any area or areas within the state as air pollution control area/areas for the purposes of the Act. Such declaration will be made by notification in the official Gazettes in such manner as may be prescribed by the rules made under the Act. The limits of the "air control area/areas" can be altered or merged under sub section (2). With section 19(3) begins the substantive part of the section, which goes up to subsection (5). It provides that in any pollution control area, The State Government, after consultation with the State Board may-

- (a) Prohibit the use of fuel other than approved fuel.
- (b) Prohibit the use of an appliance other than an approved appliance.
- (c) Prohibit the burning of any material (not being fuel) if its burning may cause air pollution.

Notification in the official Gazette is required for all these purposes. Further, the notification laying down prohibition on non-approved fuel cannot, for its commencement, fix a date earlier than 3 months from its publication.

²⁹ Air (Prevention and Control of Pollution) Act 1981.

³⁰ Sec 19

The whole of the Union Territories of Pondicherry and Chandigarh were declared as air pollution control areas on 25-1-1988 and 2-2-1988 respectively under the above provisions. There are instances where we find that industries operating in air pollution control area after obtaining consent order from the Central Board have created hazards. One of these examples is found in *M.C. Mehta v. Union of India*³¹ (oleum gas leakage case), Where the Supreme court pointed out that if the Central Board find at any time that the conditions in the consent order, are not being complied with and the particulate matter emitted by the states of the boilers is more than 150 mg/Nm³ if will be open to the Central Board to take whatever action is appropriate under the law³².

In *Animal Feeds Diaries and chemicals limited V. Orissa State (Prevention and Control of Pollution) Board and others*³³, the Orissa High Court made it clear that the State government can declare a pollution control area, and it is the power of the State Government to prohibit pollution. It is pertinent to note that though the concept of 'Pollution Control area' is the focal point of the whole frame work of the Act, the term has nowhere been defined in the Act. It is relevant to note that even though this omission was pointed out in the course of the Rajya Sabha debates, no steps were taken to overcome the shortcoming. The Act also lays down no guidelines regarding the standards that qualify an area to be designated as a Pollution Control Area. Further, it may be pointed out that unlike the other sections in the Act, the applicability of this section, extends to not only pollution control area, but also to areas not being so designated and the significance of the section lies in the fact that it empowers the board to take action even in cases where pollution is 'apprehended to occur.'

While selecting a site from the point of air pollution control, the following factors should be taken into consideration to avoid costly control measures, improve public relations and prevent litigations.

³¹ AIR 1987 SC 965

³² Id, P 977

³³ AIR 1995 Ori 84

In general, while considering each possible site for location of a plant, the site advantage vis-a-vis the out of control air pollutants should be carefully investigated.³⁴

(i) Existing levels of air contaminants: A pre-operational survey is recommended to be practices if a new plant is to be located in an area which is already industrialized, to know the existing level of contaminants, under prevailing meteorological conditions. This type of survey gives an idea regarding the nature of pollution due to existing industries, i.e. whether the existing level of pollution is high, medium or low. The results of such a survey with respect to known operational data on the magnitude of contemplated emissions from the new sources, would provide information on the extent to which waste products could be safely discharged into the atmosphere without resulting in to much contamination.

(ii) Potential Effects in Surrounding Area: The knowledge of the specific effects of the major pollutants and land use of the area surrounding the site is necessary for site selection. The effects of contaminants likely to be discharged from the proposed industrial plant is important, in particular, from the point of its effects on human health, animals and damage to crops. A particular pollutant discharged may be more toxic and harmful to negetation and animals than to people form example Hydrogen sulphide has little effect on vegetation but is obnoxious and even dangerous to human life in comparatively low concentrations while a rural and predominantly agricultural area is more affected by fluorides and sulphur dioxide than an urban population.

Meterological Factors and Climate: In order to minimize air pollution problems by site selection the prime factors, which have to be considered, are the climate and meteorology of the location under consideration. The dispersive ability of the air at each possible site has to be determined. Meteorological factors should be favourable for the air to dilute the pollutional

³⁴ G.S. Karkara: Environment law (1st Ed) central law publication at 27.

load down to acceptable levels of contamination. The ideal site for location of an industry is a level terrain in a region where the average wind speed is of the order of 16 km/hr. or more and where temperature inversions rarely occur.

Topographical Features: The adverse influence of topography and whether factors in relation to pollution control should be carefully considered, and critically examined, before selecting a site for a new industrial plant. This is because air movement is greatly influenced by the topography in the neighbourhood of site under consideration, like valleys, mountains etc.

Clean Air Available: Where supply of clean air is an essential requirement for some industries and factories, this aspect has to be looked into for site election. The industries and factories dealing with the manufacture of transistor, electronic components, antibiotics, and vaccines require clean air for manufacture. Also clean air is required for cooling the reactors of atomic energy plants and if polluted air were used, the impurities present would become radioactive and their escape into atmosphere would create a hazard. The location of industries in areas heavy air pollution will materially add to cleansing the air.

Planning and Zoning: In the control of air pollution proper planning and zoning of industrial areas and residential areas can play an important role. Residential areas and certain heavy industries should not be located too close to each other. It is always better to have green belt between industrial and residential areas. The concerned municipality of the industrial area should encourage the creation of green belt.

The Air Act under section 20 mentions the pollution caused by vehicular traffic is required to be controlled and for this purpose the provision under section 17(i) (g) should be complied with. In this regard, the state Government is empowered to give such instruction as may be deemed necessary to the authority incharge of motor vehicles under the Motor vehicles act, 1988 and such authority shall be bound to comply with such

instructions.³⁵ it may be mentioned that the Air Act³⁶ as its name suggests deals with any activity that pollutes the air and as such provides for steps and measures for dealing with such activities, namely, the industries, vehicles etc. But once we do well upon the Act we will find that taking into consideration the various industries and their polluting factor the pollution in totality is not considered in the act. There is little more than one section in the whole act that mentions the pollution of vehicular traffic but this is also not an active provision which acts as an instrument to penalise the erring vehicles. This section only confers upon the state board in consultation with the Central Board, the power to prescribe standards for emissions of air pollutants from vehicles and the state Government in consultation with the state Board is empowered to give instruction to the registering authority of vehicles in order to comply with the standards laid down by the state Board.

The specific section or sections related to vehicular pollution is section 17(i) (g) which states that it is the function of the state Board or rather it is the power of the state Boards to lay down in consultation with the Central Board, standards for emission of air pollutants into the atmosphere from industrial plants or automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft. Section of the Act seems to be more substantive in attaining the object of preserving the quality of air and preventing and controlling vehicular air pollution after taking into consideration the aforementioned section, ie. Section 17(i) (g). By virtue of these sections the state pollution Control Board in simple prescribe Standards for emission of air pollutants from vehicles (automobiles). These standards vary from place to place, urban areas have much higher standards as compared to the rural areas because of the density of traffic and such standards are followed more stringently in cities than in small rural towns as a result of the concentration of the enforcement machinery. The state Government in consultation with the state Board gives

³⁵ See *Santosh Kumar Gupta v Secretary, Ministry of*

³⁶ *Environment*, New Delhi, A.I.R. 1998 M.P.43 *Supra* note 27

such instruction as may be deemed necessary to ensure that such pollution standards are complied with. These instructions are given to the Motor vehicles Department connected with the registrations of Motor vehicles, and such authority shall, notwithstanding anything contained in that Act or rules made there under, be bound to comply with such instructions.

The problem of dense traffic in every city creates air pollution. Traffic is chaotic all the time in big cities. It not only emits pollutants in the air, it also creates noise and congestion for the common people. Lenient pollution law, corrupt officials, inadequate testing equipment, ignorance about the sources and effects of pollution, and lack of funds to correct dangerous situations usually exacerbate the problem. An estimated 60% of Calcutta's residents are thought to suffer from respiratory diseases linked to air pollution. Similar is the situation in other big cities in India. Thus the Motor vehicles Act, 1988 and the motor vehicles rules need to be examined in detail to find how effective is the law in controlling air pollution. These provisions shall be dealt under the Motor Vehicles Act, 1988³⁷ in a separate sub topic under this chapter.

Restrictions on use of certain industrial plants

Every industrial plant or operator within the air pollution control area is required to seek prior approval or consent of the State Board, without which it cannot work. If the industrial plant was already operating before April 1, 1988, for which no consent was necessary prior to commencement, it may continue to operate for a period of three months, if it has made an application for consent within the said period of three months and continue its work till its application is disposed of³⁸

An application for consent of the State Board under sub-section (1) mentioned above shall be accompanied by such fees as may be prescribed and it shall be made in the prescribed form containing all the particulars of the industrial

³⁷ Infra

³⁸ Sec 21 (1)

plant.³⁹ It is further provided⁴⁰ that where, any person, immediately before the declaration of any area as an air pollution control area, operates in such area any industrial plant, such person shall make the application under this subsection within such period (being not less than three months from the date of such declaration) as may be prescribed and where such person makes such application, he shall be deemed to be operating such industrial plant with the consent of the State Board until the consent applied for has been refused.

On receipt of the abovementioned application for consent, the Board shall make such enquiry as it may deem fit and shall follow such procedure as may be prescribed.⁴¹ After the receipt of an application for consent, the State Board shall within a period of four months, make an order in writing either by granting consent subject to such conditions as may be specified in the order and for such period, or refuse such consent. If the consent has been granted for a certain period, it can be cancelled before the expiry of the period if the conditions specified in the consent are not complied with. Before the canceling the consent or refusing a further consent, reasonable opportunity of being heard shall be given to the person concerned.⁴²

If consent is granted by the Board then the detailed obligation imposed by section 21 (s), 21 (6) and 21 (7) come into operation under the Act. These sections provided that every person whom consent has been granted by the State Board shall comply with the following conditions namely.

(i) the pollution equipment of such specifications as the State Board may approve in this behalf shall be installed and operated on the premises where the industry is carried on:

(ii) the existing control equipment, if any shall be altered or replaced in accordance with the directions of the State Board:

(iii) the control equipment referred to in clause (i) and (ii) shall be kept at all times in good running condition;

³⁹ Section 21 (2)

⁴⁰ Ibid

⁴¹ id Sub sec (3)

⁴² Id Sub sec (4)

(iv) chimney, wherever necessary, of such specifications as the State Board may approve in this behalf shall be erected or re-erected on such premises;

(v) such other conditions as the State Board may specify in this behalf;

(vi) conditions referred to in clause (i), (ii) and (iv) shall be complied with within such period as the State Board may specify in this behalf;

Provided that in the case of a person operating any industrial plant in an air pollution control area immediately before the date of declaration of such area as an air pollution control area, the period so specified shall not be less than six months:

Further it is provided that

(a) after the installation of any pollution control equipment in accordance with the specifications under clause (i); or

(b) after the alteration or replacement of any pollution control equipment in accordance with directions of the State Board under clause (ii); or

(c) after the erection or re-erection of any chimney under clause (iv),

no control equipment or chimney shall be altered or replaced or, as the case may be, created or re-created except

with the previous approval of the state Board .

Varying the consent

When the State Board is of opinion that due to any technological improvement or otherwise, all or any of the conditions referred to in sub-sec (5) require or requires variation including the change of any control equipment, either in whole or in part, the State Board shall after, giving the person to whom consent has been granted an opportunity of being heard, vary all or any of such conditions and thereupon such persons shall be bound to comply with the conditions as so varied ⁴³.

Transfer of Consent

Where a person to whom consent has been granted by the State Board transfers his interest in the industry to any person, such consent shall be deemed to have been granted to such other person and he shall be bound to

⁴³ Sub .sec (6)

comply with all the conditions subject to which it was granted as if the consent was granted to him originally.

From the above-mentioned provisions it becomes clear that for the establishment of any industry in a pollution control area the consent from the State Board at first is required. The State Board has the power to refuse or grant consent, but the board does not have the power or discretion to exempt any industry in any pollution control area. Therefore, if an industry is emitting air pollutants, then irrespective of the extent thereto, neither the State Government nor the State Board can keep such industries out of the purview of the Act⁴⁴. Simple refusal to grant consent was held illegal by the Gauhati High Court⁴⁵. In this case M/S Mahavir Coke Industry had applied to the pollution Control Board for grant of consent for operation of their industrial unit. The Standards for emission of air pollutants were not prescribed. More so on examination was made regarding air pollutants in the manner prescribed under the Act and therefore, the issuance of the direction was held to be illegal, without jurisdiction and contrary to the provisions of law. However, this judgment appears flawed as the division bench failed to notice the provision of the Environment (Protection) Act of 1986 (EPA) and the national standards prescribed in the schedules of the Environment (Protection) Rule of 1986 (EPR) Section 24 of the EPA gives overriding force to all rules formed under the Act, Rule 3(3A) requires each and every industry, operation or process to comply with the minimum National Standard set out in schedule VI to the EPR from 1 January 1994 schedule VII, Part D contains general emission standards which would apply to coke ovens. Once these standards are notified by the Central Government, they apply nationwide, without need for State Pollution Control Boards to re-issue these standards under Air act or Water Act. The judgement is also marred by a misconstruction of Section 31A. The division bench observes a direction by the board under Section 31A may be issued only where the Central Government has first issued a direction

⁴⁴ See, Supra note 23

⁴⁵ Mahavir Coke Industry v Pollution Control Board AIR 1998 Guj, page:

in that behalf. This appears incorrect. A Central Government direction is not a condition precedent for the issue of a direction by the State Board ; but where a Board issue a direction , any such direction is 'Subject to' overriding Central Government orders⁴⁶. In *M.S.Chattisgarh H.L.Industries Vs special Area Development Authority* ⁴⁷the Pollution Control Board refused to grant permission for starting a Hydrated lime factory as it was close to a Government College and a 100 bed hospital .The Supreme Court also directed in *M.C Mehta Vs Union of India (Badkal Lake and Suraj Kund Case)* to stop mining activities within a two Km radius of the tourist resort of Badkal Lake and Suraj Kund and develop a green belt of 200 metres as the mining operations were causing air and noise pollution in these areas .while upholding it's decision the Supreme Court Opined that in order to preserve environment and control pollution within the vicinity of the two tourist resorts it is necessary to stop mining in the area .The question , however for consideration is what should be the extent of the said area? NEERI in it's has recommended that 200 metres green belt be developed at 1 K. m. radius all around the boundaries of the two lakes. It is thus obvious that twelve hundred metres are required for the green belts leaving another 800 metres as cushion to absorb the air and noise pollution generated by the mining operation. The Court therefore ordered and directed as under.

There shall be no mining activity within 2 K.m radiuses of the tourist resorts? We further direct that no construction of any tupe shall be permitted now onwards within 5 K.m radius of Badkal Lake and Suraj Kund. All open areas shall be converted into green belts. The mining leases within the area from 2 K.m to 5 K.m radius shall not be renewed without obtaining prior "no objection" certificate from the Haryana Pollution Control Board as also from the Central Pollution Control .Unless both the Boards grant no objection certificate the mining lease in the said area shall not be renewed⁴⁸. In another

⁴⁶ Divan Rosenerang: Environmental law and Policy in India, (2nd) at page

⁴⁷ AIR 1989 M.P page:

⁴⁸ AIR 1987 Kant ,82.

important case ⁴⁹, the Supreme Court of India took into consideration the application for permission to instal Hot Mix Plants in the vicinity of Indira Gandhi International Airport for a period of one year for resurfacing of runways. The application was filed by the Airport authority of India. The Hot Mix Plants which were treated as hazardous industries had been closed by the court with effect from 20 th February 1997, by the Supreme Court order and the aforesaid application was considered after the order mentioned above was passed. The Expert Committee of CPCB had categorised Hot Mix Plants as hazardous industries as the process emission from Hot Mix Plants contained particulate matter and sulphur dioxide beside toxic/carcinogenic hydrocarbon like benzene, formaldehyde, anthracene and toxin metals like lead, arsenic, mercury, cadmium and therefore as per Master Plan -2001, all noxious industries was to be shifted out from the Union Territory of Delhi. The main opposition was from M.C.Mehta

Who cited the notices issued by the United State Environment Protection Agency (USEPA) to the Hot Mix Plant for causing health hazards stating that emissions from the Hot Mix Plants can impair lung functions; specially among children and the elderly. He had cited three instance where the USPA has imposed fine up to \$43,000 for clean Air Act violation.

The application in turn filed an affidavit informing about the Use of pollution control devices used in the used in the Hot Mix Plants as the expert opinion from the Ministry of Surface Transport and the Supreme Court after considering resurfacing of Airport Runway as a work of national importance, to avoid operation hazard at the time of landing and take off, has allowed the Airport Authority of India to set up Hot Mix Plant which must possess adequate capacity environment friendly Hot Mix Plant, in the safe vicinity of the Airport at least at a distance of 3 K.ms from a populated area. Further it was directed that the Hot Mix Plant set bu the Company whose tender is accepted would be examined by the Central Pollution Control Board on the environmental feasibility, specially to ensure that the particulate matter

⁴⁹ M.C.Mehta Vs Union of India A.I.R. 1999 S.C. 2367

emission does not exceed the prescribed limited of 150 mg / Nm³ under the Rule made under the E.P. Act.

An analysis that the case gives us the impression that the Court here has tried to balanced the environmental problem with the necessity of running an International Airport in the Capital of India In doing the Supreme Court has also directed that the Hot Mix Plant set up by a company shall be examined by Central Pollution Board on environmental feasibility that the main opposition was from M.C.Mehta and therefore it may create a doubt in the mind of people as that why the Central Pollution Control Board was not putting forward the issue like the USPA? Why was it reluctant in exersing its power or putting forward all the materials available for having clean air around as? Was one of its prime duties? This Halfhearted attempt of the Central Pollution Control Board also would create doubt regarding the examination; it shall perform in ascertaining environment feasibility of the Hot Mix Plant.

In *Chaitnaya Pulvererising Industry v. State Pollution Control Board*⁵⁰ the court held that if the Board with Specific conditions has granted consent and they are not abided by, the consent could be taken back by the Board .In this case the industry failed to carry out the conditions specified in the consent order. Therefore, the court decided that action could be taken against the erring industry under Section 37 of the Act and it could be punished accordingly. But before passing any prohibitory order, the Board must also take onto consideration the problems, which may arise from closure of an industry.

In *M/S Chhatisgarh H.L. Industries Vs Spl. Area Development authority* *the petitioner had filed a writ petition for quashing of cancellation of the No Objection Certificate by the Special Area Development Authority and Town and Country Planning Authority and was also seeking for issue of No Objection certificate by the aforesaid authorities for manufacture of Hydrated Lime in it's factory and to prohibit the manufacture of Hydrated Lime. The

⁵⁰ AIR 1989 MP 82

court in this case held that the No Objection Certificate was not granted by special Area Development Authority to avoid air pollution in the area, which was declared as pollution control area on 4.6.1984 notification issued on 4.6.1984. U/S 19(1) of the Air (prevention and Control of pollution Act, 1981 and also as the Hydrated Lime factory was close to a Government College and a 100 bed hospital. It is interesting to note that the State Pollution Control Board had refused to grant Consent for starting the Hydrated lime factory at Korba on 22-2-1986, as the site according to the Board was not proper and suitable with respect to environmental condition and the development proposed in the area, but subsequently on 26-11-1987 the State Pollution Board had granted no objection certificate the High Court has raised question on the granting of no objection certificate subsequently and observed.

It is surprising how the State Pollution Control has subsequently granted No Objection Certificate when there being no change in circumstances. ... The notification declaring the area as pollution control area was issued to curb and contain the area from pollution. The authorities decided in joint meeting held on 16-1-1986 not to issue to no objection Certificate to the authority for starting hydrated lime factory as the same would cause air and water pollution. Subsequent order of the State Pollution Control Board dated as 25-11-87 is not binding on the state and the Board has not taken into account the totality of the circumstances, which might be created if the permission is granted. It is surprising that the Board which has been consistently refusing to grant No Objection Certificate all of a sudden took a topsy-turvy decision and granted the alleged no objection Certificate.

Here, from this case we find that state Board is at times not performing its duty properly. Therefore, there must be some checks and balance for assessing the work of the Board. If the work of development by the Statutory authorities are being performed properly the problem of curbing pollution would be properly done. The steps taken for curbing pollution was more effective than the pollution Control Board.

In the Case of *M.C. Mehta V Union of India*⁵¹, the plants of Shriam was situated in the air pollution Control area and the industries carried on by Shriram also fell within the schedule of industries specified in the Air Act. While consideration of question for allowing the plant to be restarted without any real regard or risk to be workmen and the public at large held that the caustic chloride plant should be allowed to be restarted subject to certain stringent condition these conditions were related safety of workmen, the deputation of a senior inspector by the Central Board to visit the plant and specified the condition that the particulate matter emitted by the states of the boiler shall not be more than 150/Nm³ and the Central Board shall inspect the site for the said purpose. In another Case⁵², the Pollution control Board has given no objection for setting up tyre retreading unit by the respondent, subject to certain conditions, but the petitioner filled as public interest litigation as she apprehended the likelihood of air noise pollution from the unit. The respondent filed an affidavit that the Industry shall undertake to follow the cold retreading process with electricity the court held that there was apprehension of any water or air pollution but heavy responsibility is on the Board to ensure that respondent commences production after fulfilling all conditions mentioned in consent letter.

The cases referred above shoe the responsibilities taken up by the pollution control Board for controlling pollution. There are cases, which give us an impression that the state Board is at time performing its functions effectively. There have been other statutory bodies and Municipal Corporation also who can join their hands and take positive steps towards environment protection through sustainable development.

Emission of air pollutants

Section 22 prohibits the discharge or emission of any pollutant by any person operating any air pollutant by any person operating any industrial plant and any air pollution control area in excess of the prescribed standards laid down

⁵¹ AIR 1987 SC. 965

⁵² Ved Kaur Chandel v. State of H.P. A.I.R. 1999 H.P., 59

by the State Board. The standards are laid down by the state Board under section 17(1) (g). Contravention of the section is punishable under section 3753.

Restraint Order

The Board is empowered to make an application for restraining persons from causing air pollution besides criminal penalties. The prohibition imposed by section 22 against emission of air pollutants in excess of standards also attracts the provisions of section 22A. Under section 22A(1), if a "Board" has an apprehension that the emission of excessive air pollutant is likely to occur in any air pollution Control area, whether either by the operation of any industrial plant or otherwise, the Board may make an application to a court, not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class for restraining such person from emitting such air pollutant. Section 22A(2) provides that on receipt of application, "the court may take such orders as it deems fit.

Sub section (3) and (4) deals with enforcement of the judicial order and express of such enforcement Sub section (3) lay down that where under sub-section(2), the Court makes an order restraining any person from discharging or causing or permitting to be discharged the emission of any air pollutant, it may in that order-

- (a) direct such person to desist from taking such as likely to cause emission.
- (b) authorise the Board, if the direction under cl (a) is not complied with by the person to whom such direction is issued, to implement the direction in such manner as may be specified by the court.

Under sub-section(4), all expenses incurred by the Board in implementing the directions of the Court under clause(b) of sub-section shall be recoverable from the person concerned as arrears of land revenue or public demand.

5.1.(IV). PROVISIONS RELATING TO INFORMATION ENTRY AND INSPECTION

⁵³ Inpra

Sections 23 to 25 of the Air Pollution Act contain certain provisions relating to power to obtain information, entry and inspection. The power to the conferred affects right of citizens.

Duty to inform

Section 23 of the Act provides where there is emission of air pollutants in excess of the standards laid down by the state Board in any 54 area or apprehension of an accident or other unforeseen act or event causing pollution, the person in charge of the premises from where such emission occurs or is apprehended to occur shall *** intimate the fact of such occurrence or the apprehension of such occurrence to the state Board and to such authorities or agencies as may be prescribed.

Action by the Board

On receipt of information and respect to fact or the apprehension of any occurrence of the nature referred to the sub section (1)⁵⁵ whether through intimation under that the sub-section or otherwise, the state Board and the authorities an agencies shall, as early as practicable, cause such remedial measures to be taken as are necessary to mitigate the emission of such air pollutants.

In Chitiayna Pulverising V.K.S.P.C. Board 56 the court held that the primary responsibility of controlling the Air Pollution is on the Board Such section(2) of section 23 casts a duty on the Board to cause such remedial measures as are necessary to mitigate the emission of air pollutants and the expenses incurred can be recovered from the person concerned as arrears.

(g) to lay down, in consultation with the central Board and having regard to the standards for the quality of air laid down by the central Board, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or air craft.

⁵⁴ The word "air pollution control" to omitted by Act 47 of 1987 is prior to 1987 this provision was to apply only to air pollution control area.

⁵⁵ of sec 23

⁵⁶ AIR 1987 Kaut 82

Provided that different standards for emission may be laid down under this clause for different industrial plants having regard to the quantity and composition of emission of air pollutants into the atmosphere from such industrial plants;

h) to advise the state Government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution;

(i) to perform such other functions as may be prescribed, or as may, from time to time, be entrusted to it by the central Board or the state government;

(j) to do such other things and to perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purposes of this Act.

Reports of the result of analysis on samples taken

Section 27 deals with the manner of dealing with reports of analysis on samples of emission taken under section 26. This section provides as follows:

(1) Where a sample of emission has been sent for analysis to the laboratory established or recognized by the State Board, analyst (appointed under sub-sec(2) of sec-29) shall analyse the sample and submit a report of such analysis in triplicate to the State Board.

(2) On receipt of the report under (sub-section (1)) above, one copy of the report shall be sent by the State Board to the occupier or his agent referred to in sec. 26, another copy shall be preserved for production before the court in case any legal proceedings are taken against him and the other copy shall be kept by the State Board.

(3) Where a sample has been sent for analysis under section 26 3(d) or (4) to any laboratory mentioned therein, the Government analyst referred to in the said sub-sec(4) shall analyse the sample and submit a report of the result of the analysis in triplicate to the State Board which shall comply with provisions of sub sec(2) above.

(4) Any cost incurred in getting any sample analysed at the request of occupier or his agent as provided in sec 26(3)(d) or when he willfully absents

himself or refuses to sign the marked or sealed containers of sample of emission under section 26(4), shall be payable by such occupier or his agent and in case of default the same shall be recoverable from him as arrears of land revenue or of public demand.

State Air Laboratory

Section 28(1) provides for the establishment of one or more air laboratories. It also provides that the State Government may specify one or more laboratories to carryout the functions entrusted to the State Air Laboratories under this Act 64.

Under subsection (2) the State Government may, after consultation with the State Board, make rules prescribing (a) the functions of the State Air Laboratory; (b) the procedure for the submission to the said laboratory of samples of air or emission for analysis or tests the from of laboratory's report thereon and the fees payable in respect of such report; (c) such other matters as may be necessary or expedient to enable the laboratory to carryout its functions.

Analysts

The provision for appointment of Government analysts and Board analysts is provided under section 29. The State Government may, by notification in the Official Gazettes, Appoint such persons as it thinks fit and having the prescribed qualifications to be Government analysts for the purpose of analysis of samples of air or emission sent for analysis to any laboratory established or specified under sec 28(1)57.

The State Board may, by notification in the Official Gazettes and with approval of the State Government, appoint such persons as it thinks fit and having the prescribed qualifications to be Board analysts for the purpose of analysis of samples of air or emission sent for analysis to any laboratory established or recognized under section 1758

⁵⁷ Sec 29(1)

⁵⁸ Sec. 29(2)

Reports of analysts

Under this act any document purporting to be a report signed by a Government analyst, or as the case may be a State analyst, may be used as evidence of the facts, stated therein in any proceeding, this provided under section 30.

Appeals

Section 31 deals with appeals and is summarised below:

1. Any person aggrieved by an order made by the State Board may within 30 days from the date on which the order is communicated to him, prefer an appeal to such authority as the State Government may think fit to constitute. The Appellate Authority may, however, entertain appeals beyond the period of 30 days above mentioned, if such authority is satisfied that the appellant was prevented by sufficient cause from filling the appeal in time.
2. The Appellate Authority shall consist of a single person or three persons as the State Government may think fit to be appointed.
3. The form and the manner in which appeal may be preferred under subsection(1) above, the fees payable for such appeal and the procedure to be followed by the appellate Authority shall be such as may be prescribed.
4. On receipt of an appeal preferred under sub sec(1) the Appellate Authority shall, after giving the appellate and the State Board an opportunity of being heard, dispose of the Appeal as expeditiously as possible.

Power to give directions

Section 31-A empowers a Board to issue any directions in writing to any person, officer or authority. This section provides, notwithstanding anything contained in any other law but subject to the provision of this Act, and to any direction that the Central Government may give in this behalf, a Board may, in exercise of its powers and performance of its functions under this Act, issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.

To exercise power under this section there should be delegation of power to the concerned authority. In a *M/s Suma Traders Vs Chairman, Karnataka*

*State Pollution Control Board, Bangalore*⁵⁹. there was no delegation of power in favour of the chairman to pass order under section 31-A of the Act with regard to the chairman directed for closure of industry and also stoppage of services to the said industry. It was held by the Karnataka High Court that the order of the chairman was without jurisdiction.

In a case, instructions were issued by the State Government to the concerned authorities. The authorities did not observe the directions and the pollution continued in the big city of Gwalior. On a petition being filed the High Court issued suitable directions in the matter to bring about reduction in pollution, some of them being installation of smoke meters and gas analyzer etc.

This section therefore remains meaningless unless there is delegation of power. Therefore to make the section effective the Board has to derive its authority from the concerned Government.

5.5. Penalties, Procedures and Miscellaneous Provisions

Failure to comply with certain provisions [Sec. 37].

Section 37 provides as follows:

(1) Whoever fails to comply with the provisions of Sec. 21 or 22 or directions issued under Sec. 31 -A shall, in respect of each such failure, be punishable with imprisonment for a term which shall not be less than one and a half year but which may extend to 6 years and with fine, and in case the failure continues, with additional fine which may extend to Rs. 5000 for every day during which such failure continues after the conviction for the first such failure.

(2) If the failure continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than 2 years but which may extend to 7 years and with fine.

Penalties for certain acts

⁵⁹ AIR 1998 Kant. 8

Section 38 lays down that whoever does any act mentioned below shall be punishable with imprisonment for a term, which may extend 3 months, or with fine which may extend to Rs. 10000, or with both: The punishment mentioned above is for the following acts-

whoever

- (a) destroys, pulls down, removes, injures or defaces any pillar post or stake fixed in the ground or any notice or other matter put up, inscribed, or placed by or under the authority of the Board; or
- (b) obstructs any person acting under the orders or directions of the Board from exercising his powers and performing his functions under the Act; or
- (c) damage any works or property belonging to the Board; or
- (d) fails to furnish to the Board or any officer or employee to the Board any information required by the Board or such officer or employee for the purposes of the Act; or
- (e) fails to intimate the occurrence of the emission of air pollutants into the atmosphere in excess of the standards laid down by the State Board or the apprehension of such occurrence, to the State Board and other prescribed authorities or agencies as required by Sec. 23(1); or
- (f) in giving any information which he is required to give under the Act makes a statement which is false in any material particular; or
- (g) for the purposes of obtaining any consent under Sec. 21 make a statement which is false any material particular

Penalty for contravention of certain provisions

Section 39 provides that whoever contravenes any of the provisions of this Act or any order or direction issued there under, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to 3 months, or with fine which imprisonment for a term which may extend to 3 months, or with fine which may extend to Rs. 10000, or with both. In the case of a continuing contravention, an additional fine may be imposed which may extend to Rs. 5000 for every day

during which such contravention continues after conviction for the first such contravention.

Offences by companies

Section 40 makes provisions as regards offences by companies. This provides as follows:

(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

However, such a person shall not attract any liability to punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

For the purpose of this Section-(a) Company means any body corporate, and includes a firm or other association of individuals, and (b) director, in relation to a firm, means a partner in the firm.

Offences by Government Departments

Section 41 is concerned with offences by Government department. It provides as follows:

(1) Where an offence under this Act has been committed by any Department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to proceeded against and punished accordingly.

However, such a Head of the Department shall not attract liability to any punishment if he proves that the offence was committed without his

knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Where an offence under this Act has been committed by a Department of Government and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any officer, other than the Head of the Department, such officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Protection of action taken in good faith

Section 42 provides that no suit, prosecution or other legal proceedings shall lie against the Government or any officer, or the Government or any member or any officer or their employee of the Board in respect of anything which is done or intended to be done in good faith in pursuance of this Act or the Rules made there under.

Cognizance of offences

This Section 43 deals with cognizance of offences and provides as follows:

(1) No court shall take cognizance of any offence under this Act except on a complaint made by-

(a) a Board or any officer authorized in this behalf by it; or

(b) any person who has given notice of not less than 60 days, in the prescribed manner, of the alleged offence and his intention to make a complaint to the Board or officer authorised as aforesaid.

Further, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable under this Act.

(2) Where a complaint has been made under (1) (b) above, the Board shall, on demand by such person, make available the relevant reports in its possession to the person.

However, the Board may refuse to make any such report available to such person if the same is, in its opinion, against the public interest.

Members officers, etc. of Board to be public servants

Section 44 provides that all members and all officers and other employees of a Board when acting or purporting to act in pursuance of any of the provisions of this Act or the Rules made thereunder shall be deemed to be public servants within the meaning of Sec. 21 of the Indian Penal Code, 1860.

Reports and returns

Section 45 provides that the Central Board shall, in relation to its functions under this Act, furnish to the Central

Government, and a State Board shall, in relation to its functions under this Act furnish to State government and to the central Board such reports, returns statistics, accounts and other information as that Government or, as the case may be, the Central Board may, from time to time, require.

Bar of jurisdiction

Section 46 provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Appellate Authority is empowered by or under this Act to determine, and no injunction shall be granted by any court to other authority in respect of any action taken or to be taken in pursuance of any power conferred by, or under, this Act. It may be pointed out here that this section takes away the right to sue for damages for committing nuisance etc by polluting the air.

Miscellaneous provisions.

The Act contains certain miscellaneous provisions, which are explained below:

Power to State Government to supersede State Board

Section 47 empowers the State Government to supersede a State Board constituted under this act under certain circumstances. Under section 47

This section provides as follows:

- (1) The State Government may, by notification in the Official Gazette, supersede the State Board, if, at any time, it is of opinion—

(a) The State Board constituted under this act has persistently made default in the performance of the functions imposed on it by or under this Act; or

(b) that circumstances exist which render it necessary in the public interest so to do.

The supersession can be for such period, not exceeding 6 months, as may be specified in the notification. However, before issuing a notification for the reasons mentioned in clause (a), the State Government shall give a reasonable opportunity to the State Board to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the State Board.

(2) Upon the publication of a notification superseding the State Board—

(a) all the members shall, as from the date of super session, vacate their offices as such;

(b) all the powers, functions and duties which may, by under this Act, be exercised, perform or discharged by the State Board shall, until the state Board is reconstituted under (3) below, be exercised, performed or discharged by such person(s) as the State Government.

(3) On the expiration of the period of super session specified in the notifications, the State Government may—

(a) extend the period of supersession for such further term, not exceeding 6 months as it may consider necessary ; or

(2) On the dissolution of the state Board constituted under this Act—

(a) all the members shall vacate their offices as such:

(b) all moneys and other property of whatever kind (including the fund of the Stat Board) owned by or vested in the stat Board, immediately before such dissolution, shall stand transferred to and vest in the State Pollution control Board;

(c) every officer and other employee serving under the State Board, immediately before such dissolution, shall be transferred to and become an officer or other employee if the State Pollution control Board and hold office by the same tenure and at the same remuneration and on the same terms and

conditions of service as he would have held the same if the State Board constituted under this Act had not been dissolved and shall continue to do so unless and until such tenure, remuneration and terms and conditions of service are duly altered by the State Pollution Control Board.

(d) all liabilities and obligations of the State Board of whatever kind, immediately before such dissolution, shall be deemed to be the liabilities and obligations, as the case may be, of the State Pollution control Board and any proceeding or cause of action, pending or existing immediately before such dissolution by or against the State Board constituted under this Act in relation such liability or obligation may be continued and enforced by or against the State Pollution Control Board.

Maintenance of register

Section 51 deals with maintenance of a certain register and provides as follows:

(1) Every State Board shall maintain a register containing particulars of the persons to whom consent has been granted under Sec. 21, the standards for emission laid down by it in relation to each such consent and such other prescribed particulars.

(2) The register shall be open to inspection at all reasonable hours by any person interested in or affected by such standards for emission or by any other person authorized by such person in this behalf.

Effect of other laws

Section 52 provides that save as otherwise provided by or under the Atomic energy Act, 1962, in relation to radioactive air pollution, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act.

The provisions of the Air Act 1981 are effective provided the enforcement is done efficiently. The Act, however, could not control the rise of air pollution. The Act is still considered to be effective in bringing some control. It must be seen that the Act should not remain in as a mere

consolation that we are having legislation on air pollution. The Act must be given life and vigour through proper implementation.

5.2. THE ENVIRONMENT PROTECTION ACT 1986

India, the world's second most populous nation accounts for worlds 16 per cent population, as compared to about 15 per cent a decade and half ago. This rapidly growing population along with increased economic development has placed strain on India's infrastructure, and also on country's environment. Rapid industrialization and urbanization in India's metropolises are also serious concerns. The need for preservation and improvement of human environment came to be universally recognized only after the Stockholm Declaration of 1972. India was the first country to insert an amendment into its Constitution allowing for the State to intervene and to protect public health, forest and wild life by incorporating Article 51A and 48A. Legislative and administrative efforts were also made in India to adopt some measures for environmental protection.

The initial legislative approach was fragmented and piecemeal. These legislations aimed at controlling specific types of pollution rather than preserving and protecting environment in totality. The necessity for a comprehensive legislation with integrated approach towards environmental protection was felt and it was adopted in the form of Environment Protection Act, 1986. The Act provides a law that covers not merely land or water or air but all the aspects of the environment. It may be pointed out here that the Bhopal Gas Disaster 1984, was also another incident, which brought about the need for a comprehensive legislation dealing with the environment as a whole.

5.2.(i).General Scheme of the Act

The Act gives the terms 'environment' and 'environment pollution' a very wide definition; empowers the Central Government to take strict action for non-compliance of its provisions and provides for penalties for various offences. The supremacy of the provisions of environment of the Environment Protection Act has been laid down under Section 24⁶⁰. This Act is the most comprehensive piece of legislation relating to environment. The Chapter Scheme of the Act and arrangement of the sections are as follows:

Chapter I is preliminary containing sections 1 and 2.

Chapter II deals with the General powers of the Central Government from sections 3 to 6.

Chapter III relates to the Prevention, Control and Abatement of Environment Pollution and the corresponding sections are from section 7 to 17.

Chapter IV deals with Miscellaneous subject matter under sections 18 to 26.

Definitions:

Section 2 contains definition of certain terms and phrases. It is for the first time in the world that technical definition has been provided by the Act to various terms of the environment including term 'environment'. The definition of 'environment' under the Act is inclusive and not exhaustive. According to section 2 (a) Environment is defined to include (i) water, air and land and (ii) the interrelationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property. In order to understand the definition of the term 'environment', it is necessary to look into the definitions of environment pollutant and environmental pollution. The second part of the definition viz, (ii) provides for interrelationship existing among eight elements mentioned therein. Thus it includes animate and inanimate objects and their interrelationships. In *Virendra vs State of Haryana*,⁶¹ the Supreme Court declared that the word 'environment' is of broad spectrum which brings within in ambit 'hygienic atmosphere and ecological balance.'

⁶⁰ Infra note 99

⁶¹ (1995) 2 SCC 577

The term 'environment pollutant' has been defined to mean 'any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to human health.' Therefore presence of bio-medical waste, untreated effluents, sewage sludge, city waste, etc. into the water makes it polluted. Similarly emission of various gases in impermissible limits or in excess in the air, for eg. Carbon dioxide, Carbon monoxide, Sulphur dioxide, Methane, Chloroflorocarbon, Nitrogen oxide, smoke and others make the atmosphere polluted. Environment pollution means presence in the environment of any environment pollutant.

Section 2 (c) does not specifically mention 'Noise Pollution' as environmental pollution but section 6 refers to it as pollution. Various pronouncements of Courts⁶² have made it clear. The Air (Prevention and Control of Pollution) Amendment Act of 1987 now also includes noise as air pollution. Noise, in excess, beyond permissible limits, also amounts to noise pollution. If the cracker produces more than 125 db (A1) sound, it would amount to environmental (noise) pollution as its excessiveness effects adversely human beings, animals and plants. The limit of during daytime is 55 Decibels and during night is 45 Decibels in residential area. If the noise transgresses this limit, it caused environmental pollution. Similarly, suspended particulate matter (SPM) in air in residential areas must not exceed 140 ug/m²⁸. If the concentration of SPM is beyond this limit, it amounts to atmospheric pollution or air pollution.

"Handling" is defined under section 2 (d) as "Handling" in relation to any substance means the manufacture, processing, treatment, package, storage, transportation, use, collection, and destruction, conversion offering for, transfer or the like of such substance.

Under section 2 (e) "Hazardous substance" means any substance or preparation which by reason of its chemical or physio-chemical properties or

⁶² *Burrabazar Fire Works Dealers Association vs Commissioner of Police, Calcutta*, AIR 1998 Cal 12, *Bijayanand Patra vs Dist. Magistrate Cuttak*, AIR 2000 Ori 76, *Robin Mukherjee vs State of W.B.* AIR 1985 Cal 151; *Gotham Construction Co. vs Amulya Krishna* AIR 1968 Cal 91; *Mahendra Road Residents Association vs Lt. Governor* AIR 1995 Del 195.

handling is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment. 'Hazardous' means 'risky' or 'dangerous'. Therefore, any substance which is likely to cause harm to living beings, property or any component of the environment can be named as hazardous substance

"Occupier", in relation to any factory or premises, means a person who has control over the affairs of the factory or the premises and includes in relation to any substance, the person in possession of the substance.⁶³

Primarily, all powers under this Act vest with the Central Government and the authorities constituted under the Central Government.⁶⁴ The provisions empowering the Central Government mainly include the power to take measures to protect and improve environment and air being one of the components of the environment is included in these provisions. These provisions are summarized below.

5.2.(ii). Powers of Central Government to take measures (Section 3)

The Central Government has power to take all such measures as it deem necessary or expedient for the specific purposes under section 3 of the Act, which are:

- (I) Protecting and improving the quality of the environment, and
- (II) Preventing, controlling and abating environment pollution, in particular and without prejudice to the generality of above-mentioned sub-section (I). Some measures of which the Central Government may take are enumerated in Section 3 (II). These are with respect to all or any of the matter namely: -
 - (i) Coordination of actions by the State Governments, officers and other authorities (a) under this Act, or the rule made there under or (b) under any other law for the time being in force which is relatable to the objects of this Act.

⁶³ Section 2 (f)

⁶⁴ Section 3, 3 (3) and 23

- (ii) Planning and executing of a nation-wide programme for the preservation, control and abatement of environment pollution;
- (iii) Laying down standards for quality of environment in various aspects.
- (iv) Laying down standards for emission or discharges of environmental pollutant from various sources whatsoever.

However, different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environment pollutants from such sources.

- (v) Restriction of areas in which any industries, operation or processes or class of industries, operations of processes shall not be carried out or shall be carried out subject to certain safeguards;
- (vi) Laying down procedures and safeguards for the prevention of accidents, which may cause environmental pollution, and remedial measures for such accidents;
- (vii) Laying down procedures and safeguards for the handling of hazardous substances;
- (viii) Examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;
- (ix) Carrying out and sponsoring investigation and research relating to problems of environmental pollution;
- (x) Inspection of any premises, plant, equipment, machinery, manufacturing or other processes, material or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environment pollution;
- (xi) Establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;
- (xii) Collection and dissemination of information in respect of matters relating to environmental pollution;

- (xiii) Preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;
- (xiv) Such other matters, as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.

Clause (1) of Section 3 empowers the Central Government to take all such measures as it deems necessary or expedient for the purpose of protection and improvement of (a) quality of environment, and (b) prevent, control and abate the environmental pollution. It does not give named specific powers which can be exercised by the Central Government, but gives wide powers i.e., to take any step which the Central Government 'deems necessary' or 'expedient' for environmental protection.

It may be pointed out here that Air Act as a matter of practice operates in tandem with the Environment (Protection) Act 1986 (EPA). Being a self contained statute, the Air Act empowers the State Boards to notify the Standards independently under section 17 (g). However, there is an overlap. The Environment (Protection) Act enable the Central Government to lay down emission standards which are found in schedule appended to the Environment (Protection) Rules of 1986 (EPR). By operation of section 24 of EPR norms takes precedence and hence in practice the State Boards generally remodify the EPR Standards under the Air Act.

Powers of the Central Government to constitute by order, one or more authorities

Section 3 (3) provides that the Central Government may delegate the following powers to such authority or authorities:

- (i) Such of its powers and functions under this Act as may be mentioned in the order.
- (ii) Power of the Central Government to issue directions under section 5.

(iii) The power to take fourteen measures as enumerated above in section 3 (2) of the EPA.

Though under section 3 (3) of the EPA there is provision that Central Government may constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising or performing such of the powers and functions under the Act for taking measures against environment polluters. Yet except Central Board no other authority has been constituted so far. However, this power has been delegated to some of the State Pollution Control Boards including West Bengal. In pursuance of power conferred by the Central Government, the State Pollution Control Board proceeds for taking an action under the Court having jurisdiction against the undertaking causing environmental pollution. However, from the reported as well as unreported cases on EPA, it transpires that there is no direct case where the Court takes action against any administrative action.

In pursuant to Clauses (1) and (3) of section 3 of the Environment (Protection) Act, the Supreme Court constituted an authority for National Capital Region for traffic Safety laws and vehicular pollution under Chairmanship of Sri Bhure Lal in *M.C.Mehta vs Union of India*,⁶⁵ the Bombay High Court in *Sneha Mandal Cooperative Housing Society Ltd., Mumbai vs Union of India*⁶⁶, has explained that sections 3, 4 and 5 of the Environment (Protection) Act bestow on the Central Government plenary powers to take all steps and measures as it deems necessary or expedient for the purpose of protecting and improving the environment. The Act also contemplates appointment of several authorities for the purpose of overseeing the effective implementation of the Environment Protection Policy envisaged by the Act. Thus, the Act intended to put severe restrictions on untrammelled depredation of environment resources.

⁶⁵ AIR 1998 SC 617

⁶⁶ AIR 2000 Bom 121

The list of XIV measures under Clause (2) of section 3 is an inclusive list and not an exhaustive one. Therefore, the Supreme Court directed the Central Government to take adequate measures to make the people aware about the protection of environment, keeping the citizens informed is an obligation of the Government in *M.C.Mehta vs Union of India*.⁶⁷ The Court issued following directions to the Central Government to fulfill about obligation.

- (a) Central Government to issue directions to the State Governments and Union Territories to enforce a condition of license to all cinema halls, touring cinemas and video parlours to exhibit free of cost at least two slides/messages on environment in each show.
- (b) The Ministry of Information and Broadcasting of the Government of India to produce information films on various aspects of environmental pollution.
- (c) Spread relative information through Radio, T.V.
- (d) Making environment a compulsory subject in schools and colleges;
- (e) Laying down standards for the quality of environment in its various aspects.

The expression 'improvement and enhancement of quality of environment' was referred to by the Supreme Court in *Vellore Citizen's Welfare Forum vs. Union of India*,⁶⁸ where the Court observed that customary international laws which are not contrary to municipal law are deemed to have been incorporated in the domestic law. Because of this Fact, the statement and objects and reasons of Environment (Protection) Act stated that, 'the decline of environmental quality has been evidenced by increasing pollution. The right of a person to have pollution free environment is a part of basic jurisprudence of the land. It includes the quality of air, water and general environment. In another case,⁶⁹ the Court explained that the 'Right to life' is a fundamental right under Article 21 of the Constitution and it includes the Right of enjoyment of pollution-free water and air for full enjoyment of life.

⁶⁷ AIR 1992 SC 382

⁶⁸ AIR 1986 SC 847

⁶⁹ SUBHASH KUMAR vs State of Bihar AIR 1991 SC 420 at 424

If anything endangers or impairs the quality of life in derogation of laws, a citizen has a right to have recourse to Article 32 of the Constitution for removing the pollution of water or air, which may be detrimental to the quality of life.

In *V. Lakshmipathy vs. State*,⁷⁰ a public-spirited person with other residents filed a writ petition under Article 226 of the Constitution against the location and operation of industries in a residential area. They complained of serious threat to public health on account of environmental hazard in form of air pollution, noise pollution, and land pollution etc., by industries and industrial activity in the area. The Court while issuing the writ of mandamus directed the industries of the area to stop working and asked the Bangalore Development Authority to carry out lay-out work in accordance of law and construct roads in the area.

In *M.C.Mehta vs. Union of India*⁷¹, the Supreme Court on the basis of the inspection report of NEERI (National Environmental Engineering Research Institute) concluded that mining operations in ecologically sensitive areas of Badkal lake and Surajkund were violating the Ambient Air Quality Standards in respect of Noise (Schedule III) and SPM (Suspended Particulate Matter) limit fixed under Schedule I of the Environment (Protection) Rules of 1986. In *Taj Trapezium Case*,⁷² the Vardharajan Committee (1978) and NEERI (1990) gave their reports regarding the status of air pollution around Taj Mahal to the Supreme Court. The Court based its findings on these reports. Report of NEERI observed 'on four occasions during the five years air quality monitoring at Taj Mahal were found to be higher than 300 ug/m³, i.e., 10 folds of schedule VII standard of 30 ug/m³ for sensitive area. The values exceeded even the standard of 120 ug/m³ set for industrial zones... SPM level at Taj Mahal was invariably high (more than 200 ug/m³) and exceeded the National Ambient Air Quality Standard of 100 ug/m³ for SPM for locations barring a few monsoon seasons.

⁷⁰ AIR 1992 KANT 57

⁷¹ AIR 1996 SC 1977

⁷² M.C.MEHTA VS. UNION OF INDIA AIR 1997 SC 734

Therefore, under Clause 2 (iii) the Central Government is under an obligation to lay down standards for (i) the quality of environment and (ii) discharge of emission of environment pollutants. Rule 30 of the Environment (Protection) Rules 1986 provides for the standards for emission or discharge of environment pollutants from industries, operation or processes and such standards have been specified in Schedule I to IV to protect and improve the quality of environment. Further, Clause (2) of Rule 3 empowers the Central Board and State Boards to specify more stringent standards than the standards prescribed in the Schedule. Thus, such discharge or emission beyond such standard would amount to violation of environmental laws, and the erring person is liable to be punished.

Powers of the Central Government to give directions [Section.5]

The Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority. Such person, officer or authority is bound to comply with the directions.

The power to give direction includes the power to direct:

- (a) the closure, prohibition or regulation of any industry, operation or process, or
- (b) stoppage or regulation of supply of electricity or water or any other service.

It is obvious from the above provision that the powers given to the Central Government are very wide. It can close any industry or stop the supply of any service to the industry. It does not provide even for the issue of notice of closure of the industry to its owner or disconnection of any service. In fact the section does not specify any subjects for which directions can be issued. The Central Government can give directions in the exercise of its powers and performance of its function under the Act.

However, Rule 4 of the Environment (Protection) Rules, 1986 must be read with Section 5 of the Environment (Protection) Act. Rule 4 provides the procedure to issue directions under Section 5 of the Act.

Some essential features of this Rule are:-

- (a) Any direction issued shall be in writing.
- (b) The direction must specify the nature of action to be taken and the time within which the person shall comply it with, officer or the authority to whom such direction is given.
- (c) The person, officer or authority to which the copy of direction is issued must be given an opportunity of not less than 15 days from the date of service to file the objections.
- (d) If the direction is regarding the stoppage or regulation of electricity or water or any other service, the carrying of any industry, operation or process, a copy of the same is to be endorsed to the occupier of the industry etc.
- (e) If the occupier had already been heard early no opportunity of being heard and copy of direction shall be endorsed to him.
- (f) The Central Government shall within a period of 45 days from the date of hearing or from the date up to which an opportunity is given to the person, officer or authority to file objections whichever is earlier or after considering the objections, if any confirm, modify or decide not to issue the proposed direction.
- (g) Procedure to serve the notice of direction has also been prescribed under Rule 4 (b) as has been provided for service of summons.
- (h) In view of the likelihood of grave injury to the environment, procedure to provide an opportunity can be dispensed with after recording the reasons in writing.

In *V.S.Damodaran Nair vs. State*,⁷³ the High Court of Kerala issued the direction under Section 5 of the Environment (Protection) Act, 1986 and 17 of the Air Prevention and Control of Pollution Act of 1981.

As per report of National Environmental Engineering and Research Institute (NEERI) because of the presence of Ammonia and SPM, automobile pollution, there was air pollution in Cochin City area. In spite of the directions of the Court the Municipal Corporation, State Pollution Control Board and Central Pollution Control Board did not care to implement the remedial measures to control the air pollution. Since these directions were not carried out, this case came up as a PIL before the High court. The Court issued detail directions to the State Pollution Control Board and Municipal Corporation of Cochin to implement the recommendations of NEERI to control the air pollution in the city including the direction to provide green-belt barrier between the industrial zone and residential sector without delay.

In order to maintain the quality of environment at the proper level, the Environment Act provides power to make rules to regulate environment pollution under section 6 of the Environment Protection Act. Under the Environment Protection Act, section 25 also provides the power of the Central Government to make rules. Apart from the general rule-making power⁷⁴ the Environment Protection Act contains a specific provision⁷⁵, which confers power on the Central Government to prescribe by Rules the standards for emission or discharge of environmental pollutants.

The rules mentioned above as provided under the Act are discussed hereunder:

Power to make Rule to regulate Environment pollution.⁷⁶

⁷³ AIR 1996 KER 8

⁷⁴ The Environment Protection Act, Sections 6(1) and 25(1)

⁷⁵ Id, Section 25(2)(a) read with Section 7

⁷⁶ Id, Section 6

The Central Government may, by notification in Official Gazette, make rules in respect of all or any of the matters referred to in Section 3. Any particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters namely:-

- (i) the standards of quality of air, water or soil for various areas and purposes;
- (ii) the maximum allowable limit of concentration of various environmental pollutants (including noise) for different areas;
- (iii) the procedures and safeguards for the handling of hazardous substances;
- (iv) the prohibition and restrictions on handling of hazardous substances in different areas;
- (v) the prohibition and restrictions on location of industries and the carrying of processes and operations in different area;
- (vi) the procedures and safeguards for the prevention of accidents which may cause environmental pollution and for providing for remedial measures for such accidents.

Therefore, the Central Government after deriving its powers from section 6, have published various standards to maintain the quality of air, water, soil and for the safe handling, management and disposal of hazardous substances. This section may also be read in conjunction with section 25 of the Act, which also empowers the Central Government to make rules for carrying out the purposes of this Act. As such in pursuance of sections 6 and 25 of the Environment Protection Act the Central Government made the Environment Protection Rules from 19th November 1986.⁷⁷ The emission standards are found in the Schedules appended to the Environment Protection Rules, 1986(EPR).

The rules framed under the EPA prescribe norms for specific industries⁷⁸ and general emission standards, which are 'Concentration based'

⁷⁷ Govt. of India, Ministry of Environment and Forest; Notification No. S.O. 844(e), dated 19-11-1986; in the Gazette of India

⁷⁸ Schedule I, Environment Protection Rules of 1986

'equipment based' and 'load/mass-based'.⁷⁹ The general standards apply in the absence of industry specified norms.⁸⁰ Besides, Rule 30 of the Environment (Protection) Rules, 1986 provides that the standards for emission or discharge of environment pollutants from industries, operations or processes shall be specified in Schedule I to IV to protect and improve the quality of environment. Further clause (2) of Rule 3 empowers the Central Board or State Boards to specify more stringent standards than the standard prescribed in the Schedule. Various Schedules dealing with various aspects of environmental pollutants are as follows:

- (a) **Schedule- I**- It has enlisted 89 industries and the parameter and standards of emission/discharge. Such industries include thermal power plants, caustic soda industry, dye industries, electro-plating, cement plants, synthetic rubber, pulp and paper industry, leather, fertilizer, nitric acid, iron and steel, rubber, oil refinery, petrochemicals, pesticides, paint, tannery, lead, glass, noise from automobiles, food and fruit processing industry, organic chemicals manufacturing industry, pharmaceutical industry, water quality standard for coastal waters, marine outfalls, noise standards for firecrackers and others.
- (b) **Schedule-III**-Ambient Air standard in respect of Noise.
- (c) **Schedule-IV**-Standard for emission of smoke, vapour etc from Motor Vehicles.
- (d) **Schedule-VI**-General standards for discharge of Environmental Pollutants.
- (e) **Schedule-VII**-National Ambient Air Quality Standards.

Schedule VII mentioned above provides separate standards and concentration in Industrial areas, Residential areas and Sensitive areas and also the method of measurement of pollutants. Concentration in excess of the above-mentioned Air Quality Standards amounts to violation of environmental law and the erring person is liable to be punished.

⁷⁹Part D, Schedule VI

⁸⁰Rule 3

In *M.C. Mehta vs. Union of India*⁸¹, the Supreme Court, on the basis of the inspection report of NEERI (National Environmental Engineering Research Institute) concluded that mining operations in ecological sensitive areas of Badkal lake and Surajkund were violating the Ambient Air Quality Standards in respect of Noise (Schedule III) and SPM (Suspended Particulate Matter) limit fixed under Schedule I of the Environment (Protection) Rules of 1986.

It may be pointed out here that the Environment Protection Act confers power on Central Government to lay down standards for quality of environment and for emission or discharge of environmental pollutants from various sources. These standards are usually general standards, varying depending on the kind of industry. However, it may happen that even though the prescribed standard of emission is maintained in a particular area by industry. Still the cumulative effect of such emission or discharge from various sources may cause environmental deterioration. Such a situation can be avoided only by prescribing standards for emissions or discharge in each case keeping in view the relevant environmental factors as, (i) number of industries in a given area; (ii) nature of discharge or emission; and (iii) area where industries are located. Rule 5(1)⁸² of the Environment (Protection) Rules 1986, has taken care of this aspect.

The standards provided under the Environment (Protection) Act 1986, after being notified by the Central Government, apply Nation wide. It is not essential for the State Pollution Control Board to re-issue these standards under the Air Act and Water Act. Rule 3 (3A) of the EPR requires each and every industry, operation or process to comply with the minimum National standard set out in Schedule VI to the EPR from 1 January 1994.

⁸¹ AIR 1996 SC 1977

⁸²It may be noted that the Environment Act provides for restriction of areas in which industries. Operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to safeguards. It also provides for making rules to prohibit or restrict the location of industries and the carrying on of processes and operations in different areas. Rules have been prescribed enabling the Central Government to prohibit or restrict the location of industries or carrying on of processes and operation in any area having regard along with other things, to standards for quality of environment in the area.

5.2.(iii). Provisions for prevention, control and abatement of Environmental Pollution

Section 7 of the EP Act lays down restrictions for emission of pollutants in excess of standards prescribed. It provides that no person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollution in excess of the standard prescribed.

These standards can be prescribed under section 6 (2)(a) and 25 (2)(a). They can also be laid down by the Central Government in the form of measures under section 3(2)(iii) and (iv). Also the Central Government can issue written directions on the subject of pollution under section 5.

With respect to air pollution the standards under the Environment Protection Rules are to be maintained by any industry. Although the standards have been prescribed, very little has been done for the monitoring systems of air pollution, lab facilities for estimating pollutant levels and training of manpower to fulfill its object. The provisions of the Act do not take into account relevant factors such as, difference in capacity of various industries to take pollution measures, the cumulative effect and environmental impact of emissions or discharge from different sources at a given time in a given area and costs involved in the process of control of pollution to industry and society. The power to fix standard of emission or discharge is required to be conferred on expert authority, which has been done by taking opinion of NEERI (National Environmental Engineering Research Institute) by the Court in certain cases before the Supreme Court.⁸³

⁸³ M.C.Mehta vs U.O.I., AIR 1996 SC 1977 & M.C.Mehta vs U.O.I., AIR 1997 SC 734

5.2.(iv). ACCIDENTS IN HAZARDOUS INDUSTRIES

The act deals with the accidents causing environmental pollution in three ways (These accidents include the discharge of poisonous gases and noxious chemicals in the atmosphere). These are:

- (1)The Central Government takes measures laying down procedures and safeguards to prevent accidents likely to cause environmental pollution. In addition, remedial measures for such accidents are also prescribed under section 3(2)(vii)
- (2)The Central Government is empowered to make preventive rules, after notification in the Official Gazette, to avoid such accidents. [Section 6(2)(f)]
- (3)If the discharge of any pollutant exceeds the prescribed standards leading to an accident, the person responsible must prevent and mitigate the consequential pollution. He is under a legal obligation to intimate the prescribed Authority. Then the Authority may take measures to prevent and mitigate the pollution. [Section 9 (1)]

Therefore, under chapter III Sections 7, 8 and 9 provide preventive measures to be taken by the institutions (industry, operation or process). Prohibition of Section 7 shows that certain standards have to be maintained and a person or an industry cannot be permitted to cause damage to the environment

In *Taj Trapezium* case⁸⁴ substantial level of sulphur dioxide and particulate matter generated by various industries and Mathura Refinery and vehicular traffic was found to be very high. Thus, it caused 'acid rain' resulting in the yellowing of the Taj Mahal. On this basis 292 industries were ordered either to switch over to gas, or close down, or shift out of the Taj Trapezium.

Section 8 deals with specific types of pollutants- the hazardous substances, and directs to comply with prescribed procedure and to abide by the safeguards provided for by the Rules specially notified for them. There are two requirements for handling hazardous substances.

⁸⁴ AIR 1997 SC 734

- (a) the person has to follow the procedure prescribed by the Act or Rules made there under;
- (b) the person handling the hazardous substance has to take necessary safeguards as prescribed.

Various rules dealing with the procedure and safeguard have been notified and various rules have been enacted by the Central Government from time to time. The rules relating to hazardous substances are as under:-

- (1) Hazardous Waste (Management and Handling) Rule, 1989.
- (2) Manufacture, Storage and Import of Hazardous Chemical Rules, 1989.
- (3) Hazardous Micro-organisms Rules, 1989.
- (4) Chemical Accidents (Emergency planning, preparedness and Response) Rules, 1996.
- (5) Bio-Medical Waste (Management and Handling) Rules, 1998.
- (6) Recycled Plastic Manufacture and Uses Rules, 1999.
- (7) Municipal Solid Waste (Management and Handling) Rules, 1999.
- (8) Environment Impact Assessment Rules, 1996.

The approach adopted by Environment Act is not only for remedial action in case of accidental pollution, but also preventive action against apprehended pollution. These Rules have covered a wide aspect of handling of hazardous substances, for example, the Rules provide for the liability and duties of the occupier and operator, authorization to deal with them, packaging, labeling and transport of hazardous wastes, disposal site, operation and closure, full maintenance during collection, reception, treatment, transport, storage and disposal of hazardous substances, accident reporting and follow up. Several hazardous substances relate to cause air pollution too and hence most of the rules relate to the control of air pollution.

Therefore, the Environment Protection Act is an improvement over the Air Act, because under the Air Act, the Board has power to take remedial measures to mitigate the emission in case of actual and apprehended pollution under section 23(2). But this Act does not cast a

positive duty on the person responsible for pollution to take any preventive or remedial action, except to intimate⁸⁵ the authorities about the accident, which has or is apprehended to occur. The Environment Protection Act provides provision for preventive action against apprehended pollution along with the provisions for remedial action and Section 9 makes it obligatory to furnish information to the authority about the (a) discharge of environmental pollutants in the excess of the prescribed standards, or (b) apprehension of such occurrence due to accident, or occurrence of some unforeseen event. Hence, in a case of an accident resulting in discharge of environmental pollutants in excess of the standard fixed, the person in charge of the place where accident has occurred or is responsible for discharge of pollutant, has a statutory duty to mitigate the resultant environmental pollution. Similarly, such persons have the statutory duty to take preventive measures when the discharge of any pollutant in excess of the fixed standard is apprehended to occur. They are bound to intimate the fact of apprehension or occurrence of the accident to the prescribed authorities⁸⁶ and also render all assistance to them.⁸⁷ The authorities are empowered to take measures to prevent or mitigate⁸⁸ the pollution and recover expenses⁸⁹ from the person concerned. Due to said reason, the Environment (Protection) Act, 1986 is an improvement over the prior legislation as it casts on the polluter or the potential polluter a duty to take remedial or preventive actions and to assist the authorities.

Section 10 deals with the power of any person empowered by the Central Government for entry and inspection. Section 10, Clause (2) makes it a mandatory duty to all persons carrying on any industry, operation or process or handling any hazardous substances to render all assistance to the person so empowered by the Central Government while carrying out the function provided under Section 10, Clause 1 of entry and inspection. But-

⁸⁵ Air Act, Section 23(1)

⁸⁶ See Environment (Protection) Rules, 1986, rule (2)

⁸⁷ The Environment Protection Act, 1986, Section 9(1)

⁸⁸ Id Section 9(2)

⁸⁹ Id Section 9(3)

- (a) if a person carrying on an industry, operation or process, etc. does not render his help as envisaged, he would be guilty of an offence under this Act,
- (b) Similarly, if any person willfully delays or obstructs any person so empowered he shall be guilty of an offence under this Act.

It is important to note here that the penalties provided for offences under the Environment (Protection) Act differ from those of Air Act⁹⁰ and Water Act⁹¹ in material respect. Hence the penalty for contravening the above provision under the Air Act is punishable with imprisonment for a term of three months and a fine which may extend to Rs. 10,000, or both, with an additional fine of five thousand for every day during which such contravention continues after conviction for the first such contravention. The Environment Act contains an omnibus provision covering all offences. For violation for any provisions of the Environment Act or of the Rules made or orders or direction issued there under the punishment is provided. The maximum period of all offences is uniform namely five years and the maximum fine up to Rupees one lakh, is the same for all offences. If even after conviction the offence continues an additional fine of Rupees five thousand may be for each day. If it continues beyond one year the offender is punishable with imprisonment for a period up to seven years, while the Air Act does not lay much emphasis either on imprisonment or fine. The Environment (Protection) Act stresses more on monetary sanctions. It may be opined that the Environment (Protection) Act contains provision, which is having deterrent effect, but the Air Act contains provision, which takes away this deterrent effect. According to Section 24 of the Environment (Protection) Act if the offence committed is falling under the purview of any other Act, it is provided that the offender shall be liable to be punished under that Act and not under this Act. This strange provision therefore, takes away

⁹⁰ Air (Prevention and Control of Pollution) Act, 1981 provides punishment for three months and fine of Rs 10,000/-

⁹¹ Water (Prevention and Control of Pollution) Act, 1976 under Section 39 provides only a fine amounting to Rs 5000/-

the life out of the new enactment and reduces the law into a piece of legislation in to a 'paper tiger' having no tooth and nail.

Section 11 of the Act empowers any person empowered by the Central Government to take sample and the procedure to be followed for taking samples. Power to establish environmental laboratories and provision for Government Analysts have been provided under Sections 12 and 13 respectively. These provisions are similar to the provisions under the Air Act, relating to the power to take sample of Air or emission and procedure to be followed, the only difference is that under the Environment (Protection) Act only the Central Government or any officer empowered by the Central Government shall have power to take sample for the purpose of analysis or air, water, soil or of other substance, but under Air Act, the State Board is to take the sample of air or emission for the purpose of analysis.

Section 14 of the Act declares that a report signed by a Government Analyst, 'may be used as evidence of facts stated therein in any proceeding under this Act.' Section 15 provides penalty for the contravention of the provisions of the Act and Rules. Sections 16 and 17 provide for the liability and punishment for the offences committed by the Companies and Government Departments.

Sections 16 and 17 of the Act enunciate the principle of vicarious liability. Under Section 16 the person in charge, Director, Manager, Secretary or other Officer of the Company shall be vicariously liable for any offence committed by the Company. The Supreme Court in the case of *U.P. Pollution Control Board vs Mohan Meakins Ltd*⁹², made it clear that the Directors/ Managers who were responsible for construction work and plant would be held liable under Section 16 of the Environment (Protection) Act, 1986. The Court opined that the complaint could not be absolved only on the basis that the complaint was filed seventeen years back and there was inordinate delay in taking up a case. Section 17 lays down the provision for offences by Government Departments. It provides that the Head of the

⁹² AIR 2000 SC 1456 at 1460

Department shall be deemed guilty of the offence and shall be liable to proceeded against and punished accordingly, in case an offence under this Act is committed. Section 18 is a corollary to Section 17. It offers protection to the Government, any officer, other employees or any authority of the Government (also the authority constituted under this Act) in respect of anything done in good faith or intended to be done in good faith in pursuance of this Act or Rules made or orders/ directions issued there under. Here, good faith implies an obligation to act with a degree of prudence.

5.2.(v). COGNIZANCE OF OFFENCES

Section 19 of the Environment (Protection) Act, 1986 provides that no Court shall take cognizance of any offence under the Act except on a complaint made by (a) the Central Government or any authority or officer authorized in this behalf by that Government; or (b) any person who has given notice of not less than sixty days, of the alleged offence and of his intention to make a complaint, to the Central Government or authority or officer authorized as aforesaid. This provision is one of the significant innovation for the enforcement of the Act and there is no such provision contained in any other pollution abatement legislation at the time of the Act's adoption. A new stand with regard to locus standi has been adopted and this section enables even a common citizen to exercise his right to approach the Court provided he has given notice of not less than 60 days of the alleged offence.

However, the provision has also been characterized as an 'eye wash', because the 60 days notice period required for the Government, gives the offending industry sufficient time to clean up traces of the offence.⁹³ The citizens have seldom used this section. Most of the concerned citizens and environmental groups prefer to obtain redress through Public Interest Litigation.

⁹³ Agarwal, Significance & Perspective Impact of India's Environment (Protection) Act, 1986, 1 Encology No.7, 28-29 (1986)

Section 20 of the Act empowers the Central Government to require to furnish information, report or return from any person, State Government or other authority. It is mandatory provision and the person, officer, State Government or other authority is bound to furnish it. This provision enables the Central Government to exercise its power to obtain information from any authority to abate pollution and exercise its control.

Section 21 of the Environment (Protection) Act provides that all the Members, Officers and employees of the authority constituted under section 3 or any provision of the Act or rules shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code. Therefore, certain rights and protections have been provided to these authorities when they are discharging their duties to check air pollution or other pollution.

Bar of Jurisdiction

Section 22 of the Act provides for overriding effect of the Act and therefore debars the Civil Courts from having any jurisdiction to entertain any suit or proceeding in respect of anything done, action taken or order or direction issued by the Central Government or any other authority or officer in pursuance of any power conferred by or in relation to its or his functions under this Act.

Power of the Central Government to delegate

Under Section 23 of the Act the Central Government may delegate such of its powers and functions as it may deem necessary or expedient, to any officer, State Government or other authority. The delegation of powers may be subject to any conditions and limitations.

However, it cannot delegate the following:

- (i) the power to constitute an authority under Section 3 (3);
- (ii) power to make rules under Section 25.

5.2.(vi).Supremacy of Provisions

The Environment (Protection) Act⁹⁴ lays down the provision relating to effect of other laws which provides that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act. Therefore, if anything inconsistent is contained in the Air (Prevention and Control of Pollution) Act, 1981 and Environment Protection Act, the provisions of Air Act and rules and orders made therein shall have effect and the Environment Protection Act shall prevail. However, where any act or omission constitutes an offence punishable under this Act and also under any other Act, then offender found guilty of such offence shall be liable under the other Act and not under this Act.

5.2.(vii). Powers of the Central Government to make Rules

Section 25 of the Environment (Protection) Act empowers the Central Government to make rules for carrying out the purpose of the Act.⁹⁵

These rules may include provisions for all or any of the following matters; namely:-

- (i) the standards in excess of which environmental pollutants shall not be discharged or emitted under Section 7;
- (ii) the procedure in accordance with the safeguards in compliance with which hazardous substances shall be handled or cause to be handled under section 8;
- (iii) the authorities or agencies to which intimation of the fact of occurrence or apprehension of occurrence of the discharge of any environmental pollutant in excess of the prescribed standards shall be given and whom all assistance shall be rendered under sub-section (1) of section 9;
- (iv) the manner in which samples of air, water, soil or other substances for the purposes of analysis shall be taken under section 11(1);
- (v) the form in which notice of intention to have a sample analysed shall be served under Clause (a) of sub-section (3) of section 11;

⁹⁴ Section 24

⁹⁵ Environment (Protection) Act, 1986, Section 25(1)

- (vi) the functions of the environmental laboratories, the procedure for the submission to such laboratories of samples of air, water, soil and other substances for analysis or test; the form of laboratory report; the fees payable for such report and other matters to enable such laboratories to carry out their functions under sub-section (2) of section 12;
- (vii) the qualifications of Government Analysts appointed or recognized for the purpose of analysis of Samples of air, water, soil or other substances under section 13;
- (viii) the manner in which notice of the offence and of the intention to make a complaint to Central Government shall be given under Clause (b) of section 19.
- (ix) The authority or officer to whom any reports, returns, statistics accounts and other information shall be furnished under section 20.
- (x) Any other matter which is required to be, or may be prescribed.

In *B.L.Wadhera(Dr.) vs Union of India*,⁹⁶ the Supreme Court issued fourteen directions to the Delhi Municipal Corporation and others regarding the degrading ambient air quality and disposal of solid waste of Delhi City. In this case the Court constituted a Committee to look into the various aspects of Urban Solid Waste Management. The Committee had submitted its recommendations, which were circulated to all States. The Municipal Solid Waste (Management and Handling) Rules, 1999 was notified by the Central Government in response to that report. There are various Rules notified by the Central Government in the exercise of the powers conferred under section 25 of the Environment (Protection) Act 1986 and many of these Rules deal with Air Pollution.

Various Rules notified by the Central Government in the exercise of the powers conferred under section 25 are:-

1. Environment (Protection) Rules, 1986.
2. Hazardous Wastes (Management and Handling) Rules 1989.

⁹⁶ AIR 1996 SC 2969.

3. Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989.
4. Hazardous Micro-Organism Rules, 1989.
5. Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996.
6. Bio-Medical Waste (Management and Handling) Rules, 1998.
7. The Prevention and Control of Pollution (Uniform Consent Procedure) Rules, 1999.
8. Municipal Solid Waste (Management and Handling) Rules, 2000.
9. Noise Pollution (Control and Regulation) Rules, 2000.

Section 26 of the Environment (Protection) Act provides that every Rules made under this Act shall be laid before the Parliament as soon as may be after it is made. The Rule can be accepted, modified or rejected by both the Houses of the Parliament.

The Environment (Protection) Act 1986 has enacted to give effect to the solemn resolutions at the 1972 Stockholm Conference on Human Environment. The predominant characteristic of the Environment Act is the centralization and the concentration of all power in one authority, the Central Government. The authorities constituted to implement the environment are also subject to the supervision and control of Central Government. The vesting of such authority is advantageous in one respect but is also not above criticism. It helps in formulation of a National environmental policy and its implementation at the national level. Yet, it is criticized for undue centralization as it may lead to serious undesirable consequences and the Central Government may fail to consider vital environmental impact assessments while formulating plans and programmes and making decisions in its enthusiastic and rapid race towards development. Even if it chooses to appoint officers and confer upon them powers under the Environment (Protection) Act,⁹⁷ there is no guarantee that they will have functional freedom. This is so because they are made subject

⁹⁷ Section 4.

to general control and direction of Government. Even delegation of powers and functions by Central Government to any officer by Central Government to any officer, State Government or other authority may not bring about different results.⁹⁸

This Act is said to be a more effective and bold measure to fight environmental pollution. The Act has adopted a new stand with regard to the question of locus standi so that now even a citizen has right to approach a Court. Section 19(b) requires such person to give a sixty days notice, this aspect is criticized as an 'eye wash' because sixty days notice enables the polluter to continue pollution for sixty days and the sufferers or persons concerned have no alternative than to wait helplessly. It also allows the offending industry sufficient time to clean up. Therefore, most concerned citizens or groups prefer to obtain redress through PIL and this provision remains like a vestigial organ.

The Act strengthens penal provisions, but contains a provision⁹⁹ that takes away this deterrent effect by providing if the concerned act or omission is an offence under any other Act, the offender can be proceeded under that Act. Therefore, if any punishment is to be imposed for air pollution the provisions of the Air Act are to be taken into consideration and not the Environment (Protection) Act. Therefore, since the provisions of the Air Act do not lay much emphasis either on imprisonment or fine the offenders are being persuaded and not penalized under the Air Act. This takes away the life out of this enactment.

The Act has also failed to make any provision to provide for effective participation by individuals and voluntary organizations in development of an environmental policy and enforcement of emission standard. There should be provisions for public scrutiny over a project, as it will provide an opportunity for all concerned to study, assess and express

⁹⁸ Chandrashekhar: Environment Protection: Two steps Forward, one step back, See JILI vol 30 p.185 (1988)

⁹⁹ Section 24 of the Environment Protection Act

their views on environmental consequences of the proposed actions.¹⁰⁰ Some who would put forward an argument that the public may be ignorant of technical issue involved may oppose this type of public participation. The attitude that the public should not be unduly alarmed by probability of future danger involved in a project has actually been used to conceal relevant and vital information from public. This phenomenon has in returned aggravated the problem of pollution. The expansion of health ailments, respiratory and other diseases are increasing day by day. The authorities entrusted with the work can no longer be permitted to sit back with folded hands. The raise in the respiratory ailments, including lung cancer hovering over more than half of the city's school children in Calcutta¹⁰¹ and other metropolitan cities gives the reflection that nothing has been done to reduce pollutants from the city's air. Therefore, it is the people or innocent children who are the immediate victims of environmental hazards. Inevitably the Right to information is kept away and it may be pointed out that concealing relevant information would not leave the public remain unaware of the facts. The legislature should encourage public participation to guarantee fairness and resolve the problem of pollution through effective means. Therefore, Government should disseminate environment information as a matter of legal right of individuals and also by way of environmental education to the people. The policy should also put more stress on the air pollution because if the pollution of atmosphere occurs in a rapid pace, the day would not be far when we would find people gasping for breath in the metropolitan cities. The more vulnerable to atmospheric pollution would be the children because their lungs are at a formative stage and they inhale more air relative to their body size. Further, due to their height they are close to ground level and more exposed to pollutants. A study conducted by Chittaranjan National Cancer Institute shows that 52% school children's in West Bengal were suffering

¹⁰⁰ See P. Leelakrishnan: 'Environmental Impact Assessment Need for Law', Cochin University Law Review, 246 at 254 (1986)

¹⁰¹ The Statesman, South Bengal Plus, 21st August 2004.

from respiratory ailments.¹⁰² This situation is alarming. It shows how recklessly we are violating minors Oposa's theory of intergenerational equity and responsibility. Before the condition worsens both the Environment (Protection) Act and Air Act should work in consonance and have punitive measures imposed for violation of the emission standards and other standard to maintain ambient air quality. One of the defects of the Environment (Protection) Act is that it fails to provide for an independent statutory agency. The Environment (Protection) Act should also be amended to provide provisions for enforcement by taking adequate help from the specialized agencies performing tasks under the Environment Impact Assessment Regulations of 1994.

The Act is required to impose punishments to deter people if any law is silent and it should not provide for opting to the special legislation of the other Act, if the punishment specified in that Act has less severe penal provisions. The Act is required to give special consideration to air pollution also because a person can survive for five weeks without food and five days without water but only five minutes without air. The Environment (Protection) Act should be applied only where the Air Act is silent.

Scanning of existing laws on air pollution therefore, reveals that it partially lends credence to public participation. However, legal propensity remains neither towards substantive nor procedural participation. The enforcement and inspectorate mainly State Pollution Control Boards and environmental authority are delegated with powers to undertake all measures to protect and improve environment. The slackness coupled with woefully understaffed machinery exhibits negligible records in actualizing the objects in these laws. It is under this backdrop public has been empowered to complain to Board by giving affording 60 days prior notice¹⁰³. While granting license the Board is not under a duty to solícite public opinion

¹⁰² Ibid.

¹⁰³ Section 19, Environment (Protection) Act, 1986; Section 49 The Water (Prevention And Control of Pollution) Act, 1974; Section 43 The Air (Prevention and Control of Pollution) Act, 1981; Section 55 The Wildlife (Protection) Act, 1972.

regarding environmental enignty of industries. The 1988 amendment to Water & Air Act has provided a fillip to public participation in activating the machinery of court.¹⁰⁴

In the entire sphere of power and functions of the Boards the general public and environmental action groups have not been made a working partner. The Air, Water and Environments Act generally abdicate power to Boards to plan Nationwide programme¹⁰⁵ by laying down of standard of quality¹⁰⁶ activising State Government with respect to suitability of localities of industries¹⁰⁷ and to take all measures which are expedient for control of air pollution. Identification, demarcation and alation of air pollution area the State Government is only supposed to consult State Board¹⁰⁸. Such an important step is to be taken without any public feedback and hearing. So much so while granting consent, the Board is not under a duty to solícite the opinion of voluntary groups and local people¹⁰⁹. This is equally true in case of watch and vigilance¹¹⁰.

Environmental laws are many. In spite of so many laws, the implementation process is moving at snail's pace. Fundamentally a research has to be undertaken to see why some of these laws are toothless. According to Justice Krishna Iyer, the impotency of law is to be tackled by including environmental issues under the umbrella of public interest litigation. A right to information emphatically exercised and backed by powerful public support would bring in some fear to violators of law. In India we have the National Commission for Women and the National Human Rights Commission, which have played a very big role in curbing the atrocities taking place in these respective fields. Such a Commission should be set up especially for environmental issues- they cannot be clubbed with other

¹⁰⁴ Md Zafar Mahfooz Nomani, Community action and environmental protection: A review of Legal Judicial Mechanism, Indian Bar Review, Vol. 29 (3 & 4) 2002, P.9.

¹⁰⁵ Section 16 (b), The Environment Protection Act 1986.

¹⁰⁶ Id Section 17 (b).

¹⁰⁷ Id Section 17 (h).

¹⁰⁸ Id Section 19, The Air Act, 1981.

¹⁰⁹ Id Section 21.

¹¹⁰ Id Section 24.

litigations. Special courts or tribunals can be empowered to adjudicate upon such matters. Justice Krishnaswami Iyer also recommends the existence of a seasoned and knowledgeable person to play the role of an 'Environment Ombudsman'. Participative social active groups can become catalyst to encourage and activate people and link them with the legal process. It is very important to create awareness among people as well as prevent them from misuse of nature.

There should be provisions like Wildlife Protection Act passed in 1972 seems more sensitive towards public participation. In the constitution of Wildlife Advisory Board the State Government is empowered to nominate ten persons who is in the opinion of State Government are interested in protection of Wildlife including three representatives of Tribal¹¹¹. To boost general public the Act contains a very salubrious provision to reward person who helps in the detection of the offence. It provides that out of the Fine collected from the culprit 25 percent should be paid as a reward to the person who renders assistance in detection of the offence¹¹².

There are similar provisions provided in the Forest Act 1927 where mandatory duty on the person exercising any right in reserved forest to assist Forest and Police officials with information regarding the likely offences. Therefore, the Air Act must have legal provisions engraved into it to check pollution with the help of public. Public participation to assist the Board to ascertain pollution is required to be embedded into the Air Act.

The Forest Conservation Act, 1981, is equally sensitive to solicit the opinion of non-government specialists in the Advisory Committee¹¹³. The National Environment Tribunal Act, 1995, passed facilitate information sharing in environmental dispute resolution inducts one environmentalist in the Tribunal¹¹⁴.

¹¹¹ Section 60, The Wildlife Act, 1972.

¹¹² Id Section 60-A.

¹¹³ Section 3 & Rule 2A, The Forest Conservation Act, 1981.

¹¹⁴ Section 4, The National Environment Tribunal Act, 1995.

The weaknesses in the Pollution Acts are that there was no machinery to ensure their implementation. Workers and citizens were neither given access to information nor the right to monitor or use any industry without the permission of the Board.

One of the surest ways of controlling and monitoring pollution would be to give powers to workers to stop a plant if emission levels cross the prescribed limits. The Clean Air Act of USA provides for this. The US Act also provides that no worker raising the issue of pollution or calling for stoppage of work due to apprehension of excessive emission shall be discharged or discriminated against. Swedish law allows workers to strike work in the event of flouting of environment regulations by the management. Far from trying to solve this problem, the Environment Act refuses to even address itself to this question.

Industries under the Pollution Acts are accountable only if the Pollution Board officials decide to do so. Lack of infrastructure, political pressure and corruption has resulted in the Boards allowing the industries to go scot-free. The Environment Act does not solve any of these problems.

The individual's right also does not stand on a better footing. This is because the individual cannot proceed with his complaint, if on receiving 60 days notice; the Government communicates to the individual its decision not to file a complaint. This section has been partly borrowed from Section 7604 of the American Clean Air Act. Under the U.S. Act 60 day's notice has to be given. However, if the Government communicates its refusal to file a complaint, the individual can proceed with his own case. An individual will be stopped only if 'the State has commenced and is diligently prosecuting an action in Court'. Even in such cases, any individual can intervene as a matter of right. Under our Act, citizens, worker and environmental groups are neither given access to any data nor any right to commence independent action. This is a major flaw in the Act.

5.3. Vehicular Pollution and Legislative Development

Vehicular Pollution is one of the major sources of air pollution. The immense crush of pedestrians and vehicles of all sorts that clog the streets often overwhelm every big city. The noise, congestion and confusion of traffic make it suicidal to venture into the street. Surveys indicate that India's vehicular pollution has increased eight times over past two decades, while pollution from industries has quadrupled. The legislative measures for control of automobile air pollution require a careful examination. Before going through the legislative measures one is required to understand the gravity of the problem, in order to bear a clear notion on what should be the legislative measures to check air pollution.

5.3.(i). Gravity of the Problem

Vehicular pollution is the pollution of the air and the environment by the discharge of harmful automobile exhaust. The air which can be said to be healthy for human, animal and plant life is a mixture of gases- 78% Nitrogen, 21% Oxygen, 1% Argon, 0.03% Carbon dioxide and very minor trace of helium, methane, krypton and 1.3% of water vapour by volume. If the relative mix of these gases in the ambient air is disturbed due to any reason, the air become unhealthy or non-conductive to the existence and survival of living organisms. Then the air is said to have become polluted. This problem of air pollution is caused mainly from combustion sources, industrial activities etc. Combustion sources comprise- power plants, domestic cooking and heating equipments producing sulfur dioxide, Nitrogen oxide and particulates in varying concentrations; motor vehicles exhaust emission resulting in pollution by carbon monoxide, smoke, lead and nitrogenous gases.

The major contributor to the atmospheric pollution is the automobile exhaust emission from all types of vehicles. Automobiles generate 90% of Carbon Monoxide in the major urban areas. The remaining

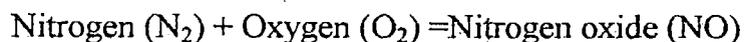
10% is produced by the various industries, power plants and solid wastes. On a global scale 80% of the Carbon monoxide is emitted by degradation of organic matter.¹¹⁵

Unlike other gaseous pollutants, Carbon monoxide passes through the lungs directly into the blood stream and since there is a great affinity¹¹⁶ of the haemoglobin for Carbon monoxide molecules the Carbon monoxide reacts with the haemoglobin in the blood converting the easy flowing liquid substance into a jam like substance hindering the flow of blood in the circulatory system. Once the circulatory system is jammed organs fail to function as a result of non-supply of blood from the heart to the brain and other areas. In such an event a person dies from suffocation and the process is known as Asphyxiation. This is the most immediate effect caused by the dreaded pollutant and people in the West, especially the US apply this method to commit suicide.

As per the Bhurelal Committee's Report¹¹⁷ more than 90% of nitrogen dioxide and respirable particulate matter or suspended particulate matter in Delhi come from vehicle exhausts.

Ordinarily nitrogen and oxygen do not react directly under normal circumstances, but high temperature as found in combustion reaction in automobile cylinders facilitates a direct combination and as a result reaction between them take place producing nitrogen oxide (NO) and as soon as Nitrogen oxide from the hot exhaust of the automobile hits the outside air, it reacts with more oxygen in thin air and produce nitrogen dioxide. The reaction takes place as follows¹¹⁸:

I st reaction: (inside the automobile engine)



II nd reaction (once it comes out from the hot exhaust and reacts with the oxygen in the air outside):

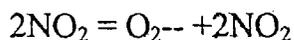
¹¹⁵ Das, Sharma and Agarwal, An Introduction to Physical Chemistry, 1997, p.182.

¹¹⁶ Carbon monoxide binds to the haemoglobin 200 times more strongly than oxygen.

¹¹⁷ *M.C.Mehta vs. Union of India*, (1999) 6 SCC, p.9.

¹¹⁸ K.N.Upadhyaya, A text book of Organic Chemistry (1992), p.190.

Nitrogen oxide + Oxygen = Nitrogen dioxide



Though both nitrogen oxide and nitrogen dioxide are toxic gases, the latter is far more harmful than the former. Breathing nitrogen dioxide in large concentration causes chronic lung diseases even death. It also causes Chlorosis or loss of the normal green coloration of leaves and extensive leaf drop in plants. It also plays a part in producing Ozone in the lower layers of the atmosphere (ozone layer in the upper layers of the atmosphere is important for providing protection from ultra violet rays of the Sun), which is harmful since it is present in smog, a mixture of smoke and fog, which has been creating problems to the aeroplanes in landing and the driving of vehicles on the roads. Nitrogen dioxide also causes irritation to the eyes and respiratory tracts.

Together with carbon monoxide and oxides of nitrogen, a large percentage of hydrocarbons are also emitted by vehicles. Such gases cause the green house effect and as such the reason for global warming. It also is one of the factors for depletion of the ozone layer, which is found in the outer layer of the atmosphere and is responsible for the protection from the Ultra Violet Sunrays, which is the main cause for skin cancer.

Suspended particulate matter is one of the major products in vehicular pollution. It is an enormously complex category of solids and liquids found in the air space and is of two types, both manmade and natural. Manmade suspended particulate matter are the creation of various activities carried on by man in a modern industrialized world such as industries and vehicles to name a few, and as such can be minimized down to zero levels whereas Natural suspended particulate matter can never be nil and as such there is always some amount of suspended or respiratory particulate matter in the atmosphere, e.g. dust.

Of all the toxic metals found in the atmosphere in the form of suspended particulate matter, Lead is the one present in large concentrations and such presence of lead in the atmosphere is the result of burning gasoline.

Lead Tetraethyl is found in petrol or gasoline and is used as an additive to prevent antiknocking of combustion engines in vehicles. Such lead poisoning can lead to chronic lung disease and ultimately lead to cancer of the lungs. In the U.S. the U.S. army has stopped using lead in bullets as per a recent report. The ban is to avoid lead poisoning in the atmosphere since once a bullet is released from the barrel of a gun some toxic lead is bound to pollute the air in such a high temperature when released (fired) from a gun.

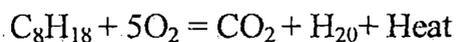
The increase in the automotive emission levels effects the ambient air quality especially in urban areas. In India, the major metropolitan cities like Delhi, Mumbai, Kolkata, Bangalore are experiencing pollution of air due to motor vehicles. The transport sector is the largest emitter of Carbon monoxide (CO), Nitrogen oxides (NO) and Hydrocarbons (HC) into the air. Gasoline- run vehicles contribute the most of the Carbon monoxide, Hydrocarbons and lead (Pb), while diesel vehicles are the chief source of particulate and Sulphur dioxide. Emission statistics indicate that vehicular pollution is responsible for a shocking 64% of the total air pollution load from various sources in Delhi, 52% in Mumbai.

The facts and figures available from the report of the monitoring Committee on ambient and automotive emission levels are such that on March 31, 1982 Delhi had a total number of 5,92,544 vehicles. The vehicular population of 1990 was 13.5 as is evident from the affidavit of the Deputy Director of Transport of the Delhi Administration.¹¹⁹ This means that within about 8 years there has been increase of about 8 lakh vehicles in Delhi, which would work out to an addition of one-lakh vehicles per year. Though the Deputy Director of Transport has indicated that the automobile contribute about 50% of the polluting factor there is material to suggest that the proportion is still higher.

The problem of air pollution from vehicles in cities has a serious effect on the health of the citizens. Carbon dioxide and Carbon monoxide emitted out by combustion of fuel created a green house effect in the cities,

¹¹⁹ In *M.C.Mehta vs. Union of India* (1991) 2 SCC 353 (Para 10)

making them hotter in the summer and colder in winter. The high rate of air pollutant emission is usually due to poor maintenance of vehicles, poor upkeep of roads, frequent traffic jams, use of over aged vehicles and over loading etc. If we examine the various factors contributing to environmental pollution, we shall find combustion engines as a major source of air pollution. Different fuels in these engines include coal, petrol, gasoline, kerosene and diesel. Black and heavy smokes are produced when these fuels are burnt. In metropolitan cities and urban areas where automobiles and numerous industries are the common features, the major air pollutants are contained in the Smoke generated by internal combustion engines used in running vehicles like buses, cars, scooters, trucks etc, on the roads. The most common fuels used in most of these engines are gasoline. When a mixture of air and gasoline vapour burn, the reaction most likely to occur is represented by the equation¹²⁰



meaning that when the vapour (octane) burns with the help of Oxygen heat energy is released together with Carbon dioxide and water vapour.

If the combustion action is complete as indicated in the above equation, the problem is not to be acute. But the combustion reaction in an automobile engine is not totally complete no matter how efficient the engine is. It is also clear that there are several impurities in form of Sulphur, Benzene, lead etc, which would burn with the fuel and release various poisonous gases. Even ill maintained vehicle is another source of pollution.

Therefore, proper control of vehicular pollution is possible by proper planning and control through various measures like maintenance of roads, withdrawal of over aged vehicles, by implementing the direction of Supreme Court through installation or upgrading of the vehicles into eco-friendly ones. Using of proper fuel and anti pollution devices should also be developed to minimize vehicular pollution. Another basic problem for the rise in the air pollution by vehicles and other relative agents have been due

¹²⁰ K.N.Upadhyay, A text book of Organic Chemistry, (1992), p.184.

to lack of awareness among the masses and limited information regarding such problems.

5.3.(ii). The Legal Control of Automobile Air Pollution in India

The legislature on environment pollution does not effectively cover the entire aspect of vehicular pollution. The substantive law for curbing menace caused by vehicular pollution is however not sufficient. The problem arises also because its application is not carried out as expected. The legislations dealing with the provisions relating to pollution by transport are; The Environment (Protection) Act 1986 along with the Environment Protection Rules,¹²¹ the Air (Prevention and Control of Pollution) Act, 1981 and the Motor Vehicles Act amended in 1988 along with the Motor Vehicles Rules 1989. These legislations mainly contain provisions regarding control of smoke emission, noise pollution caused by vehicular traffic etc.

(a) Prevention under The Environment (Protection) Act, 1986

The Environment (Protection) Act 1986 was not enacted keeping in mind the perils of vehicular pollution. The legislation, however, does not totally skip the area connected with vehicular pollution. Some sections under the Act have been utilized to check vehicular pollution through judicial activism. One of the sections under which authority was constituted to check vehicular pollution is section 3.¹²² Section 3(1) empowers the Central Government to take all necessary steps to improve and protect environment. Since, vehicular pollution qualifies very much as environment pollution as per the definition of 'environment' under the Act. The Central Government is thus invested with the power to take any measures to prevent, control and abate such pollution as a reason to protect and improve the environment quality. The Supreme Court in *M.C.Mehta vs.*

¹²¹ 1986, mentioning the prescribed standards to be maintained by different types of vehicles using different fuels.

¹²² In *M.C.Mehta vs Union of India* AIR 1998 SC 2963

*Union of India*¹²³ has opined that even the Norms fixed under the Motor Vehicles Act are in addition to and not in derogation to the requirements of Environment (Protection) Act, 1986.

The provision under section 3 (2) of the Act empowers the Central Government to co-ordinate the actions by the State Government, Officers and other authorities that are taken under the Environment Protection Act or Rules made there under. This provision also enables the Central Government to coordinate the actions by State Government, Officers and other authorities under any other law for the time being in force, which is relatable to the objects of this Act. Such coordination is essential as the authorities i.e., the Pollution Control Boards, the Officers or the Committees might be different but their objective is common, so they too should lead towards the common goal to protect and improve the quality of environment.

Under section 3 of the Environment Protection Act the Central Government has also been empowered to constitute an authority for performing powers and function of the Central Government. The authority headed by Mr. Bhurelal happens to be an example of such an authority. The Supreme Court¹²⁴ has opined that since the Committee had been set up under the Environment Protection Act, it could give directions towards effective implementation of the safeguards of Environment Protection Act, more particularly aimed at preventing air pollution. The Committee was also said to have legal sanctions. The Committee was known as the "Environment Pollution (Protection and Control) Authority" for the National Capital Region for preparing and submitting a report for the steps and measures to be taken for controlling vehicular pollution and connected matters.

There are some other important provisions also besides the above-mentioned functions of the State, which are very important for curbing vehicular pollution. These measures include the planning and execution of Nation wide programme for the prevention, control and

¹²³ AIR 2001 SC 1950

¹²⁴ Ibid

abatement of environmental pollution¹²⁵, laying down standards for the quality of environment in its various aspects¹²⁶ and laying down standards for emission discharge of environment pollutants from various sources whatsoever.¹²⁷ In the exercise of the power to take measures under section 3 (2)(iv) of the Act the Government has laid down the standards for emission or discharge of environmental pollutants. Such standards are to be maintained by the person in charge of the source, which emits environmental pollutants, for e.g. the driver or the person in charge of the vehicle has to maintain the prescribed Standard laid down for emission. These standards are provided in the Environment (Protection) Rules, 1986 by the concerned authority after deriving power conferred by sections 6 and 25 of the Environment (Protection) Act 1986.

(b) Prevention under The Air (Prevention and Control of Pollution) Act 1981

The Air Act¹²⁸ also deals with any activity that pollutes the air. Although the Act covers in its ambit noise pollution and pollution caused by vehicle. There is only little more than one section in the whole Act that mentions pollution of vehicular traffic but this is also not an active provision because it does not penalize the erring vehicles. The specific section, which is related to vehicular pollution, is section 17(1)(g). This section provides that it is the function of the State Board to lay down in consultation with the Central Board, standards for emission of air pollutants. Section 20 of the Act seems to be more substantive in attaining the object of preventing quality of by controlling vehicular pollution. This section empowers the State Government to give instructions to the concerned authorities in charge of registration of motor vehicles under the Motor Vehicles Act, 1988 for ensuring standards for emission from automobiles. This section further

¹²⁵ Section 3(ii) of the Act.

¹²⁶ Section 3(iii) of the Act

¹²⁷ Section 3(iv) of the Act

¹²⁸ Air (Prevention and Control of Pollution) Act 1981

provides that the standard for emission of air pollutants from automobile, laid down by the State Board¹²⁹ should be complied with by such authorities notwithstanding anything contained in the Motor Vehicles Act and Rules. Thus a registering authority while registering a motor vehicle can refuse to register the said vehicle if the vehicle fails to comply with the emission standard prescribed by the State Board in consultation with Central Pollution Control Board. Such a refusal can be made even though the said vehicle fulfils all the conditions required for registration as per Motor Vehicles Act, 1988.

The standard for emission of air pollutants from vehicles vary from place to place, urban areas have much higher standards as compared to rural areas because of the density of traffic and such standards are followed more stringently in cities than in small rural town as a result of the concentration of the enforcement machinery. The Central Government or the State Government has powers to make rules in relation to such instructions and thus we find the Central Motor Vehicles Rules, 1989 and the respective State Motor Vehicles Rules.

In *Santosh Kumar vs. Secretary, Ministry of Environment, New Delhi*,¹³⁰ two Writ petitions had been filed in respect of pollution of air in the City of Gwalior and surrounding areas on account of plying of a large number of motor vehicles using unauthorized kerosene and diesel oil causing health hazards to the local inhabitants. The Court quoting section 20 of the Air Pollution Act 1981 and Rules 115 and 116 of the Central Motor Vehicles Rules opined that the vehicle failed to comply with the prescribed standard of vehicular emissions is bound to have its registration suspended and together with the permit, if any granted in respect of vehicles under Chapter V or Chapter VI of the Motor Vehicles Act, 1988 until a fresh pollution under Control Certificate is obtained. Therefore, the provisions found in the Air (Prevention and Control of Pollution) Act, 1981 for control

¹²⁹ Under Section 17 (1) (g)

¹³⁰ AIR 1998 MP 43

of vehicular pollution provide a general guideline to prevent and control pollution.

(c) Prevention under The Motor Vehicles Act 1988

The Motor Vehicles Act, 1988 came into force after the repeal of the Motor Vehicles Act 1939. The Act consists of altogether two hundred and seventeen sections divided into fourteen chapters with two schedules. Out of the said two hundred and seventeen sections only few sections deals with the menace of vehicular pollution. The Act together with the Motor Vehicle (Amendment) Act, 1994, strives to minimize the problem of vehicular pollution. The Motor Vehicles Act 1988 with its timely amendments is a comprehensive legislation regarding the regulation of vehicles and helps in dealing with matters incidental to the running of a motor vehicle. The Act, however, is unable to eradicate vehicular pollution because there are various other factors also, which may lead to atmospheric pollution besides simple reason of vehicular activity. Vehicular pollution may be due to improper driving of a vehicle, improper maintenance of a vehicle, traffic jams etc. The Act and the Motor Vehicles Rules 1989 contain provisions regarding control of smoke emission, noise pollution caused by vehicular traffic etc.

Chapter VII of the Motor Vehicles Act, 1988, is more or less directly connected with vehicular pollution. Chapter VIII consists of three sections¹³¹ dealing with construction, equipment and maintenance of motor vehicles. Under subsection (3) of section 109 some measures for curbing the menace for vehicular pollution is embedded. According to this sub section if the Central Government is of the opinion that it is necessary or expedient so to do, in public interest, it may by order in Official Gazette, notify that any article or process used by a manufacture shall conform to such standard as may be specified in that order. In pursuant to this sub section the Supreme Court had directed that any four wheeler manufactured or sold after April 1,

¹³¹ Sections 109, 110 and 111

1995 in Delhi was to be fitted with a catalytic converter, which would minimize the level of pollution by helping the vehicle in maintaining the prescribed standard for vehicular emissions.¹³²

Section 110 of this Act empowers the Central Government to frame Rules regulating the construction, equipment and maintenance of motor vehicles and trailers with respect to all or any of the matter named in subsection (i) of section 110. Among these Clauses, Clause (g) empowers the Central Government to make Rules for regulating the emission of smoke, visible vapour, sparks, ashes, grit or oil. Clause (h) empowers the Central Government to make Rules for the reduction of noise emitted by or caused by vehicles. The Central Government in pursuance of the power conferred under section 110(g) and (h) framed the Rules known "the Central Motor Vehicles Rules, 1989"

(d) Prevention under The Motor Vehicles Rules 1989

The Motor Vehicles Rules, 1989 provides for certain important provisions relating to the prevention of air. The Rules relating to emissions, smoke, vapour, ashes, grit and oil have been provided under Rule 112, Rule 115 and Rule 116. Rule 113 provides for location of exhaust pipes and Rule 114 lays down provision for exhaust pipes of public service vehicles. These Rules are being discussed hereunder.

Rule 112

Every motor vehicle shall be so constructed or equipped that the exhaust gases from the engine are discharged neither down nor to the left side of the vehicle and shall be so fitted as to allow the gases to escape to the right side or rear of the vehicle.

Provided that in the case of tankers carrying explosives and inflammable goods, the figment of the exhaust pipe shall be according to the specification of the Inspector of Explosives.

¹³² Section 109 (3) of the Act, 1988 inserted by the Motor Vehicle (Amendment) Act 1994, or Act 54 of 1994.

Provided further that in the case of tractors, vertical exhaust pipe may be provided.

Rule 113: Location of exhaust pipes

On and from the date of commencement of this sub-rule, no exhaust pipe shall be located within a distance of 35 millimeter from the fuel line connecting to the fuel tank and engine.

Rule 114: Exhaust pipes of public service vehicles

The exhaust pipe of public service behind shall be so fitted or shielded that no inflammable material is thrown upon it from any other part of the vehicle and that it is not likely to cause a fire through proximity to any inflammable material on the vehicle.

Rule 115: Emission of smoke, vapour, etc. from motor vehicle

(1) Every motor vehicle shall be manufactured and maintained in such condition and shall be so driven that smoke, visible vapour, grit sparks, ashes, cinders or oily substance do not emit there from.

(2) On and from the date of commencement of this sub-rule, every motor vehicle shall comply with the following standards:

- (a) Idling CO (carbon monoxide) emission limit for all four-wheeled petrol driven vehicles shall not exceed 3 percent by volume.
- (b) Idling CO emission limit for all two and three-wheeled petrol driven vehicles shall not exceed 4.5 percent by volume.
- (c) Smoke density for all diesel driven vehicles shall be as follows:

Method of test	Maximum smoke density		
	Light Absorption	Bosch	Hartridge
	Coeffiml.	Units	Units

(a) For vehicles other than

agricultural tractors			
(i) Full load at a speed of 3.1 60% to 70% of maximum engine rated speed declared by the manufacturer	5.2	75	
(ii) Free acceleration	2.3	-	65

(3) On and from the date of commencement of this sub-rule all petrol-driven vehicles shall be so manufactured that they comply with the mass emission standards as specified at Annexure 'I'. The breakdown of the operating cycle used for the test shall be as specified at Annexure 'II' and the reference for all such less shall be specified in Annexure 'III' to these rules.

(4) On and from the date of commencement of this sub-rule, all diesel-driven vehicles shall be so manufactured that they comply with following based on exhaust gas capacity as specified at Annexure 'IV' to these rules.

(5) On and from the date of commencement of this sub-rule as diesel-driven vehicles shall be so manufactured that they comply with the following levels of emissions under the Indian driving conditions:

Mass of Carbon Monoxide (CO)	14%
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Max. Grams per K.W.H.

Mass of Hydrocarbons (HC)	
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3.5

Max. Grams per K.W.H.

Mass of Nitrogen Oxide (NO)	18
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Max. Grams per K.W.H.

(6) Each motor vehicle manufactured on and after the dates specified in sub-rules (2), (3), (4) or (5) shall be certified by the manufacturers to be conforming to the standards specified in the said sub-sections and further

certify that the components liable to effect the emission of gaseous pollutants are so designed, constructed and assembled as to enable the vehicle in normal use despite the vibration to which it may be subjected, to comply with the provisions of the said sub-rule.

Rule 116: Test for smoke emission level and carbon monoxide level for motor vehicles¹³³

This rule provides that notwithstanding anything in sub-rule 7 of Rule 115¹³⁴ any officer not below the rank of a sub-Inspector of Police or the Inspector of Motor vehicles who has reason to believe that a motor vehicle is not complying with the provision of sub rule (2) or sub rule (7) of Rule 115, may in writing direct the driver or any person in charge of the vehicle to submit the vehicle for conducting the test to measure the standards of emission in anyone of the testing stations, and to produce the certificate to the authority at the address mentioned in the written direction within 7 days from the date of conducting the check.

The measurement for compliance of the provisions of sub rule (2) of Rule 115 shall be done with a type of meter of a type approved by the agency referred to in Rule 126 of the principal rule or by the National Environment Research Institute, Nagpur-440001. Provided that such a testing agency shall follow 180 or ECE Standards or procedures for approval of measuring meters.

There have been proposals made requiring a careful review of the legislative measures for control of automobile air pollution by Prof. B.S.Murthy¹³⁵. It was opined by Prof.Murthy that in the present form the legislative measures are not appropriate to the prevailing condition in our country. These provisions are not fully backed up by scientific and technological considerations. According to him, the foremost factor that has

¹³³ This Rule 116 was substituted by amendment on 26th March 1993.

¹³⁴ Sub rule 7 of Rule 115 provides that after the expiry of a period of one year from the date on which vehicle was first registered, every such vehicle shall carry a valid 'Pollution under Control' certificate issued by an agency authorized for this purpose by the State.

¹³⁵ Former Professor, IIT, Chennai.

to be considered is the revision of the "Pollution under control or Emission under control certificate procedures (PUCC or EUCC)."

The origin of these certificates goes to the so-called "Smoke Check Certificates" which is mandated in advanced countries of the world like USA. As applied to petrol engines, these are roadside emission checks conducted periodically on the vehicles by taking samples in the tail pipe when the vehicle is stationary with the engine idling. Both unburned hydrocarbons (HC or UBF) and carbon monoxide (CO) are measured and checked whether they are within the prescribed limits. These tests are done at two speeds- one at idling and the other at specified intermediate speed. But in our national standards, only volumetric emission of CO is mandated and checked for the issuance of PUC certificates (upper limit by volume of 4.5% for two-stroke and 3% for four-stroke vehicles). The instrument used in the standard non-dispersive infrared analyzer (NDIR), which has selective absorbance for both CO and UBF at two discrete frequencies and hence can measure both CO and UBF. Yet, many pollution control stations give in addition the level of UBF in their printouts though the level of HC emission is not under mandatory regulation. Recall that unburned hydrocarbons are hazardous emissions as there is so much concern over cancer and other respiratory disease. During idling, nearly 85g/kg petrol of unburned HC is emitted in the exhaust of an uncontrolled four-stroke car and in a two-stroke vehicle this will be about twice due to direct short-circuiting of raw petrol through exhaust ports. While carbon monoxide level in g/kg petrol is more or less same during transients like idling, acceleration and deceleration, the level of HC will vary very drastically- the level some times going to quarter the mass of petrol during deceleration. Detection and control of both CO and UBF at idling speed and at another intermediate speed should be considered for regulatory purposes when reviewing the PUC regulations. The PUC tests, do not characterize the complete emissions under actual driving conditions, which includes transients like acceleration, deceleration and

steady state cruising all under varying driving conditions.¹³⁶

The term "Pollution Under Control" itself is misleading since it does not do justice to the public who, as customers, get these certificates with the hope that they are paying for the control of total air pollution. At best, this is an idling tailpipe emission check only for CO. As far as petrol driven vehicles are concerned, it is therefore better to suspend the PUC certificate procedure as it stands, till more meaningful regulations are formulated keeping in step with the progress of technology. Regarding the diesel vehicles, a smoke meter is used and the opacity of the smoke is assessed by a light meter. These tests too are static tests conducted when the vehicle is stationary with the warmed-up engine running, when subjected to free acceleration with the sampling probe stuck in the tail pipe. The exhaust sample passes through the Hartridge smoke meter, which is the preferred imported meter used by the testing authorities. An average value of the prescribed number of readings gives the smoke number in Hart ridge numbers. The upper limit around 65 is the prescribed smoke limit. These tests have elaborate procedures and the meter requires careful calibration and adjustments. Let us recognize that the diesel vehicle emits visible smoke unlike its petrol driven counterpart. The human eye is the best smoke meter to detect smoking vehicles. First we can isolate offending vehicles by eye judgment alone. Black smoke (soot), on account of overloading results from incomplete combustion and is easily discernable to the naked eyes. Poorly maintained old engines emit blue smoke on account of burning of lube oil, while white smoke is indicative of partially burned fuel due to long periods of idling and use of adulterated fuel. Trained personnel can check these abnormal conditions, and only offending vehicles can be short listed and subject to elaborate smoke meter tests. Proper maintenance and repair and avoiding overloading and erratic running alone will reduce diesel smoke to a large extent. India has a skillful technical-workforce, which would find employment in reconditioning old vehicles. A blanket decision to replace all

¹³⁶ The Hindu, May 31, 2002.

old vehicles (which have no place for dumping) would eventually profit MNCs who are ready to find market in India. Soon after economic liberalization and open market competition in the late eighties, India embarked on meeting with the Euro emission standards and catch up, in a short time, with the stringent standards of Europe to enter into global competition. Conformance to these stringent norms by the vehicle manufacturers is certainly necessary for global export market. For domestic market, conformance to these Euro norms does not produce the desired improvement in air quality. Without standard fuels, road infrastructure, traffic management, maintenance and repair schedules conforming to Euro standards, it is a futile exercise to insist on conformance to Euro emission standards for domestic markets.

If the results of the test indicate that the motor vehicle complies with the provision of Rule 115 (2), the driver or any person in charge of the vehicle shall produce the certificate to the authority specified in sub-rule (1) within the stipulated time. If the result indicates that the motor vehicle does not comply with the provisions of Rule 115 (2), the driver or in charge of the vehicle shall rectify the defects so as to comply with Rule 115 (2) within a period of 7 days. If the vehicle fails to do so within a period of 7 days, the owner of the vehicle shall be liable for penalty prescribed under sub section (2) of section 190 of the Act.

Section 190 (2) of the said Act provides that any person who drives or causes or allows to be driven in any public place any motor vehicle, which violates the standards prescribed in relation to road safety, control of noise or air pollution, shall be punishable for the first offence with a fine of one thousand rupees and for any second or subsequent of offence with a fine of two thousand rupees. Section 190 provides the punishment for using vehicles in unsafe conditions. This penal section acts as a deterrent to erring person and would impose a duty on the owner to maintain the vehicle properly. Further, any person who drives or causes or allows to be driven in a public place a motor vehicle, which violates the provisions of the Act or

Rules made there under relating to the carriage of good which are of dangerous or hazardous nature to human life shall be punishable for the first offence with fine which may extend to three thousand rupees or with imprisonment for a term which may extend to one year or both. For any second or subsequent offence, with fine which may extent to five thousand rupees or with imprisonment for a term which may extend to three years or both.¹³⁷

The vehicle contravening the provision of Rule 115 (2) and not producing the said certificate within 7 days according 116 (1) is to be reported by the checking officer to the registering authority. The registering authority shall on receipt of the report of the checking officer, on the basis of the report and for reasons to be recorded in writing suspend the certificate of registration of the vehicle. This suspension of registration would also suspend the grant of permit, if any. This would result in disallowing the plying of the vehicle on road, because such an act would attract sections 192 and 192A of the Act. But the implementation of the section 116 (1) seldom occurs. Usually the vehicle polluting is charged and allowed to compound the offence. This provision allows the vehicle to pollute the atmosphere for 7 more days. The notice of 7 days allows the owner to escape liability, as the owner would usually obtain 'pollution under control' certificate only after being charged for contravening section 115 (2). The deterrent effect of the section does not occur due to the period of 7 days Notice in *Urmi Ghosal vs. State*¹³⁸ we find that the appellant contended that if the emission level was exceeding the standard and still 'pollution under control' certificate was issued by the concerned authority. It was the fault of the authority issuing the certificate. The Court therefore held that the appellant was not liable and there was no direction given by the Court for issue of such certificate by the concerned agency. This is what practically occurs, at times the persons issuing 'pollution under control' certificate do not verify properly. There is

¹³⁷ Section 190 (3)

¹³⁸ AIR CAL

not verify properly. There is negligence on their part and nobody to check such negligence. The Pollution Control Board should be given power for looking into the implementation of the emission standard under section 17 (1)(g) of the Air Pollution Act. Section 17 (1)(g) only empowers the Pollution Control Board to lay down the standards, but it does not speak anything relating to the power given for looking into its implementation. They must be empowered to check the instruments and to check whether the person issuing such certificate is working diligently. If effective implementation of the provision is not done the legislation would be meaningless.

Further, it may be pointed out here that the notice of seven days delays the process to check vehicular pollution. Since, vehicular pollution today contributes 70% towards the pollution of air, the law should be more stringent. The authorities must check the vehicle polluting the atmosphere frequently. If it exceeds the emission standard, fine must be imposed on spot.

5.3.(iii). Implementation of Legal measures: A review.

After examining and going through the substantive law, we would find that the law today does not cover almost all the aspects to deal with vehicular pollution. The main problem lies with the enforcing agencies. In addition to the enforcement agencies there are other problems, which must be looked into. One of them is the issue of 'pollution under control' certificate, which are not backed by scientific considerations. The problem of traffic jam, which is due to the roads, also contributes to increase in pollution. Without standard fuels, road infrastructure, traffic management, maintenance and repair schedules conforming to Euro standards, it is a futile exercise to insist on conformance to Euro emission standards for domestic markets. The introduction of the implementation of technology into the engines which would give total fuel consumption. Supply of proper fuels to reduce pollutions should be introduced.

The environmental jurisprudence in India is still in infancy, particularly for the control of atmospheric air pollution from automobiles. The legislative norms, which are currently in force, are fashioned after the Euro norms prevailing in Europe, allowing for a small phase-lag for meeting the stringency. It must be understood that norms in Europe were formulated after a long lead time, allowing for development of associated infrastructures for clean and safe operation of the automobile vehicles, like the road and traffic infrastructure, provision of clean fuel and more importantly manufacture of clean burning engines to power the vehicle and requirements for periodic maintenance systems. USA is rightly credited for giving to the world awareness of the environmental laws for the regulation of air pollution from automobiles. Federal norms came into force in the early 60's, after the crisis of air pollution in the basin of Los Angeles, that claimed many lives and affected many inhabitants with serious respiratory ailments. It was surprising, that no one identified the environmental fact that the high population of automobiles was the cause. In fact, laws were enacted to shift many industries to remote places from the city. From the past experience of the so-called "London particulate smog" in the early 50's in London and Glasgow, smog in California was assumed to be caused by the uncontrolled burning of fuel like coal and oil in the industries located in the bay-area. Eventually, it was given to the Caltech Professor Haagen-Smit to recognize the environmental fact that emission from the automobiles was the real culprit. This brought awareness to the necessity of environmental jurisprudence for regulating the automobile exhaust emissions like Federal test procedure (FTP) norms for passenger cars. Subsequently, other countries in Europe (Euro Norms), and Japan formulated their own regulations suitable to their countries. This experience illustrates that even in industrially advanced countries, there was a big time lag in bridging the gap between environmental laws and environmental facts.¹³⁹

However, through judicial activism we find that the Supreme

¹³⁹ Supra Note 129.

Court has implemented many policies to curb the menace of vehicular pollution in Delhi. The awareness programmes have been launched as per the direction of Supreme Court. Even the Supreme Court went to the extent of confirming that vehicular pollution being detrimental to the environment and poisoned the surrounding atmosphere was a violation of Article 21 of the Constitution, after it perused the Bhure Lal Committee's Report submitted on April 1, 1999.¹⁴⁰

The provision envisage in section 52 of the Act is to a large extent giving help in controlling vehicular pollution. According to this section a person is allowed to alter his vehicle after giving notice to the registering authority within whose jurisdiction he has the residence or the place of business where vehicle is normally kept. It is a positive step if the modification of engine or any part thereof is done for facilitating its operation by converting to single fuel mode on CNG¹⁴¹ (i.e., Compressed natural gas), the other sources of energy include battery or solar energy. The battery driven vehicles and solar driven vehicles would be zero polluting vehicles whereas compressed natural vehicle is zero polluting. As per the order of Supreme Court 3,000 buses of Delhi Transport Corporation was ordered to close down until they were converted into compressed natural gas driven ones. The provision will create problem if the provision is taken for conversion of petrol driven vehicle to diesel driven ones. Such conversion was taking place in numbers due to low cost of diesel fuel. However, the Government announced that it was considering a ban on the conversion of petrol driven vehicles to diesel driven and it may bring amendment to this effect in Motor Vehicles Act of the country.¹⁴²

The Central Pollution Control Board has felt that the containment of vehicular pollution requires an integrated approach, the essential components of which include the following:

(i). Improvement of Public Transport System

¹⁴⁰ *M.C.Mehta v. Union of India* (1999) 6 SCC 9.

¹⁴¹ As directed in *M.C.Mehta vs. Union of India*, AIR 2001 SC 1948.

¹⁴² The Times of India, January 18, 2000.

According to an estimate made by RITES, a modal split of 70-75% in favour of public transport needs to be planned for the city of Delhi. Presently, the modal share of public transport (Bus) is 62 percent. Along with the increase in number of buses, the passenger capacity should also be increased and the engines should conform to urban design. The existing circular ring railway network also requires to be improved. These measures will meet the immediate requirements since the mass rapid transport system (MRTS) will take some years to materialize.

(ii). Traffic Management System

Well planned Traffic management system results in better mobility level on road by providing higher journey speeds and reduced delay at intersection thereby bringing significant reduction in fuel consumption and emission. Automatic traffic control, signal optimisation, tidal flow and removal of encroachments are among the important components of traffic management system. This will reduce the congestion and consequently pollution. Frequent digging of roads and construction work also leads to congestion and pollution, which can be minimized through proper coordination with traffic police.

(iii) Comprehensive Inspection and Certification System

It is a system to reduce the pollution by requiring regular inspection and maintenance of motor vehicles already plying on roads. It identifies those in-use vehicles that need maintenance and repair because they pollute more than the new vehicles. The system helps in reducing the air pollution. Such system is widely used in other countries and it has been possible to reduce about 30-40% of pollution loads by proper inspection and maintenance of vehicles. Such facilities for thorough inspection and maintenance of vehicles are required in different parts of the country.

(iv) Phasing Out of Grossly Polluted Vehicles

Pre- 1990 vehicles emit more than ten times pollutants than the vehicles meeting Euro I norms (India 2000 norms). In Delhi, more than 15-year-old commercial vehicles are not allowed to ply on roads. Similarly, de-

registration of all older vehicles should be made effective so that the grossly polluting vehicles are phased out.

(v) Fuel Quality Improvement

(a) Benzene and aromatics in Petrol

Due to high level of benzene in atmosphere, benzene content of gasoline needs to be reduced to 1% (v/v) or lower as in other countries. With the reduction of benzene in gasoline (<1%) it is possible to achieve significant reduction in benzene emission from exhaust. Benzene and PAH emission also depend upon the aromatic content of gasoline. Therefore, in addition to reduction of benzene, it is also necessary to reduce to aromatic content in petrol.

(b) Sulphur Content in Diesel

Sulphur in diesel has direct effect on SO₂ and particulate emission and indirectly on other pollutants due to its poisoning effect on catalytic converter. In European countries, sulphur content in diesel has been reduced to 0.005 from the year 2000.

(c) Reformulated gasoline

Reformulated gasoline with the use of oxygenates and additives etc. help reducing pollution load from on-road vehicles. According to a study commissioned by CPCB, 3-5% ethanol can be used in petrol without affecting the engine performance and with the attendant benefits in terms of emission control.

(vi) Tightening of emission norms

The emission norms effective from 2005 need to be further tightened to offset the increase of pollution load due to exponential growth of vehicles. It is time to bridge the gap between Euro norms and Indian norms. Euro IV norms for petrol vehicles and diesel passenger cars and Euro III norms for heavy diesel vehicles may be a preferred target for 2005.

(vii) Improvement in Vehicles

In India, majority of vehicles is of two stroke engines. Although the two stroke engine technology for 2 or 3 – wheelers has been upgraded to

some extent there is not much improvement in control of hydrocarbons and particulate (due to combustion of lube oil). Hence, it is necessary to consider as to whether 2-stroke technology should be replaced by 4-stroke technology for reducing the emission specially in terms of hydrocarbons and particulate matter apart from increased fuel efficiency in 4-stroke engines.

The On Board Diagnostic System (OBD) electronically records the fault and their causes in combination with various Diagnostic Strategies to enable vehicle owner/driver to take corrective action. This is one of the requirements of emission regulation in USA and it will be followed in Europe from year 2000 which will be a part of Euro III norm for 2000.

(viii) Checking Fuel Adulteration

Adulteration of fuel plays a major role in emission of pollutants from on roads vehicles. Effective measures are required to prevent adulteration of fuel.

(ix) Evaporative Emission Control

To minimise evaporation losses of fuel and consequent pollution, adequate preventive step need to be taken during storage, loading, unloading and distribution. Vapour recovery system in the filling stations is yet another important measure for reducing evaporative losses.

MEASURES TO CURB ADULTERATION OF FUEL

An Anti Adulteration Cell (AAC) was set up in March, 2001, with Regional Offices in the four Metros. The cell would draw officers from the police, revenue services, sales tax as well as administration to give a multi disciplinary approach with focus on curbing adulteration. AAC launched its website (www.antiadulterationcell.com or www.aacindia.org) dedicated for receiving complaints/suggestions from general public all over the country against adulteration and other malpractices seen or suspected in distribution of petroleum products. A state-of-the-art fuel-testing laboratory has been set up at Noida (U.P.) at a cost of Rs. 15 crores. The number of mobile laboratories, which conduct surprise inspection at petrol pumps has

been increased from 22 to 50 throughout the country.

This is no doubt an effective measure towards a positive direction to curb the problem of adulterated fuel from being used in vehicles. Which would in turn resolve to some extent the problem of vehicular pollution, which some times aggravate due to the use of adulterated fuels in automobiles.

5.4. Noise Pollution and Rule to Control Noise

In our country some attention has paid to water and air pollution but no attention was paid to the ever-increasing problems of noise pollution either at the State or Central Government level. There is not a single iota of doubt about the dangerous situation created by the noise pollution and it should be found and tackled on war footing. Human beings live as a part of a complex natural system with aspects of interdependence.

Various sources of pollution are found to have damaging effects on the behaviour of human beings and some of the effects are so serious that they create risk even for their survival. Frightened by these serious consequences psychologists, scientists, administrators and legal experts have started studying the effects of these pollutions on different and various aspects of human functions in a systematic and empirical manner. Subsequently, various new disciplines relating to ecology have developed, e.g., ecological sciences, ecological psychology and laws for the prevention and control of the pollution. Under these disciplines causes of pollution and its control are being studied throughout the globe.

Noise is one of the main pollutants of the environment causing various hazardous consequences for human life. Excessive noise is an inescapable product of industrial environment, which is increasing very fast with the advancement in industrialization. Motors, horns, printing presses, riveters, drills, lathes, heavy machinery work and movement roadside amusements, blaring loudspeakers and radios, supersonic aero planes, construction works in urban areas, urban crowding and all assets of industrial revolution have

become our irritants and a source of environmental annoyance. Noise not only impairs our sensibility to auditory stimuli masking effects, it has behavioural and psychological consequences also. Its effects on human beings may be classified under three categories, namely, physiological, behavioral and personological.

Physiological Effects: Intense and shrilling noise may over power the simple and combined tones and thus auditory receptors fail to respond to the stimulus properly. Thus, the auditory threshold will go up. Some empirical research conducted on animals (especially pregnant female mice) which are not possible to be conducted on human beings on ethical and moral grounds reveal that aircrafts taking off which brings in 120 to 150 decibels caused miscarriages in them. If the findings hold generalizability, high noise is capable to create these disturbances in human beings also. Prolonged and continuous noise of 95 decibels causes deafness and significant rise in blood pressure.

Behavioural: By lowering down the auditory sensitivity of person noise result in poor attention and concentration. It has been observed that children's performance is poor in 'comprehension' tasks whose schools are situated in busy areas of a city and suffer from noise pollution. Sudden noise distracts a person and can create nervousness in him.

Personological: If the injurious effects of noise tend to persist for long, they cause stable maladaptive reactions in the individual disturbing his total personality make up. The lowered performance level among children may develop a feeling of inadequacy, lack of confidence, poor perception of one's ownself, which may jeopardize their optimal personological development as a growing child. Once a child develops the feeling of ineptness, worthlessness and inadequacy in the formative period, its disastrous effects are not going to be removed easily without leaving their masks behind.

Keeping in mind these serious and disastrous effects of noise pollution on human life, the measures for prevention and protection of noise pollution

were framed through subordinate legislation. Such Subordinate legislation framed under the Environment Protection Act and Motor Vehicles Act may be discussed with a view to ascertain potentiality of the Rules in controlling noise pollution.

5.4.(i). ENVIRONMENT (PROTECTION) RULES, 1986

The Environmental (Protection) Rules 1986 was enacted by the Central Government, in exercise of power conferred by Sections 6 and 25 of the Environment Protection Act, 1986. It was enacted for the purposes of protecting and improving the quality of environment and preventing and abating environmental pollution.

Schedule III annexed to the Rules specifies the ambient air quality standards in respect of noise for different zones during day and night. According to the notes given in the schedule, day time is reckoned in between 6 am to 9 pm and night time in between 9 pm to 6 am. As per the schedule the standards during day will be 75 dB for industrial areas, 65 for commercial areas, 55 for residential areas and 50 for silence zones. During the night the standards would be 70, 55, 45 and 40 respectively. Note 3 of the Schedule defines silence zone as areas upto 100 meters around hospital, educational institutions and courts. Within the area of silence zone use of vehicular horns, loudspeakers and bursting of crackers shall be banned and the ban is to be imposed by the authority competent in this regard. The Rules also provides a list of general noise standards¹⁴³ which are as follows---

A. Noise limits for Automobiles (Free field Distance 75 meter) in dB at manufacturing stage

Automobiles

Unit

(a) Motorcycle, Scooters and Three wheelers

80 dB

(b) Passenger Cars

82 dB

¹⁴³ Part E, Sch. VI.

(c) Passenger or Commercial Vehicles upto 4MT

85 dB

(d) Passenger or Commercial Vehicles above 4MT and upto 12MT

89 dB

(e) Passenger or Commercial Vehicles exceeding 12MT

91 dB

B. Noise Limits for Domestic appliances and construction equipments at manufacturing stage to

be achieved by 31-12-1993.

Appliances or equipments

Unit.

(a) Window, Air conditioner of 1 ton to 1.5 ton

68 dB

(b) Air coolers

60 dB

(c) Refrigerators

46 dB

(d) Diesel generators for domestic purpose

85-90 dB

(e) Compactors (rollers) Front loaders, Concert mixers, Cranes (Movable),
Vibrators and Saws.

75 dB

The Environment (Protection) (Second Amendment) Rules, 1999¹⁴⁴ specifies the noise standards for firecrackers and makes the Department of Explosives responsible to ensure implementation of these standards. It prohibits the manufacture, sale or use of fire-crackers generating noise level exceeding 125 dB(AI)¹⁴⁵ or 145 dB(C)_{pk}¹⁴⁶ at 4 meter distance from the

¹⁴⁴ G.S.R. NO. 682 (E) dt. 5-10-1999.

¹⁴⁵ dB(AI) means A-weighted impulse sound pressure level in decibel.

¹⁴⁶ DB(C)_{pk} means D-weighted peak sound pressure level in decibel.

point of bursting¹⁴⁷. For individual firecracker constituting the series (joined fire crackers) the above-mentioned limit be reduces by 5 by 10 (N) dB (where N= number of crackers joined together)¹⁴⁸. According to the Rules the broad requirements for measurement of noise from the firecrackers shall be: (i) The measurement shall be made on a hard concrete surface of minimum 5 meter diameter or equivalent. (ii) the measurement shall be made in free field conditions i.e. there should not be any reflecting surface upto 15 meter from the point of bursting. (iii) The measurement shall be made with an approved sound level meter¹⁴⁹.

5.4.(ii).CENTRAL MOTOR VEHICLES RULES 1989

The Central Motor Vehicles Rules 1989 bans the use of multitone horn giving a succession of different notes or similar devices giving unduly harsh, shrill, loud and alarming sounds in motor vehicles¹⁵⁰. However vehicles used as ambulance or for fire fighting or salvage purposes or vehicles used by police officers or officers of Motor Vehicles Department may be fitted with such sound signals if the registering authority in whose jurisdiction such vehicles are kept approves it¹⁵¹. Further the Motor Vehicles Rules 1989 provides that every motor vehicle shall be so constructed and maintained as not to cause undue noise without any motion. But no specification has been prescribed by the rule making authority about the motor vehicles noise.

5.4.(iii). NOISE POLLUTION (REGULATION & CONTROL) RULES, 2000

The Central Government through a Gazette notification dated 14th February 2000 notified the Noise Pollution (Regulation & Control) Rules,

¹⁴⁷ Serial No. 89 (A) (i), Sch I.

¹⁴⁸ Serial No. 89 (A) (ii), Sch I.

¹⁴⁹ Serial No. 89 (B), Sch I.

¹⁵⁰ Sub Rule (8) of Rule 119.

¹⁵¹ Sub Rule (3) of Rule 119.

2000¹⁵² for the regulation and control of noise pollution. The Rules¹⁵³ came into force with the publication in the Gazette. The Rules was made in exercise of powers conferred by clause (ii) of Sub section (2) of Section 3, sub section (1) and clause (b) of subsection (2) Section 6 and Section 25 of the Environment (Protection) Act 1986. The Noise Pollution (Regulation and Control) Rules, 2000 have been framed for regulating the increasing ambient noise levels in public places from various sources like industrial activity, construction activity, generator sets, loudspeakers, musical systems, vehicular horns and other mechanical devices. It was considered necessary to regulate and control noise producing and generating sources as they have deleterious effects on human health and psychological well being.

The ambient air quality standards in respect of noise for different areas / zones has been specified in the schedule annexed to the Rules. The ambient noise level (in decibels) fixed under the Rules in 75 dB for industrial area, 65 for commercial area, 55 for residential area and 50 for silence zone (during day) and 70, 55, 45 and 40 dB respectively during the night. The day time has been considered to be between 6 am and 10 pm, the rest of the hours are considered as night time. It is stipulated that the noise level in any area or zone shall not exceed the ambient noise standards¹⁵⁴. The notification authorizes the State Government to categorize the areas into four zones, namely, industrial, commercial, residential and silence zone¹⁵⁵. The silence zone has been defined to be areas upto 100 meters around hospitals, educational institutions and courts¹⁵⁶. The State Government has been entrusted with the responsibility to take measures for abatement of noise including noise emanating from vehicular movements and to ensure that the existing noise level do not exceed the prescribed air quality standards¹⁵⁷. The Rules stipulate that all development authorities,

¹⁵² Notification No. S.O. 123 (E) dt 14 Feb 2000.

¹⁵³ The Noise Pollution (Regulation and Control) Rules 2000.

¹⁵⁴ Sub Rule (1) of Rule 4.

¹⁵⁵ Sub Rule (2) of Rule 3.

¹⁵⁶ Sub Rule (3) of Rule 5.

¹⁵⁷ Sub Rule (3) of Rule 3.

local bodies and other concerned authorities, while carrying out development activity or discharging functions relating to town and country planning, shall take into consideration all aspect of noise pollution as a parameter of quality of life. These authorities are further required to avoid noise menace and to achieve the objective of maintaining the ambient quality of standards in respect of noise¹⁵⁸.

The authority¹⁵⁹, as defined in the Rules, is required to enforce noise pollution control measures and ensure compliance of the air quality standard in respect of noise¹⁶⁰. The Rules prohibit the use of loudspeaker or public address system except without written permission of the authority¹⁶¹. It bans the use of loudspeaker or public address system during night time i.e. from 10 pm to 6 am. However, in closed premises like auditorium, conference rooms, community halls and banquet halls, such use at late hours, only for the purpose of communication within, is allowed¹⁶². Playing music, beating drum, tomtom or blowing horn or exhibiting any musical or any other performances of a nature to attract crowds in silence zone is an offence under the Rules. The person committing such offence shall be liable for penalty under the provisions of the Environment Protection Act¹⁶³. Participation of public in controlling noise pollution is provided under the Rules. In the event of noise level exceeding the ambient noise standards by 10 dB (A) or more, a person may make a complaint to the authority¹⁶⁴. The authority on receipt of the complaint made by a person is empowered to take action as per the provisions of the Rules or any other law in force¹⁶⁵.

¹⁵⁸ Sub Rule (4) of Rule 3.

¹⁵⁹ Rule 2(c) authority means any authority or officer authorized by the Central Government, or as the case may be, the State Government in accordance with the laws in force and includes a District Magistrate, Police Commissioner and any officer designated for the maintenance of the ambient air quality standards in respect of noise under any law for the time being in force.

¹⁶⁰ Sub Rule (2) of Rule 4.

¹⁶¹ Sub Rule (1) of Rule 5.

¹⁶² Sub Rule (2) of Rule 5.

¹⁶³ Rule 6.

¹⁶⁴ Sub Rule (1) of Rule 7.

¹⁶⁵ Sub Rule (2) of Rule 7.

The authority under the Rules has power to prohibit, prevent continuance of music, sound or noise by a written order for the purpose of preventing annoyance, disturbance, discomfort or injury to the public or to any person who dwell or occupy property in the vicinity. The authority while making an order may issue such direction as he may deem fit. Before passing such order the authority must be satisfied, from the report of an officer-in charge of a police or other information received, that issuance of such order is necessary¹⁶⁶. The person aggrieved by such order may make an application to the authority for reconsideration. The authority *suomoto* or on such application may rescind, modify or alter such order. It is mandatory that the authority while disposing of the application must afford to the applicant an opportunity of appearing before it and show causes against the order. When the authority rejects such application it must record reasons for such rejection¹⁶⁷.

5.4.(iv). CONCLUSION

Scientific studies conducted all over the world have proved that excessive noise is a health hazard having far reaching effect which in some cases may lead to cardiac arrest and even injury to human fetus. Its worst victims are highly industrialized, mechanized and urbanized sectors. In view of rapid industrial development especially in already industrialized urban areas, the mushroom growth of unplanned urban colonies and uncontrolled noisysome traffic in developing and over populated India, the problem assumes alarming dimensions and dangerous proportions. The religio-superstitious structure of the Indian society adds to the intensity of environmental pollution by noise. In view of the alarming proportions of noise and its impact, what is called for, is 'noise control' through legislation, judiciary, determination of administrators, public and technology.

¹⁶⁶ Sub Rule (1) of Rule 8.

¹⁶⁷ Sub Rule (2) of Rule 8.

Quietness and freedom from noise are inseparable to the full and free enjoyment of a dwelling house. No person has an absolute right to create noise upon his own land because any right, which the law gives, is qualified by the condition that it must not be exercised to nuisance of his neighbours. The Indian Penal Code under Section 268 covers the problem of noise when noise amounts to public nuisance. The true position is that a person may be made liable of nuisance caused by noise under this Section if the noise is nuisance to the community as a whole.

Criminal Procedure Code to some extent cover the problem of noise by empowering the Magistrate under Section 133 to try a case of unlawful obstruction of nuisance whereby the Magistrate may by an order remove public nuisance caused by noise.

The Workmen's Compensation Act makes the employer liable to pay compensation to the workers on their absolute deafness and hearing impairment resulting from the working condition.

Though the noise of aircraft cause severe health hazard to the people residing near airport, Aircraft Act does not directly provide for control of noise of aircraft. However as noise directly affects the public health by way of causing various health hazards, the problem of noise of aircrafts can be checked through the power of making rules under Section 8 (A) and (B) of the Aircraft Act. For the effective control of noise arising from aircraft, some new technology as invented in Marlin 300 aircraft should be adopted in the engines of the aircraft.

Though in the areas of water and air pollution, there are two independent Acts, i.e. the Water (Prevention and Control of Pollution) Act 1974 and Air (Prevention and Control of Pollution) Act 1981, there is no independent Act to deal with the problem of noise pollution. It was after the enactment of Environment Protection Act 1986 that the attention was attracted to noise pollution. But instead of bringing any self contained enactment for prevention of noise pollution, the Air (Prevention and Control of Pollution) Amendment Act 1987 was brought to include 'noise' in the

definition of the term 'air pollutant'. Consequently the duty of Air Pollution Control Boards prescribed under the Act extends to pollution caused by noise as well.

Although Central Pollution Control Board while approving noise standards for different sources of the noise, has prescribed the name of implementing agencies in order to ensure the better implementation of noise standards regulating noise pollutant including the domestic appliances already working in residential area, the municipal boards or local authorities should especially be authorized as implementing agencies. In case of violation of noise standards by any industrial plant the State Pollution Control Boards should be authorized to cancel its registration.

5.5. Legislative Measures for Protection of Ozone Layer

The Environmental backlash at humanity for its own advancement and Nature's destruction has landed humanity in a fix for the depletion of Ozone in the atmosphere. International efforts of the Vienna Convention and then the Montreal Protocol were to stop the Ozone depletion and that the world community should be a beneficiary of the concern called for. Although scientists suspect that it might have been damaged to the effect that its original forum will be difficult to retain.

No one dreamed human activity would threaten the ozone layer until the early to mid-1970s, when scientists discovered two potential problems: ultra-fast planes and spray cans. Through decades of use, CFCs proved themselves to be ideal compounds for many purposes. They are nontoxic, noncorrosive, nonflammable and unreactive with most other substances. Because of their special properties, they make excellent coolants for refrigerators and air conditioners. CFCs also trap heat well, so manufacturers put them into foam products such as cups and insulation for houses. Most scientists had not worried about how CFCs would affect the atmosphere. But two chemists, F. Sherwood Rowland and Mario Molina, began considering these wonder compounds, and they uncovered something disturbing, that they were depleting the ozone layer.

5.5.(i) THE CONCEPT

Ozone is a life-giving layer, which has a filtering action, as it prevents the harmful UV-B radiation from reaching the earth's surface. Without ozone, life on earth would not have evolved. This ozone led to the formation of different life forms on earth. Ozone is highly reactive pale-blue gas with a penetrating odour. It is an allotrope of oxygen, made up of three atoms of oxygen. It is formed when the molecule of the stable form of oxygen (O_2) is split by ultraviolet radiation or electrical discharge. At ground level, ozone can cause asthma attacks, stunted growth in plants, and corrosion of certain materials. It is produced by the action of sunlight on air pollutants, including car exhaust fumes, and is a major air pollutant in hot summers. In the upper atmosphere ozone has a beneficial effect, shielding life on Earth from ultraviolet rays, a cause of skin cancer. Ozone is a powerful oxidizing agent and is used industrially in bleaching and air conditioning.

The first effect of depletion was felt when ozone loss was recorded in the Antarctica and later on came to be known as the "ozone hole"¹⁶⁸. Depletion of ozone is also related to other adverse environmental effects such as climate change, green house effect etc. The revelation came in the initial stages to the scientific community when two scientists at the University of California at Berkley, Professor F. Sherwood Rowland and Mario Molina stated that it was the CFCs, which were depleting the ozone layer.¹⁶⁹

The Ozone was caused in part by chlorofluorocarbons (CFCs), but many reactions destroy ozone in the stratosphere: nitric oxide, chlorine, and bromine atoms are implicated. In 1989 ozone depletion was 50% over the Antarctic compared with 3% over the Arctic. In April 1991 satellite data from NASA revealed that the ozone layer had depleted by 4-8% in the N

¹⁶⁸ <http://www.oar.noaa.gov/> (Discovered by the British in the Antarctica)

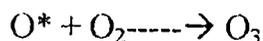
¹⁶⁹ M.J.Molina and F.S.Rowland, Stratospheric sink for chlorofluoromethanes chlorine atom-catalysed destruction of ozone, NATURE, Vol.249, 28 June 1974 at 810.

hemisphere and by 6-10% in the S hemisphere between 1978 and 1990. It is believed that the ozone layer is depleting at a rate of about 5% every 10 years over N Europe, with depletion extending south to the Mediterranean and southern USA. However ozone depletion over the polar regions is the most dramatic manifestation of a general global effect. As a pollutant at ground level, ozone is so dangerous that the US Environment Protection Agency recommends people should not be exposed for more than one hour a day to ozone levels of 120 parts per billion (ppb). It is known that even at levels of 60 ppb ozone causes respiratory problems, and may cause the yields of some crops to fall. In the USA the annual economic loss due to ozone has been estimated at \$5.4 billion.

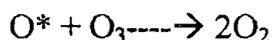
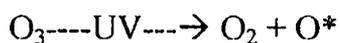
5.5.(ii). OZONE LAYER DEPLETION

Ozone depleter is a chemical that destroys the ozone in the stratosphere. Most ozone depleters are chemically stable compounds containing chlorine or bromine, which remain unchanged for long enough to drift up to the upper atmosphere. Once in the upper atmosphere, they are broken up by the intense solar radiation and form a cocktail of more active substances, which then react with ozone, causing its depletion. The best known is chlorofluorocarbons (CFCs) but many other ozone depleters are known, including halons, used in some fire extinguishers; methyl chloroform and carbon tetrachloride, both solvents; some CFC substitutes; and the pesticide methyl bromide. Most research into alternatives to ozone depleters seeks chemical alternatives, which will break up before they get into the upper atmosphere, but still have a useful working life as a refrigerant or propellant.

Reactions responsible for the destroy of ozone:



Reactions responsible for the formation of ozone:



Under this natural equilibrium, the rate of destroy equals the rate of formation. Therefore, the concentration of ozone is fairly constant in the stratosphere. Chlorofluorocarbons (CFCs) are the killer of ozone. They generate chlorine radicals that attack and destroy ozone molecules. CFCs are important compounds in industry and domestic uses. This renders the depletion of ozone layer severe. Now a region of low ozone concentration (commonly called 'hole') is situated over Antarctica and the Arctic region.

Ozone is constantly created and destroyed. The above reaction is responsible for the vital screening effect of ozone. The presence of chlorofluorocarbons (CFCs) generates reactive chlorine radicals that constantly destroy ozone.

Ozone can also be formed in the lower part of the atmosphere. It is formed by reactions between nitrogen oxides and hydrocarbons under sunlight, or by electric sparks which occur in car engines or electrical appliances like photocopiers. In nature, the gas can be generated during lightning. Ozone layer in the stratosphere filters out 99 per cent of dangerous ultraviolet radiation from the sun. The thinning of the ozone layer may lead to an increase of skin cancer and eye cataract. The presence of 'ozone hole' over Antarctica and the Southern hemisphere has introduced incidence of increasing victims of skin cancer. The yield of crops may also decrease. The expanse in medical cure and economical loss in food is uncountable.¹⁷⁰

The discovery of depletion of the ozone layer caused concern in the advanced community of the world that human minds have been shaping the environment towards its destruction. This voice found shape in the Vienna Convention adopted in 1985 followed by the Montreal Protocol of 1987, which laid the foundation for action to be taken to protect the ozone layer.

¹⁷⁰ S.S.Purohit and B.Kulkarni, Air Environment and Pollution, pg.89.

In 1981 the UNEP Governing Council set up a working group to prepare a global framework convention for the protection of the ozone layer. Its aim was to secure a general treaty to tackle ozone depletion. First, a general treaty resolved in principle to tackle a problem; then the parties got down to the more difficult task of agreeing protocols that established specific controls.

The first, relatively easy, step proved remarkably difficult. The Convention for the Protection of the Ozone Layer, finally agreed upon in Vienna in 1985, appears unexceptionable. Nations agreed to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities, which modify or are likely to modify the ozone layer, but the measures were unspecified.

There was no mention of any substances that might harm the ozone, and CFCs only appeared towards the end of the annex to the treaty, where they were mentioned as chemicals that should be monitored. The main thrust of the convention was to encourage research, cooperation among countries and exchange of information. Even so it took four years to prepare and agree. Twenty nations signed it in Vienna, but most did not rush to ratify it. The Convention provided for future protocols and specified procedures for amendment and dispute settlement.¹⁷¹

With all its complications and seemingly endless disputes, the Vienna Convention set an important precedent. For the first time nations agreed in principle to tackle a global environmental problem before its effects were felt, or even scientifically proven. The Vienna Convention committed its Parties to take measures to protect human health and environment against human activities that protect the ozone layer. It was a framework agreement, which do not contain binding controls. This Convention then gave way to the Montreal Protocol on substances that deplete the ozone layer in 1987. It came as a legal basis for the worldwide effort to safeguard the ozone layer through controls on production,

¹⁷¹ *Supra* note 138

consumption and the use of those substances, which deplete the ozone layer.

Although the Montreal Protocol does phase out the worst ozone depleting substances (CFC's, HCFC's, halons, methyl bromide), unfortunately it allows ozone depleting chemicals to be replaced with two greenhouse gases, hydrofluorocarbons (HFC's) and perfluorocarbons (PFCs). Both of these chemicals are among the six global warming gases to be controlled under Kyoto Protocol.¹⁷²

The Montreal and Kyoto protocols contain mechanisms for reviewing the scientific knowledge, revising control target dates, and banning more chemicals. The Montreal Protocol's Scientific Assessments (1989, 1991, 1994 and 1998) have led, for instance, to the adoption of three amendments to create phase-out schedules for methyl bromide, HCFC's, and other ozone depleting chemicals. The much newer Kyoto Protocol, although not amended to date, has a similar mechanism requiring a scientific review of its provisions.¹⁷³

Ozone Depleting Substances (ODS) or "controlled substances" include chloro-fluoro-carbons and halons and a broad range of industrial chemicals used as refrigerators, foaming agents, aerosol propellants, fire retardants. The depletion of the ozone layer caused by these substances allowed more ultraviolet-B radiation to reach the ground, which could raise the incidence of skin cancer, cataracts, and other adverse effects on the human immune system. Even small increases of ultraviolet-B radiation could disturb ecological food chains, affecting agriculture, fisheries and biological diversity.

5.5.(iii).INDIA AS A SIGNATORY

Realizing the danger of ozone depletion, Governments adopted the Vienna Convention on Protection of the Ozone Layer in 1985, the Montreal Protocol on substances that deplete the Ozone Layer (Montreal

¹⁷² Jessica Vallette Revere, Ozone depletion and Global Warming, Friends of the Earth, Vol.5, No. 8, April 2000.

¹⁷³ Ibid

Protocol) in 1987, and amendments to the Protocol in London in 1990 and Copenhagen in 1992. By June 1995, more than 150 countries had ratified the Montreal Protocol. The Protocol lays down the time schedule for freeze and reduction of ODS. A Multilateral Fund was established under the Protocol to assist developing countries in meeting the control measures of the Protocol.

Initially India did not become a signatory to the Montreal Protocol. It was only after the First World countries agreed to assist the Third world countries agreed to assist the Third world countries with finances as well as transfer of technology that India became a signatory. It acceded to the Protocol in September 1992, when it prepared a detailed country programme for phasing out ODS without undue burden on the Industry and consumers.

Phase out Schedules¹⁷⁴

Name of Activity	Phase out Date
Manufacture of aerosol products excluding Metered Dose Inhalers (MDI)	Jan. 1, 2003
Manufacture of foam products (including domestic refrigerators)	Jan. 1, 2003
Manufacture of Mobile Air-conditioners (MAC'S)	Jan. 1, 2003
Manufacture of other refrigeration & Air-conditioning products	Jan. 1, 2003
Manufacture of products based on other ODS	Jan. 1, 2010
Manufacture of Metered Dose Inhalers (MDI)	Jan. 1, 2010
Use of methyl bromide except Quarantine and Preshipment	Jan. 1, 2015

¹⁷⁴ Sanjay Upadhyay & Videh Upadhyay, Water Laws, Air Laws and the Environment, Butterworths, Pg. 120.

UNDP was assisting 41 developing countries in implementing their national programmes under the Montreal Protocol through national country programme formulation, technical training and demonstration projects, institutional strengthening and national capacity building and technology transfer investment projects.¹⁷⁵

During 1991-95, India received \$ 3.3 million (around Rs. 11.2 crores) under the UNDP work programme portfolio approved by the Executive Committee of the Montreal Protocol Multilateral Fund. Of this \$ 1,755,000 (about Rs. 6 crores) was towards technology transfer an investment project for the phase-out of CFCs by five leading private sector enterprises in the foam sector.¹⁷⁶ In addition to Sunpra and Camphor & Allied Products, the other enterprises include Eagle Flasks, Maharashtra (manufactures of thermoware), Bakelite Hylam, Andhra Pradesh (phenolic foam and foam products), and U-foam, Andhra Pradesh (polyurethane foams).¹⁷⁷

The support to these five enterprises symbolizes the coming together of the private sector, the government and the international community in the effort to find solutions to urgent environmental problems and reaffirms the commitment of UNDP to working with the private sector as a partner in development. The enterprises had been specially selected to function as "beacons" in the Indian CFC phase out programme, allowing Indian manufacturers to apply newly developed CFC-free systems and gain the necessary experience for subsequent general phase out.

The original India Country Program for the phase-out of ODS was prepared with UNDP assistance and considered by the EC in November 1993 as a first step in the development of a comprehensive phase-out strategy. Against this background, the Government of India (GOI) had been working on

¹⁷⁵ <http://undp.org/seecl/esp/Montreal/index.htm>

¹⁷⁶ Ibid

¹⁷⁷ Ibid

individual affected sectors with assistance from the UNDP and the Bank in order to prepare a revised Country Program (CP). The sector work and related policy analysis have taken on more importance with the tightening of eligibility requirements, one of which is that the EC is looking increasingly for an integrated approach, including policy action, as part of the approval process. In addition to engaging consultants to prepare the strategy papers, the Government of India has so far made a number of significant decisions in terms of a regulatory framework needed to achieve commitment to ODS phase-out. However, it might be the right time for the Government of India to move to the next phase of formulating an action plan to enable it to meet its phase-out commitment by the year 2010. To meet this challenge and take concrete steps, the Government of India will need full cooperation from its industries, including its chemical producers. Only with a full commitment from all concerned bodies to join in collaborative efforts will ODS phase-out be achieved in a cost-effective and timely manner.

5.5. (iv). Technology Transfer

World Environment Day on 5 June 1996 marked another milestone for India in its efforts to phase out harmful Ozone Depleting Substances (ODS) that were still being used in the manufacturing sector of the country. With the inauguration of its new plant in Pune on 5 June, Sunpra Energy & Recovery Engineering Pvt. Ltd. Of Pune, Maharashtra, a leading private sector manufacturer of rigid polyurethane sandwich panels for the cold storage industry in India and abroad, will have successfully switched its production technology from the use of environment-endangering chloro-fluorocarbons (CFCs) to a combination of water and HCFC-22 technology. As a result of the completion of this project, with technical assistance from the United Nations Development Programme (UNDP), 20 tons of CFCs was to be eliminated from the atmosphere and the ground laid for the replication of the technology and elimination of ODS in the manufacture of rigid polyurethane foams. This was the second success

story under UNDP-assisted ODS phase-out projects in India (Camphor & Allied Products Ltd. of Gujrat had earlier successfully completed the phase-out of 120 tons of CFCs in the manufacture of extruded polyethylene foam sheets in December 1995).¹⁷⁸

5.5.(v). Policy Instruments those were introduced before Rules 2000

In accordance with the National Strategy for Ozone Depleting System phase out the Ministry of Environment and Forests, Government of India, had framed comprehensive draft rules, covering various aspects of production, sale, consumption, export and import of ozone depleting system.

Ozone Depleting Substances (Regulation and Control) Rules to be issued under the Environment (Protection) Act of 1986, requiring all producers and consumers of CFCs to register with government and file reports on ODS consumption; production, and exports; establishing deadlines for phase out of ODS consumption, and banning creation of new and expansion of existing ODS production capacities

CFC production quotas were to be issued by the Government to the four CFC producers each calendar year, totaling no more than the national production ceiling. The enterprises were to report their production levels regularly to the Ministry of Environment and Forests (MoEF), which will administer the CFC production quota scheme. The production Quotas may be traded among the enterprises, upon authorization by MoEF.

India ratified the Montreal Protocol (MP) on Substances that Deplete the Ozone Layer in June 1992 and is eligible for grant assistance from the Multilateral Fund for the Implementation of the Montreal Protocol (MFMP), which was established to provide support to eligible developing countries to meet their Montreal Protocol obligations.¹⁷⁹ In 1994, India's production amounted to 35,740 tons, in terms of ozone depleting potential (ODP) and consumption was 16,066 ODP tons. Most consumption of ozone

¹⁷⁸ Ibid

¹⁷⁹ <http://www.worldbank.org/>

depleting substances (ODS) is in foams, refrigeration, aerosols and solvents. India is self sufficient in production of CFC-11, CFC-12 and halon-1211.¹⁸⁰ The Ministry of Environment & Forests (MoEF) is the agency responsible for implementation of the Montreal Protocol. Within the Ministry of Environment and Forests, the Ozone Cell is coordinating Montreal Protocol activities.¹⁸¹

5.5. (vi).Ozone Depleting Substances (Regulation and Control) Rules 2000

These Rules were enacted in pursuance of the Montreal Protocol on substances that deplete the ozone layer. The main objective of this protocol was the protection of the ozone layer through the gradual phase out of the substances that deplete the ozone layer. For this, regulations covering various aspects relating to ozone depleting substances (ODS), such as production, consumption, purchase, sale, import, export and use have been provided in the Rules.

These Rules prohibit the use of CFCs in manufacturing various products beyond 1 January 2003 except in metered dose inhaler and for other medical purposes (see table below). The Rules also provide for compulsory registration of ODS producers, manufacturers of ODS based products, importers, exporters stockist and sellers and the same provision is applicable to manufacturers, importers and exporters of compressors. Enterprises which have received financial assistance from multilateral funds for switchover to non-ODS technology have to register the date of completion of their project and to declare that the equipment used for ODS technology has been destroyed. Creation of new capacity or expansion of capacity of manufacturing facilities of ODS and ODS-based equipment has been prohibited. Purchasers of ODS for manufacturing products containing ODS are required to declare the purpose for which ODS is purchased. Trade

¹⁸⁰ Ibid

¹⁸¹ Project Brief, Montreal Protocol ozone Investment Portfolio, India 1998

in ODS with non-parties has been banned. Authority has been specified to issue license for all import and exports of ODS and products containing ODS.¹⁸²

A list of ODS has been provided for in Schedule I of the Rules. All producers/ consumers and users (including importer/ exporters and stockist) of the specified ODS have to necessarily register with the specified authority by the dates mentioned in Schedule V. Different phase out dates for different ODS, both for the producers and for the consumers have been specified in Schedule IV to the Rules.¹⁸³

5.5.(vii). Reporting, Assessment, Review and Monitoring System in India

A detailed monitoring mechanism has been established by the Ozone Cell to ensure that the investments, which are being made directly by the Multilateral Fund through implementing agencies, are being fruitfully utilized by the enterprises. The monitoring mechanism has the following components:

A Monitoring and Evaluation Sub Committee is set up under the chairmanship of Special Secretary, which includes representatives from four implementing agencies, other line ministries and industry associations. The Sub-Committee is an advisory body to the Empowered Steering Committee on the Montreal Protocol, which is fully responsible for the implementation of the Protocol in India. The Committee developed detailed formats for evaluation and monitoring of the investment and non-investment projects.

The Director (Ozone Cell) has been convening monthly evaluation meetings with representative of UNDP, IDBI and UNIDO with a view to note the progress of implementation and to sort out short-term problems, which might occur during the implementation process.

¹⁸² 'The Montreal Protocol: India's Success Story', Ozone Cell, Ministry of Environment and Forests, Government of India, 2000.

¹⁸³ Supra Note 142

A provision of the site inspections of the projects, which are under implementation and also where the project completion reports have been submitted, has also been made. Normally, during the course of the year, implementing agencies send three to four missions to visit sites where project implementation work is going on and where projects have been completed and hand over protocols are to be signed. During such missions, ODS equipment is also destroyed. Now, an officer of Ministry of Environments & Forest is accompanying the mission of the implementing agency in these visits with a view to evaluate the work being done by the enterprises.

It is also proposed to send a term of officers from Ministry of Environments & Forest to the project sites/ after the project has been completed to ensure that the enterprise has not reverted back to using ODS and that the new technology has been put in place. These visits are being planned on a quarterly basis.¹⁸⁴

5.5.(viii). CONCLUSION

The regime of implementation of the Montreal Protocol has begun. It is an outstanding and remarkable achievement as most controversies and conflicts have been resolved and the world has started climbing the steps for achieving compliance. The stakes for removing the threat to life are very high and humanity cannot afford to be complacent. Under the International achievement of bringing a framework and illumination of the threat at a time when measures have been taken with all precautions, and most countries have committed to a schedule for reducing and finally measures to promote effective implementation to control ozone depleting substances has begun as most controversies have been resolved. Under the International achievement most countries have committed to a schedule for reducing and finally phasing out production and consumption of ozone depleting substances. The

¹⁸⁴ Ministry of Environment and Forests, Ozone Cell, India's Success story, Government of India Act, 2002

Governments and Industries are meeting the challenge through a combination of means, including public awareness campaigns, setting conducive policies and incentives, implementing investment projects and non-investment projects such as training, information exchange and experience sharing. The investment of the international community and elimination of production and consumption of ODS (ozone depleting substances) would contribute significantly to the recovery of the ozone layer.

Initially the developing countries refused to sign the Montreal Protocol to become parties to it. they held suspicions and only agreed to become Parties after being given the assurance that it was indeed detrimental to mankind to continue using these ODS and if not stopped would lead to further ill-effects. Without accepting the duty to transfer technology and to funding there was the realistic danger that the developing countries were unable to comply with the control measures. These countries demanded this as a matter of right and not charity as the developed countries were primarily responsible for this problem. There was then a danger that most fast developing countries would have become a large producer and consumer by year 2000. In that case it would have been senseless of the developed countries to enforce control measures. With the help of financial mechanism and transfer of technology the issue between developed and developing countries was resolved and they became parties to it.

The Rio Declaration had brought with it certain basic environmental principles thus laying the foundation for framing of environmental laws. Through this process the concept of Sustainable Development was introduced. It incorporated several principles like common concern, common but differentiated responsibilities, the precautionary principle and the polluter pays principle. These principles thus formed the basis for bringing out the Vienna Convention and the Montreal Protocol. Evidence is now known and it is found that ozone has depleted in most parts of North America, Australia, New Zealand and more famously over the Antarctica

with the discovery of “ozone hole”. With the discovery of more ODS and new discoveries along with changes in situations amendments have been made under the Montreal Protocol namely in 1990, 1992, 1995, 1997 and 1999.¹⁸⁵

It is on the basis of polluter pays principle that the developed countries were asked to fund the financial mechanism, which would help the Article 5 countries* to destroy ozone depleting technologies and switch over to environment friendly ones. With the adherence to the measures called for, the ozone layer is expected to recover by the next 50 years.

The environmental concern of the use of CFCs and other ODS has not been included in the list of crimes under the Statute of the International Criminal Court (ICC) adopted at Rome on 17 July, 1998.* It has not been defined as an international crime under any of the international conventions nor it has been so stated as such in the light of Montreal Protocol. Montreal Protocol simply works on that use of ODS should be eliminated and those who do not adhere to it would have to face isolation in relation to trade aspect of the world. It is silent on the provisions that relate to environmental crimes thus it is regarded under a civil wrong.

In India there is legislation as far as certain crimes are concerned. Section 133 of the Criminal Procedure Code empowers the Magistrate to take action against environment criminal acts. The Environment Protection Act also operates with criminal procedures, although the nature of offences is not defined. The Montreal Protocol has not been considered a crime in India, except where smuggling activities take place, which come under other Laws as crimes. This is so because under Montreal Protocol non-compliance is not taken as an environmental crime. It is only regarded as a civil wrong. The punishment for the polluter is of civil or criminal nature. It depends on the facts and kinds of acts, which are defined and interpreted as such, and accordingly the person is penalized for it.

¹⁸⁵ United Nations Environmental Programme, Handbook for the International Treaties for the Protection of the ozone layer, Fifth edition, 2000 at 197.

Under the Montreal Protocol, non-compliance calls for stricter measures along with tortious liability. It does not include the activities of these ODS as criminal as they are identified as such. These measures include stopping of trade with that party and withdrawal of all other facilities, which a party to the Montreal Protocol may enjoy. As a result the non-complying party stands in isolation to the Nations of the world. States are often unable to combat environmental crimes because they lack either the resources or ability to detect the crimes and ferret out the criminals. One potential way to capture environmental criminals and to improve State compliance with international environmental obligations is to utilize new monitoring technology like remote sensing and globally positioned satellite systems.

Under the Indian scenario, initially the world was surrounded by such global politics that the rich and developed countries refused to acknowledge their liability in environmental degradation and the developing countries harboured suspicions that multilateral environmental deliberations are disguised attempts to keep them economically at a disadvantage. In the wake of resolutions adopted at the Conference on Human environment at Stockholm in 1972, different countries at different stages enacted laws to protect the deteriorating conditions of environment. The confirming of fears of threats as ozone depleting and in turn wiping out life on earth led to international meets as the Vienna convention. The resolution then to phase-out all ozone depleting substances was undertaken by the developed countries. The developing countries were then named as Article 5 countries and slowly and steadily all these countries joined hands in helping resolve the issue. India being a developing country ratified the Montreal Protocol (MP) on Substances that Deplete the Ozone Layer in June 1992.¹⁸⁶ In India the depletion of ozone because of pollution was not there under the Environment Protection Act 1986. This has now been included by the insertion of the Rules 2000 framed specially to encounter this problem. India is eligible for grant assistance from the Multilateral Fund for the

¹⁸⁶ Supra note 152

Implementation of the Montreal Protocol (MFMP). In 1994, India's production amounted to 25,740 tons, in terms of ozone-depleting potential (ODP) and consumption was 16,066 ODP tons. Most consumption of ozone depleting substances (ODS) is in foams, refrigeration, aerosols and solvents.¹⁸⁷ India is self sufficient in production of CFC-11, CFC-12 and halon-1211.¹⁸⁸ The Ministry of Environment & Forests (MoEF) is the agency responsible for implementation of the Montreal Protocol. Within the MoEF, the Ozone Cell is coordinating Montreal Protocol activities. The MoEF has established a Steering Committee to implement the provisions. This Committee review's various policy's implementation options along with project approvals and project monitoring. A Project Management Unit is also operational in the ozone cell for monitoring CFC production, phase-out and implementing other support activities to aid CFC production "phase-out."¹⁸⁹

After assessing the entire scenario, that is the assessments relating to ODS, ODP, the sectoral phase-out and taking up the Regulatory, fiscal and awareness campaigns, India framed the Ozone Depleting Substances (Regulation and Control) Rules, 2000. The Ozone Depleting Substances Rules 2000 are framed keeping in mind that there should be development in synthesis with the principle that environment should be protected too.

The Rules start the phase-out from 2003-2004.¹⁹⁰ They prohibit the use of CFC's in manufacturing products beyond 1-1-2003 except in MDIs (metered dose inhalers) and for other medicinal purposes. The use of Halons is prohibited after 1-1-2001, except for servicing and essential use. Other ODS such as carbon tetrachloride and methyl chloroform and CFC for MDI can be used upto 1-1-2010.¹⁹¹ The use of methyl bromide has been allowed upto 1-1-2015.¹⁹² Since HCFCs are used as interim substitute to replace

¹⁸⁷ Ibid

¹⁸⁸ Ibid

¹⁸⁹ Ibid

¹⁹⁰ Ibid

¹⁹¹ Ibid

¹⁹² Ibid

CFC, these can be used upto 1-1-2040.¹⁹³

The adverse effects are, the use of ODS has increased despite the Montreal Protocol and its various control measures. The other negative factors operating are more in wider use than the control measures. The strict adherence to the measures are not there as there is lack of a central agency to have a coordination of activities of the developed and the developing countries. Illegal trade between countries has increased, as those, which are asked to stop the use is illegally selling them in the less developed countries. There is a need to frame at least those activities as crimes, which are related to smuggling and other trans-border crimes. As in India one-week training programs are not sufficient to combat problems posed due to illegal activities. Certain activities should come under the criminal law so that these illegal activities are restricted under the law.

There is a need to ensure that the goals of the Montreal Protocol do not undermine the Kyoto Protocol. To do so, there should be something to support the legal linkage between the two protocols and should ban the adoption of HCFCs, HFCs, and other global warming chemicals as alternatives to ozone depleting chemicals, unless there is no other technologically feasible alternative.

India has undertaken numerous response measures that are contributing to the objectives of the United Nations Framework Convention on Climate Change (UNFCCC). India's development plans balance economic development and environmental concerns. The planning process is guided by the principles of sustainable development.

Despite all measures taken for stopping hazardous wastes and uses of ODS, wars aggravate the environmental issues more. U.N. as a peace keeper appears to have failed in its mission of stopping the uses of such environment degrading activities which brings the efforts to square one.

Although there are international efforts to phase out ODS, the effective implementation has been delayed due to different situation in different

¹⁹³ Ibid

countries. More stern measures are required to be taken for the implementation and Regulating Ozone Depleting Substances. There should be an effort taken to start implementing the provisions of Montreal Protocol without waiting for phase out dates. India needs to draft Laws instead of Rules to implement measures to check ozone depletion. The Ozone Cell set up in India should have more sub cells and proper coordination to monitor the work of these units. Awareness programmes and measures should be brought about in India due to lack of awareness in masses of ozone depletion problem. Testing Laboratories on substances should be established where scientifically products, which are checked for CFC free technologies.

Effective measures should be taken to outline these activities as crimes under the criminal law. This issue is tried under the common law remedies, but when smuggling of CFC takes place, then the Act gets transformed into a crime. This should not just be effected in the international law, but also under the municipal laws. There is a need for the nuclear wastes as well as the Hazardous wastes to be linked together so that there is an overall solving of the deep-rooted problem. Countries like India who are in the beginning of implementation have not linked the two, which is an important provision given under the Protocol.

New Jurisprudential techniques have to be devised to deal adequately with this problem of ozone depletion so that the switch over to non-CFC products is more effective. In order to make the legal provision more effective the Rules granting prospective right should be construed restrictively and should be interpreted strictly to cover subtle-invasions of CFC uses.

The decisions of the Ozone Cell should be taken as precedents and should be followed in the remaining cases in view of stricter provisions of law. The sentencing policy should place emphasis on abatement of ozone depletion, rather than mere imposition of fines or penalties or let them off for want of awareness. Public Interest Litigation for protection of ozone should be practiced more often as regards depletion.

More ODS officers and inspectors are required to seek effective checks on adverse activities. Mere weekly training to officers is not enough to encounter this threat. Every country should take precautions on dumping of adverse technologies in third world by legal or illegal means. Incentives should be given to promote indigenous environmental friendly technologies free from CFC uses. The third world countries should ensure that transfer of finances reach to the required industries. After the transfer of technology, it should be the industries do not again switch back to old uses of equipment or other technology, which would again create the problem of ozone depletion.

EVALUATION OF THE CONCEPT OF LIABILITY AND DISPUTE REDRESSAL MECHANISM

Environmental liability is a legal concept whereby through the rule of law, damage to the environment can be determined, assessed and redressed. Pollution and nuisances and the consequences of irrational use of environmental resources or technologies for which environmental legislation creates obligations gives rise to liability for environmental damages. The basis of environmental liability in India by and large favours strict liability principle. Gradually through judicial activism, in case of hazardous industries the principle of absolute liability evolved. Subsequently, the apex court has also followed the polluter pays principle and precautionary principle based on the concept of Sustainable Development.

The engrafting of the concept of these liabilities into the Environmental Statutes is required to be analysed, to understand the concept of environmental liability in India, with special reference to air. Based on these liabilities and doctrines the legislative enactments on redressal have been framed. The effect of such enactment shall also be analysed.

The criminal sanction for environmental violations has been sanctified in all countries, which have legislations dealing with environmental matters. Indian Parliament has also enacted three major laws on environmental pollution as control mechanism. Indian environmental Statutes, though impressive in range and coverage are more often observed in breach than in practice. The deterrent theory of punishment employed under strict and absolute liability principle has achieved some degree of success. The Fault liability and vicarious liability is applied to auxiliary offences and offence against enforcement. The basis of liability is required to be examined to understand whether it could achieve the desirable consequence.

6.1. Concept of Environmental Liability in India

6.1.(i). Strict Liability

Under the Environmental Statutes, Offences relating to core prohibitions mainly employ strict liability principle. The following provisions under Environment Act are based on strict liability mainly because of difficulty in proving *mens rea* and protection of wide social interest:¹

- a) discharging, emitting or permitting to be discharged or emitted any environmental pollutant in excess of such standard as may be prescribed.
- b) handling or caused to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed under the Act.
- c) fails to comply with or contravenes any of the provisions of the Act, or the rules or the orders or directions issued thereunder.

Under Air Act, the strict liability is being circumstanced under the following provisions:

- a) Whoever, fails to comply with the provisions of Subsection (5) of section 21 or section 22 of any industry specified in the Schedule in an air pollution control area (section 37).
- b) Whoever contravenes any provision of this Act such as standard for emission from automobile etc.

Among these provisions section 22 of Air Act is an illustration which prescribes fir strict liability; it provides No person operating industrial plant in any air pollution control area shall discharge or cause or permit to be discharged the emission of any air pollutant in excess of standard laid down by the State Board.

6.1.(ii). Fault Liability

Mens rea and *actus reus* are necessary constituents of fault liability. There are certain offences under Environment Act and Air Act that favour fault

¹ See Md Zafar Mahfooz Nomani, Law relating to Environmental Liability and dispute redressal: Emergence and dimension, Indian Bar Review, Vol 23 (3 & 4) 1996, p 144.

liability. Sections 16 and 17 of the Environment Protection Act 1986 and 40(2) and 41 of the Air Act provide that the principal officer and officers shall be liable for the offence committed by the Company or Government departments.

Section 40(2) of the Air Act provides that where an offence under the Act has been committed by a Company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on any part of any Director, Manager, Secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Similar provision is provided under Section 16 of the Environment Protection Act, which lays down where any offence under the Act has been committed by a Company, every person who, at the time the offence was committed was directly in charge of and was responsible to the Company for the conduct of the business of the Company, as well as the Company, shall be deemed to be guilty of the offence and shall be liable to be proceeded and punished accordingly.

Section 17 of the Environment Protection Act and Section 41 of the Air Act make the Heads of the Departments guilty of the offence in the same way as principal officers of the Company are accountable for environmental violations. These Heads can also avoid their liability in the like manners by proving that the offence was committed without their knowledge and that they exercised due diligence to prevent its occurrence. They can also rebut the presumption of consent, connivance and negligence.

6.1.(iii). Vicarious Liability

Whatever may be the nature of offence, the corporate entities and persons in-charge of the affairs of the company are to be held vicariously liable for strict or fault liability-offences. This deeming fiction has been incorporated under section 16 of Environment Act and section 40 of Air Act. But the director, manager, secretary and other officer in charge of the conduct or the business of the company can avoid liability on the following grounds:

- a) the offence was committed without knowledge, or
- b) he exercised all due diligence to prevent the commission of offence.
- c) The offence has been committed without his consent, connivance and any neglect on his part.
- d) He is not directly incharge and responsible to the company.

Thus employment of criminal sanction under various principles of liability has proved ineffective. The increase in penal sanction and dose of punishment has not brought desired effects. Enhanced magnitude of fines has also not financially deterred erring polluting industries. During the years, the enterprise engaged in hazardous process also grew to assume serious proportions. The devastating effect on the environment and lives of innocent people volcanised in *Union Carbide* and *Sri Ram* can be cited to bring home the point.

The use of criminal sanctions for environmental violations has proved ineffective. Environmental laws contemplate deterrent value in the imposition of punishment on the violators. Imperfection in definitions of environmental offences and the complexities involved in the prosecution of such offenders has forced the pollution Boards to go for preventive action rather than prosecution. But ineffective enforcement has reduced any threat of punishment. There has been marked increase in the penal sanctions but mere increase in the dose of punishment will not bring the desired effect. The laws providing coercive punishment are not enforced with any regularity or certainty. The criminal activity tends to increase because the people feel that a threat has been removed. Environmental laws are more followed in their breach than in their observance.²

Alongwith these concepts of liability another new concept i.e., the concept of absolute liability has evolved in our country.

6.1.(iv). Absolute Liability

² Mohd. Zakia Siddiqui, "Environmental law and the limits of Criminal Sanctions", *Indian Bar Review*, Vol 21(4) 1994, p.43.

The concept of Absolute liability for the harm caused by industry engaged in hazardous and inherently dangerous activities is newly formulated. It is free from the exceptions to the strict liability rule in England. The Indian rule was evolved in *M.C.Mehta v. Union of India*³, which was popularly known as the oleum gas leakage case. In Oleum Gas leakage Case, Chief Justice P.N.Bhagwati stressed on the need to develop a law recognizing the rule of strict and absolute liability in cases of hazardous or dangerous industries operating at the cost of environment and the human life.

The learned Chief Justice observed that- We in India cannot hold over hands back and I venture to evolve a new principle of liability which English Courts have not done. We have to develop our law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because, it not been so in England⁴.

Therefore, on the Substantive law, it was emphasized that the principle of absolute liability should be followed to compensate victims of 'hazardous and inherently dangerous activity'. Industries engaged in hazardous and inherently dangerous activity are 'absolutely liable' to compensate those who are effected by the harm arising from such activity.⁵ It is a newly formulated doctrine free from the exceptions to the strict liability rule in England. The principle of strict liability evolved in England more than a century ago, in *Ryland v. Fletcher*, was watered down to a large extent in that country by adding exceptions such as act of God, act of default of the plaintiff, consent of plaintiff, independent act of a third party and Statutory authorization for tort.

The Supreme Court of India⁶ opined that such exceptions to *Ryland v. Fletcher* were not applicable in India in cases of determining liability for

³ AIR 1987 SC 1086.

⁴ Id 1089.

⁵ Id 1099.

⁶ Ibid.

hazardous and inherently dangerous industry. The Court did not stop here it went further and observed that- The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on the hazardous or inherently dangerous activity by the enterprise.⁷

This is found necessary because of its deterrent effect on the behaviour of the industry. The Indian Supreme Court, no doubt, was developing an indigenous jurisprudence free from the influence of English law. The Court took its inspiration from Article 32 of the Constitution of India, which guarantees the right to move the Supreme Court for 'appropriate' directions, orders or writs. The scope of the power conferred on the Court was so widely interpreted as to include formulation of new remedies and new strategies for enforcing the right to life and awarding compensation in an 'appropriate' case.⁸

However some jurists outside India criticized the Mehta dictum of absolute liability as imposing a liability, regardless of general principles, which would undermine the credibility of Indian courts and lead to accusation of bias by foreign investors.⁹ According to an Indian jurist, the dictum suffers from a misconception of the role of industry as exploiter and ignores its role as contributor to the economy. The Court saw only thorns and forgot roses.¹⁰ The Union Carbide Corporation (UCC) had hinted that the Supreme Court had UCC in mind and prejudged their 'absolute liability' when the Mehta principle of absolute liability was evolved even before the question of compensation to the victims of Bhopal tragedy reached the Court. Rejecting the contention, the Supreme Court made the comment that- The criticism of the Mehta principle, perhaps ignores the emerging postulate of tortuous liability whose principal focus is the social limits on economic adventurism. There are certain things

⁷ Supra note 3.

⁸ Supra note 3, p 1091.

⁹ PT Muchlinski, 'The right to development and industrialization of less developed countries: The case of compensation of major industrial accidents involving foreign-owned corporations', (1989) *Human Rights Unit Occasional Paper*, Commonwealth Secretariat.

¹⁰ Jayaprakash Sen, 'Liability without responsibility: A problem of justice', (1992) *Cochin University Law Review*, 155, pp 163,164.

that a civilized society simply cannot permit to be done to its members, even if they are compensated for their resulting losses.¹¹

6.2. REMEDIES UNDER ENVIRONMENTAL LAWS IN GENERAL

In *Vellore Citizens' Welfare Forum v. Union of India*¹², the Supreme Court traced the source of the Constitutional and Statutory provision that protect the environment to 'inalienable Common law right' of every person to a clean environment. The Court held that since the Indian legal system was founded on English Common law, the right to pollution-free environment was a part of the basic jurisprudence of the land.¹³

Therefore, a study on redressal would be incomplete without mentioning the common law remedies and the law evolved under Criminal law and other laws in India. However, these remedies have been dealt in the previous chapter¹⁴. Here we would mention the crux of other remedies.

The law of easement guarantees beneficial enjoyment to the owner of a land, free from air, water or noise pollution, without disturbing the natural environment.¹⁵

In all cases where environmental assault amounts to private nuisance, the law enables an aggrieved person to challenge such act of pollution by moving the court under the Code of Civil Procedure.¹⁶ The court can give different remedies such as damages, injunctions, interim orders, declarations and decrees¹⁷.

Only when the harm is of such a nature, that it may affect a lot of people, does it attain the character of public nuisance, but the extent of harm may not be ascertainable. Nor will it be easy for the court to quantify the damages and apportion them. The court may also find the problem as a

¹¹ *Union Carbide Corporation v. Union of India*, AIR 1990 SC 273 (283).

¹² AIR 1996 SC 2715.

¹³ *Id.*, at 2722.

¹⁴ Chapter III.

¹⁵ The Indian Easement Act 1882, Sec 7 illus. (b) (f) and (h), See also Chapter III.

¹⁶ Code of Civil Procedure, Section 9, See also *

¹⁷ Sections 94 and 95 as well as under Order 39 of C.P.C., and Sections 37 to 42 of the Specific Relief Act, See also Chapter*

standing hurdle. To overcome such crisis, there are techniques tailored into our legal system. One method is found in the Code of Civil Procedure¹⁸, under which the Advocate General, or with the leave¹⁹ of the Court, two or more persons, can institute a suit, whether or not special damage is caused to such persons.²⁰ Nowadays, however this action is less frequently taken by the Advocate Generals or the Collectors since in many instances, the local bodies or other authorities may have adequate statutory powers to deal with such situations.

These remedies are more prominent when the environmental disturbance amounts to private nuisance. However, the new era poses challenge as to how these remedies can be rendered in instances when the disturbance has a wider impact on the rights of more persons than one. Section 133 of the Code of Criminal Procedure is notable in this respect. A district magistrate or a Sub divisional magistrate specially empowered in this behalf may take the initiative in removing public nuisance. Therefore, the Code enables the common man to avail quick remedy against public nuisance.

6.3. DOCTRINES

The doctrines and the evolution of various principles of environmental jurisprudence have resulted in the formulation of National Environmental Policy and resulted in the Parliament enacting comprehensive laws in the field of Wildlife protection and water pollution. In the early 1980's the nationwide forest conservation and air pollution laws were also passed. Subsequently, the Bhopal Gas tragedy led to the enactment of Environment Protection Act of 1986, followed by amendments tightening the laws relating to air and water pollution.

The Public Liability Insurance Act, the National Environmental Appellant Authority Act 1997, was formulated to ensure environmental justice,

¹⁸ Under Section 91 of C.P.C.

¹⁹ Ibid., Formerly, it was with the leave of the Advocate General. However, if the member of a class suffer some special damage, the action is maintainable even without the consent of Advocate General (*Faquirchand v. Sooraj Singh*, AIR 1949 All 467.) The 1976 amendment made it possible for two or more.

²⁰ P.Leelakrishnan, *Environmental Law in India*, 2nd Reprint 2002, p.34.

rehabilitation, speed and independent investigative capabilities. These legislations were enacted in the wake of the Bhopal tragedy to adopt stronger environmental policies for industries engaged in hazardous activities.

The Legislations on environmental redressal usually have their basis on the doctrines evolved at the International Convention. These doctrines have also found place in the environmental jurisprudence in India. Doctrines formulated at International Conference are still to find place in the environmental legislation in the country. However, the apex Court through an ingenious juristic technique has filled up this deficiency at times. The Constitution of India indicates the procedure on how decisions made at International Conferences and Conventions are incorporated into the legal system. This is done by enacting a parliamentary legislation. The Air and Environment Acts are the result of such exercise.

Indiscriminate growth of industrialization coupled with application of ultra modern technologies unmindful of their catastrophic consequences in our environment has done enormous damage to our ecosystem pushing us to a strange stage where we can spare neither development nor a clean environment, both being inextricable interconnected. The problem has given rise to a debate on right to livelihood versus protection of nature or environment. Thus the problem cropped up how to balance the right to development and protection of environment. The answer to this question may come from present thinking of 'sustainable development'. Sustainable development has a fixed set of goals though approaches any means to achieve them can differ. These goals are:

- (1) Basic needs of all human beings –i.e. food, clothing, shelter, health, education, security and self-esteem must be met adequately. Priority must go to these needs.
- (2) Development process should be so articulated that ecological balance and environmental purity is least disturbed, if at all; and
- (3) All nations and people must join hands to support each other and work with each other to create a world in which the above two

goals are optimized. Each country should find ways and means to promote this interdependence.²¹

Therefore, the traditional concept that development and ecology are opposed to each other is no longer acceptable, due to the development of the concept of sustainable development. In the international sphere, 'Sustainable development' as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987, the concept was given a definite shape by the World Commission on Environment and Development²².

6.3.(i).SUSTAINABLE DEVELOPMENT

"Sustainable development' as defined by the Brundtland Report means 'development that meet the needs of the present without compromising the ability of the future needs'.

The concept of sustainable use of earth's resources is an ancient one. The Coyce declaration in the 70's first used the term under it. The principle first received impetus with the adoption of Stockholm Declaration in 1972, World Conservation Strategy prepared in 1980 by the World Conservation Union (IUCN) with the advice and assistance from the United Nations Environment Programme (UNEP) and the Worldwide Fund, the World Charter for Nature of 1982, Report of the World Commission on Environment and Development (Brundtland Report) and the document Our Common Future of 1987, the document Caring for the Earth: A Strategy for Sustainable Living developed by the second world conservation project comprised of the representatives of the IUCN, UNEP and the Worldwide Fund for Nature. The concept of sustainable development is the foundation stone of the Montreal

²¹ Dr.N.K.Chakrabarti, "Right to livelihood and Environmental Protection", Indian Bar Review, Vol. 23 (3 & 4) 1996, p.59.

²² The Commission was Chaired by the then Prime Minister of Norway, Ms G.H.Brundtland and as such the report is popularly known a 'Brundtland Report'.

Protocol for the protection of the ozone layer of 1987 and the instruments adopted at the Earth Summit at Rio in 1992.²³

In the quest for sustainable development, International law is an increasingly important mechanism. The States were held responsible for the damage resulting from the trans boundary pollution to the other States or the property of persons therein under the Trail Smelter Arbitration.²⁴ A United Nations Conference on Human Environment was held at Stockholm in 1972 putting forth a Declaration containing 26 principles, which opened the floodgates for, subsequent developments for the protection and promotion of the environment. Under the auspices of the Stockholm Conference, the United Nations Environment Programme was also established. To achieve sustainability the Vienna Convention followed by the Montreal Protocol of 1987 served a framework and laid down broad guidelines on the basis of sustainable development. In 1992, United Nations Conference on Environment and Development (UNCED) was held wherein more than 170 Governments participated. To put the world on a path of sustainable development, which aims at meeting the needs of the present without compromising the ability of future generations to meet their own needs, was the UNCED's mission.²⁵ To provide the principles of economic and environmental behaviour for individuals and nations was the view with which the Earth Summit was held. As a matter of fact, premised on the interconnectedness of human activity and the environment, UNCED heralded a new global commitment to sustainable development.²⁶

The degree to which a nation can prosper depends on its productivity, which is the efficiency with which it is able to utilize the natural resources of environment to satisfy human needs and expectations. If gains in productivity are to be sustained resources must also continue to be available for all times to

²³ P.S.Jaiswal, Nishtha Jaiswal, Environmental Law, 2000 at 79-80.

²⁴ Trail Smelter Arbitration, III United Nations Report of International Arbitral Awards, 1949 at 1907.

²⁵ Patti L. Petesch, North South Environment Strategies, Costs and Bargains, WASHINGTON: OVERSEAS DEVELOPMENT COUNCIL, 1992 at 7.

²⁶ Kathi Sessions, Building the Capacity for Change, EPA JOURNAL, Vol 15 (April-June) 1993.

come. This requires that while providing for current needs, the resources base be managed so as to enable Sustainable development²⁷.

The Supreme Court of India in *Vellore Citizens Welfare Forum v. Union of India*²⁸, elaborately discussed the concept of 'Sustainable development' which has been accepted as part of the law of the land, and observed:

“We have no hesitation in holding that ‘Sustainable development’ as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalized by the International law jurists”.

Some of the salient principles of 'Sustainable development' as called out from Brundtland Report and other international documents are intergenerational equity, use and conservation of natural resources, environmental protection, the precautionary principle, 'Polluter pays' principle, obligation to assist and co-operate, eradication of poverty and financial assistance of the developing countries. However, the 'precautionary principle' and the 'polluter pays principle' are essential features of 'Sustainable development'.²⁹

The U.N. Commission on Sustainable Development (CSD) was established through which Governments would review progress towards the goals of sustainable development and integrate economic and environmental decision-making and would serve as a permanent forum. The CDS were to recommend further actions to promote sustainable development and review reports from Governments and international organizations of their efforts to implement Agenda 21 and discuss financial and technical issues. The success of CSD would depend heavily on the participation from national governments including the reports and information they provide, the technical expertise and political authority their delegates bring, and to the degree to which these governments reinforce CSD decisions through representatives to other international for a. The Commission can greatly strengthen their collective

²⁷ See. Seventh Five year Plan: 1985-90, Planning Commission, Government of India (1985).

²⁸ AIR 1996 SC 2715.

²⁹ Id at 2720 and 2721.

capacities to tackle environment and development problems, if the States use the Commission to build consensus on global sustainable development goals and thereafter the States reinforce that consensus through their national and international efforts. This has been followed under the Montreal Protocol. The text of the Protocol provides for the plan of action and accordingly different countries have framed laws, rules and regulations to integrate these guidelines into their framework of laws.

The concept of Sustainable development has grown since its inception at the international forum and has acquired new dimensions in terms of economic growth, development and environment protection. The salient features as deduced from the international arena of environmental documents are as under:

1) *Common but differentiated responsibility*

This principle under the Rio Declaration on Environment and Development provides for, "In view of the different contributions to global environmental degradation, States have a common but differentiated responsibility". Under this principle those States which are responsible for causing environment degradation should do something so that the damage done by them is restored for the present as well as future generations. It is their duty to help the developing countries so that even they do not walk on their footsteps and cause environment degradation. It is this principle for the developed countries under the Montreal Protocol for help in the Article 5 countries with all assistance to restore the ozone layer and meanwhile they will stop their uses of ODS within their respective countries.

2) *Intergenerational equity*

The ethical principle of equity, particularly intergenerational equity, is central to the concept of sustainable development. Yet Governments all over the world are adopting sustainable development policies that reinforce existing inequities and create new ones. They involve monetary valuation of the environment and the use of financial incentives aimed at using market mechanisms to allocate scarce environmental resources. However, these

policies tend to remove decision-making power from the community and cause some sections of the community to bear more than their fair share of environmental burdens.

The central ethical principle behind sustainable development is equity and particularly intergenerational equity. Equity is about fairness: Equity derives from a concept of social justice. It represents a belief that there are some things, which people should have, that there are basic needs that should be fulfilled, that burdens and rewards should not be spread too divergently across the community, and that policy should be directed with impartiality, fairness and justice towards these ends. Equity means that there should be a minimum level of income and environmental quality below, which nobody falls. Within a community it usually means that everyone should have equal access to community resources and opportunities. Therefore, for the benefit of the future generations the use of ODS should be stopped.

Equity includes both intergenerational equity (relating to the rights of future generations and our obligations to them) and intragenerational equity (relating to members of generations existing today). The principle of intergenerational equity reflects the view that as the members of the present generations while deriving benefits from the natural resources of this earth, hold the earth in trust for future generations. All generations form a partnership that extends across time in relation to their human environment. The principle includes three components: quality, options and access to the environment. These must be comparable across generations.

The theme of the theory of intergenerational equity is the right of each generation of human beings to benefit from the culture and natural inheritance of the past generations as well as the obligation to preserve such heritage for future generations. Intergenerational equity requires conserving the diversity and quality of biological resources, and of renewable resources such as forests, water and soils³⁰. The idea behind not reducing the ability of future generations

³⁰ Armin Rosenzanz, Shyam Divan and Mathal L. Noble, *Environmental Law and Policy in India*, 1991 at 60.

to meet their needs is that although future generations might gain from economic progress, those gains might be more than offset by environmental deterioration. Most people would acknowledge a moral obligation to future generations, particularly as people who are not yet born can have no say in decisions taken today that may affect them.

There are two different ways of looking at the need to ensure that future generations can supply their needs. One is to view the environment in terms of the natural resources or natural capital that is available for wealth creation, and to say that future generations should have the same ability to create wealth as we have. Therefore, future generations will be adequately compensated for any loss of environmental amenity by having alternative sources of wealth creation. This is referred to as 'weak sustainability'. The other way is to view the environment as offering more than just economic potential that cannot be replaced by human-made wealth and to argue that future generations should not inherit a degraded environment, no matter how many extra sources of wealth are available to them. This is referred to as 'strong sustainability'.

There are various reasons why strong sustainability may be preferable to weak sustainability. Closely related reasons are 'non-sustainability', 'uncertainty' and 'irreversibility'. There are many types of environmental assets for which there are no substitutes: for example, the ozone layer, the climate-regulating functions of ocean phytoplankton, the watershed protection functions of tropical forests, the pollution-cleaning and nutrient-trap functions of wetlands. For those people who believe that animals and plants have an intrinsic value, there can be no substitute. We cannot be certain whether or not we will be able to substitute for other environmental assets in the future.

Scientific knowledge about the functions of natural ecosystems and the possible consequences of depleting and degrading them is at best uncertain. The depletion of natural capital can lead to irreversible losses, such as species and habitats, which cannot be recreated using man-made capital. Other losses are not irreversible but repair may take centuries, for example, the ozone layer and soil degradation. Losses of species and ecosystem types also reduce

diversity. Diverse ecological and economic systems are more resilient to shocks and stress.

3) *Environment protection*

Keeping various principles in mind, it is generally perceived that, the right to development must be so fulfilled, to equitably meet development and environmental needs of present and future generations. The States have the right to exploit their own resources, but it is also indicated that the global environment is a common concern of humanity. It is therefore with the help of various legislation and regulations every country must do something to preserve its environment not only for future generations but also for those living now to be provided with a healthy environment. The adverse effects of ozone depletion have more grave health and other extinction of species effect.

Without adequate environment protection, development is undermined: without development, resources will be inadequate for needed investments, and environment protection will fail. Strong legislation in various countries would reinforce sustainable development. As an environmental concern this would help the ozone layer recover faster.

4) *The polluter pays principle*

The legal requirement of the 'polluter-pays' principle is that the person responsible should bear the consequential as well as other costs of pollution for causing pollution and environmental degradation. However, the meaning and its application to various cases and situations is subject to interpretations; particularly the circumstances in which the principle can be subject to exceptions and regarding the nature and extent of costs involved. According to the principle as interpreted by decision-makers, the polluters must pay for:

- The pollution abatement costs,
- The environmental recovery costs and,
- The damages caused to victims due to pollution and their compensation costs.

Particularly regarding various aspects of liability, the practical implications of the polluter principle are remarkable in its allocation of economic obligations as for environmental damaging activities. The use of economic instruments can be inspired by the polluter pays principle, and the application of rules relating to competition and subsidy. Examples of specific applications of the polluter-pays principle include adjusting fees or taxes payable by hazardous installations, to cover the cost of exceptional measures taken by public authorities to prevent and control accidental pollution, charging to the polluter the cost of reasonable pollution control measures. Particularly to avoid the spread of the damage or to limit the release of pollutants, or their ecological effects usually called the rehabilitation measures, such measures can be taken when an accident occurs.

The scope of the polluter-pays principle can be understood by rules of environmental liability and through compensation mechanisms to victims of environmental damages in the framework. These include a range of issues to be considered in the application of the principle, such as – the nature of conceptual problems encountered in incorporating these rules into the legal system. However, to achieve and maintain a cleaner environment is the primary goal of the polluter-pays principle. For an appropriate remedy to victims of damage from environmentally harmful activities, the polluter-pays principle is particularly valid. The environmental lawyer presumes that the permission to carry on an activity is conditional on the enterprise absorbing the cost of any pollution arising from the activity. However, other questions arise concerning the consideration of- the extent of environmental damages, -the need for a reasonable and better compensation for such damages, -the adoption of promotional measures or preventive approaches for better management of environmental resources. As it involves many approaches underlying environmental planning, the scope of the polluter-pays principle depends on the policy-making context. It is commonly understood taking into account its preventive effects, as a mechanism for compensation of damage.

Holding a person liable for trespassing on others rights to an healthy and free environment has been held good by the Indian Judiciary in various case where it has given sound judgements that a person responsible for causing pollution, holds the liability to resurrect and pay for the damage caused. In *Indian Council for Enviro Legal Action v. Union of India*³¹, it was held that once the activity carried on was hazardous or inherently dangerous, the person carrying on that activity was liable to make good the loss caused to any other person by that activity. In this case the industries located in Bichhri village in Udaipur (Rajasthan) were discharging highly toxic effluents which percolated deep into the earth and polluted the water down below, which not only made it unfit for drinking but also spread diseases, death and disaster. This principle has also been followed in the case of *Vellore Citizens Welfare Forum v. Union of India*.

This principle also has been discusses at length in the case of *M.C.Mehta v. Kamal Nath*³², where lease was granted by the State Government of riparian forest land for commercial purposes to a private company having a Motel located at the bank of river Beas, which was questioned through a Public Interest Litigation (PIL). The Motel management was interfering with the natural flow of the river by blocking natural relief/ spill channel of the river. Applying the polluter pays principle, enumerating the provisions of the Water Act, Air Act and the Environment protection Act 1986; the Court contemplated the cognizance of offences under them. It said that, “a person guilty of contravention of provisions of any of the three Acts which constitute an offence has to be prosecuted for such offence and in case the offence is found proved then alone he can be punished with imprisonment and fine or both. The *sine qua non* for punishment of imprisonment and fine is a fair trial in a competent court. The punishment of imprisonment or fine can be imposed only after the person is found guilty”.

5) *The precautionary principle*

³¹ AIR 1996 SC 1446.

³² (1997) 1 SCC 388.

The 'Uncertainty' of scientific proof and its changing frontiers from time to time has led to great changes in environmental concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. Earlier the concept was based on the 'assimilative capacity' rule as revealed from Principle 6 of the Stockholm Declaration of the UN Conference on Human Environment, 1972. The said principle assumed that science could provide policy makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and if presumed that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. But in the 11th Principle of the UN General Assembly Resolution on World Charter for Nature, 1982, the emphasis shifted to the 'Precautionary Principle', this was reiterated in the Rio Conference of 1992 in its principle 15, which reads as follows:

"In order to protect the environment, the precautionary approach shall be widely applied by the States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing cost effective measures to prevent environmental degradation".

This principle plays a significant role in determining whether developmental process is sustainable or not. The growing recognition of the need for precautionary action on environmental issues despite the existence of scientific uncertainty presents society with substantial new public policy challenges. Examples of this problem include global warming and concerns that numerous toxic substances may be posing endocrine-disruption throughout the biosphere.

What is particularly vexing about these problems is that in the absence of conclusive proof about the magnitude of impacts or precise casual mechanisms, they may demand dramatic readjustments of human economic activities. Profound levels of investment by society may be required for the efforts to shift behavior. Under such circumstances, the Precautionary Principle

is a policy principle to nevertheless promote action. It states "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically". This precautionary approach is advanced by attempts of various existing and proposed mechanisms. The approach range from outright action forcing measures such as bans and phase-out of substances suspected of causing the harms to promoting additional societal study of the activities of concern, to shifting burdens of proof, to providing incentives for preventive behavior.

In *Vellore Citizens' Welfare Forum v. Union of India*³³ a three Judge Bench of the Supreme Court referred to these changes, to the 'Precautionary Principles' and the new concept of 'burden of proof' in environmental matters. Kuldip Singh, J. after referring to the principle evolved in various International Conferences and to the concept of 'Sustainable Development', stated that the Precautionary Principle, the polluter-pays principle and the special concept of onus of proof have now merged and govern the law in our country too, as is clear from Article 47, 48-A and 51-A (g) of our Constitution and that, in fact, in the various environmental status, such as the Water Act, 1974 and other statutes, including the Environment (Protection) Act, 1986, these concepts are already implied. The learned Judge declared that these principles have now become part of our law.

Recently in *A.P. Pollution Control Board v. M.V.Nayudu*³⁴, a Division Bench of the Supreme Court further elaborated the concept, as it observed:

"Inadequacies of science are the real basis that has led to the Precautionary Principle of 1982. It is based on the theory that it is better to err on the side of caution and prevent environmental harm, which may indeed become irreversible... The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty. Environmental protection should not only aim at protecting health, property and economic interest but also protect the

³³ Supra note 18.

³⁴ AIR 1999 SC 812.

environment for its own sake. Precautionary duties must not only be triggered by suspicion of concrete danger but also by (justified) concern or risk potential”.

The Precautionary principle serves as a tool to guide legislators, where adoption of an appropriate action is required where there are potential threats to human health and environment. When there is likelihood that some serious or irreversible damage to health and environment may occur, this is applied. It is also applied, when there is reasonable suspicion of harm, lack of scientific certainty or consensus must not be used to postpone preventive action. Accidental harm may be caused in turn as new technologies have reaped great benefits for the advancement of mankind. As pollutants have been inculcated in the mainstream of human lives, pollution has become personal. The alarming increases in the incidence of certain diseases have been suspected of having links to environmental pollution. The question derived from this is as to how careful mankind should be about introducing innovations, which have the potential to affect human health and the environment. It sounds more like common sense rather than a revolutionary idea: better safe than sorry; look before you leap or a stitch in time saves nine. It requires scientific and technical specialization for properly understanding the phenomena.

6) *Eradication of poverty*

The vicious circle of poverty as spoken of by economists cannot make the economy progress as it pulls down the economy. The state of poor economy of any country is shown by poverty. In order to revive any economy, economic growth is essential, although not at the cost of environment. Eradication of poverty forms an integral part of sustainable development as it reduces the outlook of people to use their resources in a sustainable manner. Poverty would mean one is “feeding” away one’s resources without realizing any damages, which may be caused as its end result. Sustainable development forms development as an essential for bringing changes for the betterment of economy. In case poverty exists there would be no development as people would be more engaged in the vicious circle of poverty as they could strain

their resources to meet their basic needs. In case poverty continues to exist, the article 5 countries would not realize the depletion of ozone.

7) Financial assistance to the third world countries

The developing countries do not have the finances or the technology to bring changes suggested under the Montreal Protocol or any other environment problem facing the world. Finances are an important part, which to a lot of extent determines a country's status. Developing countries because of many inherent problems or by reason of under-development cannot make good to the people, the idea of development without indulging in environment damaging activities. In order to achieve sustainable development equity must be brought for development to take place. Therefore under any significant environment call, the transfer of finances as well as technology from the developed to the developing world is always called for.

In order to achieve sustainable development, environment protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Pollution knows no boundaries; therefore the global community has to work together to counter issues and threats facing our environment. Without these and even the missing of any one of these, the principle would be rendered as useless and baseless as the elements have to form an integral part of sustainable development. It points to those principles or obligations for global conventions, charters, documents and treaties, which seek to protect the well being of posterity. It brings forth the need for a guardian or series of guardians who would speak on behalf of future generations.

To represent future generations at various international for a, those decisions would affect the future and who would argue the case on behalf of future generations, the world should have an authorized guardian. To counter the firmly established attitude of our civilization to discount future, bringing out the long-term implications of proposed actions and proposing alternatives; the role would not be to provide, but to plead for future generations. Where, who and what the guardian should be are some of the questions, which are

raised. Should they be housed in a non-governmental organization, federal government bodies and/or the United Nations? Should the guardian(s) be scientists, lawyers and/or policymakers or an advocate who urges the living to leave few risks, little poverty and a healthy ecosphere for future generations? In common usage, different meanings have been assigned to the term and among the present generation some (loosely) regard children as being included in future generations, while others only consider those who would follow the present or living generation to constitute future generations. Since the present generation, its successor, as well as, in turn, every following generation constitute a continuum in generations complications arise in considering discrete future generations as it is well nigh impossible to separate specific collective persons from a continuum.

The principles of distributive justice bind the concept of intergenerational and intra-generational equity. This interpretation calls for greater equality among generations. It recognizes the intra-generational dimension that all members of the present generation have an equal right to use and benefit from the planet.

Moreover, the proposal is of the United Nations as a guardian for future generations. The United Nations Charter, the chief document of International law, possesses permanent and continuous legal force. Interestingly its main goal is to give consideration to the interests of the coming generations and to prevent suffering by these generations.³⁵

6.3.(ii).THE PUBLIC TRUST DOCTRINE

In protecting the environment and checking its degradation and pollution, the judiciary has played a vital role. Keeping in view the dangerous consequences of environment pollution, the judiciary has profounded some theories to keep strict vigilance and control on the environmental polluters and offenders. The judiciary has engrafted several principles into the environmental

³⁵ Reviewed by: Tim Boston, Review Essay: Future Generations and International Law, *Future Generations and International Law (Law and Sustainable Development)*, 1998 at 206.

jurisprudence. The principle of public trust is one of these important doctrines, which recently has drawn much attention of the Supreme Court.

In *M.C.Mehta v. Kamal Nath*³⁶, the apex court has quoted with approval an article entitled 'Public Trust Doctrine' in Natural Resource Law. In this case the court reviewed a number of U.S. decisions and held that the Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority:

'Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses.'³⁷

The ancient Roman Empire developed a legal theory known as the 'Doctrine of the Public Trust'. It was founded on the ideas that Government held certain common properties such as rivers, seashore, forests and the air in trusteeship for the free and unimpeded use of the general public. Our contemporary concerns about 'the environment' bear a very close conceptual relationship to this legal doctrine. Under the Roman law these resources were either owned by no one (*res nullious*) or by every one in common (*res communious*). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could

³⁶ (1997) 1 SCC 388.

³⁷ AIR 2002 AP 256 at 268.

not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public.

According to Prof. Sax, the Court has articulated a principle that has become the central substantive thought in public interest litigation. When a State holds a resource, which is available for the free use of the general public, a Court will look with considerable skepticism upon any governmental conduct, which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.³⁸

In *M.I.Builders Pvt. Ltd. v. Radhey Shyam Sahu*³⁹, the resolution of the Lucknow Nagar Mahapalika permitting M.I.Builders Pvt Ltd to construct an underground shopping complex was quashed and set aside by the High Court. Aggrieved by the order the appellant went for an appeal. The Supreme Court opined that Mahapalika is the trustee for the proper management of the park. When true nature of the park, as it existed, is destroyed it would be violative of the doctrine of public trust as expounded by the Supreme Court in *Span ResortCase*⁴⁰. Public doctrine is part of Indian law.

The Court held the facts and circumstances when examined point to only one conclusion that the purpose of constructing the underground shopping complex was a mere pretext and the dominant purpose was to favour the M.I.Builders to earn huge profits. In depriving the citizens of Lucknow of their amenity of an old historical park in the congested area on the specious plea of decongesting the area, Mahapalika and its officers forgot their duty towards the citizens and acted in a most brazen manner.

The Court also observed that construction of shops will bring in more congestion and with that the area will get more polluted. Any commercial activity now in this unauthorized construction will put additional burden on the locality. Primary concern of the Court is to eliminate the negative impact the

³⁸ Ibid at para 37.

³⁹ AIR 1999 SC 2498.

⁴⁰ Supra note no 36.

underground shopping complex will have on environment conditions in the area and the congestion that will aggravate on account of increased traffic and people visiting the complex. There is no alternative to this except to dismantle the whole structure and restore the park to its original condition leaving a portion constructed for parking. The Court was aware that it might not be possible to restore the park fully to its original condition as many trees have been chopped off and it will take years for the trees now to be planted to grow. But beginning has to be made.

The Public Trust doctrine has vast potential and the doctrine should be effectively used against the consent orders granted to air polluters. Since, the State, as a trustee is also under a legal duty to protect the air and atmosphere along with other natural resources.

6.4. STATUTORY REGIME OF DISPUTE REDRESSAL

In India, the concept of compensation for environmental pollution can be traced from the common law remedies. *J.C. Galstaun v. Dunia Lal Seal*⁴¹ is an illustration of a case where substantial sum was awarded as compensation against persistent pollution in Calcutta. Usually the remedies available for pollution were injunction or fine for causing nuisance. This situation existed till the special laws for environment protection were enacted. Compensation to the victims of industrial mass disaster was awarded, of late, in Bhopal Mass Disaster.

It was not possible for the court to make quick decisions relating to the compensation of victims of accidents in the worst industrial disaster in human history. The interests affected were various and the intensity of damage and sufferings varied. Therefore, the assessment of the quantum compensation was an arduous task. The aftermath of Bhopal disaster disclosed the realities about the burden of industrialization on the shoulders of a developing nation. It also threw a challenge to the Indian legal system. *Union Carbide*⁴² and *Sri Ram*⁴³

⁴¹ 1905 9(CWN) 612.

⁴² *Union Carbide Corporation v. Union of India*, AIR 1987 SC 273.

have not only given warning signal to the country's environmental sustainability but also exposed the loopholes in the existing environmental legislations.

Day-to-day pollution of water, air and atmosphere paved the way for social auditing of environmental compliance. Rehabilitation, compensation and perpetual agony of the valiant victims resulted in passing of the Public Liability Insurance Act (PLI) in 1991. Besides that the Parliament passed the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985. The Bhopal case evolved the doctrine of *Parens patriae* in Mass tort action.

Doctrine of *Parens patriae*

The doctrine of *Parens patriae* connotes the rights of a person, real or artificial, to sue and to be sued on behalf of another who is incapacitated to take up the case before a judicial forum as effectively as the former can. The Bhopal Act⁴⁴ conferred on the Union of India the responsibility of suing *Parens patriae* on behalf of the victims.

Forum non conveniens

Acting as *Parens patriae*, the Union of India had to select the forum where it should sue for compensation on behalf of victims. The doctrine of *forum non conveniens* allows a court to decline jurisdiction when there is an alternative more convenient forum which can give adequate and satisfactory relief. The Union of India thought that a US court would be the most appropriate forum for adjudication of the claims. They tried to justify their choice of forum on the following grounds: Indian courts have not reached full maturity to protect the interests of victims suitably and to decide the issue of compensation in the best possible manner. Indian law of torts is in its infancy. Hence a just and speedy decision was not possible. The Union Carbide Corporation (UCC), on the other hand, argued that the Indian legal system was so well developed, that its courts could try the cases and protect the interests of victims. The American court accepted the stand of the UCC and rejected the

⁴³ *M.C.Mehta v. Union of India*, AIR 1987 SC 965.

⁴⁴ Bhopal Gas Leak Disaster (Processing of Claims) Act 1985.

contentions of the Union of India. Holding that an Indian court is the most appropriate forum, Judge Keenan of the US District Court, Southern District of New York, observed that to retain the litigation in this forum as plaintiffs request would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation.

The judge pointed out that the Union of India was a world power in 1986, and that its courts had the proven capacity to mete out fair and equal justice. Judge Keenan also observed that to deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary.

After the dismissal of the suits in America, the Union of India filed a suit in the district court of Bhopal. Since 1985, public interest litigation has played an important role in majority of environmental pollution cases and it has significantly contributed to the development of the law relating to environmental compensation. The Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 was one of the early enactments, which was passed to grant compensation as a remedial measure to the victims of Bhopal gas tragedy.

The Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 'to confer certain powers on the Central Government to secure that claims arising out of or connected with, the Bhopal Gas Leak Disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto'. Section 3 of the Act confers on the Central Government, the exclusive right to represent and act in place of every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person. Section 9 empowers the Central Government to frame a scheme for registration of claims and their processing, for creation of fund for meeting expenses in connection with the administration of the scheme and for the

utilization by way of disbursement of any amounts received in satisfaction of the claim.⁴⁵

6.4.(i).THE PUBLIC LIABILITY INSURANCE ACT 1991

The recent times, the miseries caused by industrial disasters have engaged the attention of the government in terms of providing immediate relief to the victims of industrial accidents. For this purpose the Public Liability Insurance Act, 1991 was passed by the Parliament in June 1991, and a Bill was also introduced in the Lok Sabha in August 1992 to ameliorate the miseries of the victims and to provide expeditious disposal of cases involving hazardous substances by constituting environmental tribunals.

The Public Liability (Insurance) Act was enacted in 1991 to provide for public liability insurance for the purpose of providing immediate relief to the persons affected by the accident occurring while handling any hazardous substances and matters connected therewith or incidental thereto.

The Public Liability Insurance Act, 1991 consists of 23 sections and one Schedule. Short title and commencement of the Act are dealt with in section 1, while section 2 contains several definitions. The substantive provisions of the Act are mainly contained in sections 3 and 4. Section 3 incorporates the principle of liability without fault for death or injury to any person (other than a workman) or damage to any property, resulting from an accident.

Definition of Accident

Section 2 defined 'accident' as an accident involving a fortuitous, sudden or unintentional occurrence while handling any hazardous substance resulting in continuous, intermittent or repeated exposure to death of, or injury to any person or damage to any property but does not include an accident by reason only of war or radio activity. (This definition replaced the earlier one by the 1992 amendment).

⁴⁵ Ramaswamy Iyer, *The Law of Torts*, Ninth Edition, 2003, Butterworths, p.735.

Section 3(2) says that in any claim the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any persons. It imposes a kind of strict liability on the owner of hazardous substances to pay compensation.

Insurance Policy

Section 4(2A) and succeeding sub-sections make certain detailed provisions as to contents of the policies. No insurance policy taken out or renewed by an owner shall be for an amount less than the amount of the paid up capital of the undertaking handling any hazardous substance and owned or controlled by that owner, and more than amount, not exceeding fifty crore rupees as may be prescribed. Paid up capital means the market value of all assets and stocks of the undertaking on the date of contract of insurance, in case of an owner not being a company. Every owner shall also, together with the amount of premium. Pay to the insurer for being credited to the relief fund not exceeding the premium. By section 4(3), the Central Government is empowered to grant exemption from the duty to take out an insurance policy.

Application for Claim and Establishment of Environment Relief Fund

Sections 5 to 7 of the Public Liability Insurance Act deal with the preliminary formalities and procedure for applications for claims for relief under the Act. Section 5 requires the Collector to verify the occurrence of an accident, if it comes to his notice, and to cause publicity to be given to it for inviting applications for claims for relief. Section 6 deals with the manner of making such applications and also prescribes a time limit of five years for making such applications

Section 6 provides for application for the claim for relief, which can be made by the person who has sustained the injury or owner of the property, which was damaged. In case of death, the legal representatives of the deceased have to make application. Or a duly authorized agent can make application.

Section 7A (inserted in 1992), provides for the creation of Environment Relief Fund by the Central Government.

Award After Inquiry

On receiving the application, the Collector shall after giving notice of the application to the owner and after giving the parties an opportunity of being heard, hold an inquiry into the claim and make an award.

Within 30 days of announcement of award, the insurer shall deposit that amount as prescribed by the collector. The collector shall arrange to pay from the relief fund, in terms of such award and in accordance with the scheme. The collector shall have the powers of the civil court in conducting the inquiry for giving the award. If the owner or insurer fails to deposit the award amount, within the period specified, such amount shall be recoverable from the owner or insurer as arrears of land revenue or of public demand.

Claim for relief in respect of death of or injury to any person or damage to any property shall be disposed of as expeditiously as possible and every endeavour shall be made to dispose of such claim within three months of the receipt of the application.

Section 8 saves any other right to claim compensation in respect of death, injury to person or damage to property under any law for the time being in force. Certain powers necessary for the working of the Act are dealt with, in sections 9, 10 and 11, relating to calling for information, entry and inspection and search and seizure.

The Central Government has power to call for information⁴⁶ or any person authorized by the Central Government shall have a right to enter premises where a hazardous substance is handled for purposes of examining the compliance of provisions of the Act, rules or directions issued under this Act⁴⁷. The Central Government has power of search and seizure⁴⁸ and power to issue directions⁴⁹.

⁴⁶ Section 9, Public Liability Insurance Act.

⁴⁷ Section 10, Public Liability Insurance Act.

⁴⁸ Section 11, Public Liability Insurance Act.

⁴⁹ Section 12, Public Liability Insurance Act.

A very important provision, contained in section 12, is to the effect that the Central Government may issue written directions “for the purposes of the Act”, to any owner any other person and regulating the supply of “electricity, water or an other service”. By section 13, the Central Government or an authorized person is also given power to apply to the court for an order restraining the owner handling any hazardous substance in contravention of Act.

Offences, Penalties and Procedures connected therewith

Sections 14 to 18 deal with offences, penalties and procedural provisions connected therewith. Section 14 provides for penalty of imprisonment for a term not less than one year and six months which may extend to six years with a fine not less than Rs one lakh or both for contravention of sub-sections (1) or (2), (2A), (2C) of section 4⁵⁰ or for failure to comply with any direction given under section 12. For a second offence, the punishment is imprisonment not less than two years but which may extend to seven years and with fine which shall not be less than one lakh rupees.

Section 15 provides for punishment with imprisonment, which may extend to three months or with the fine, which may extend to ten thousand rupees or with both if any owner fails to comply with direction issued under section 9⁵¹ or fails to comply with order issued under 11(2) for search and seizure.

Section 16 says that if the offences are committed by the company, the persons directly in charge of and responsible to the company for the conduct of the business, as well as the company, shall be deemed to be guilty. However, the provision under this section exempts the officer who had no personal knowledge of the offence or when he exercises due diligence to prevent it. If the offence is committed with the connivance of or is attributable to the neglect on the part of any officer, such officer shall be liable to be proceeded against and punished accordingly.

⁵⁰ Duty of owner to take insurance policies.

⁵¹ Calling for information.

Section 17 says that if the government department commits the offence, the Head is deemed to have committed it. Two exemptions are provided to the Head of department from the punishment if it is proved that he was not having personal knowledge or tried to prevent the offence with due diligence.

Section 18 provides that the court shall take cognizance of the offence only on complaint made by the Central Government, or its authorized officer or by any person who has given 60 days advance notice of his intended complaint.

By section 19, the Central Government is empowered to delegate its powers under the Act, excepting the rule making power. Section 20 protects action taken in good faith under the Act.

Public Liability Insurance Advisory Committee

Section 21 provides for an advisory committee on matters relating to insurance policies under the Act. The section provides for constitution of an advisory committee with three officers representing the center, two from the insurers, two from owners and two from amongst the experts of insurance or hazardous substances. The Central Government has powers to appoint such a committee, to which one of the representatives of the Central Government will be the chairman.

Power to Make Rules

The Central Government has rule making powers under section 23 to provide detailed rules for maximum amount for which an insurance policy may be taken by an owner, amount to be paid into relief fund by every owner, the manner and period in which amount is remitted by insurer, for establishment and maintenance of fund, procedure for holding inquiry, to give powers of civil court to collector, the manner in which notice of intention of complaint has to be made, and any other relevant matter. Every rule or scheme made by the Central Government under the Act has to be approved by the Parliament.

Schedule of Compensation

The Schedule to the Act gives a tariff of compensation to be awarded as result of the liability provided for in section 3(1) of the Act. Following are some of the prescribed amounts:

1. Reimbursement of medical expenses up to Rs 12,500 in each case.
2. Relief of Rs 25,000 per person for fatal accidents, in addition to medical expenses.
3. In addition to medical expenditure reimbursement, cash relief on the basis of percentage of disablement as certified by an authorized physician as to be paid for permanent total or permanent partial disability or other injury.
4. For loss of wages or reduction of earning capacity, a fixed monthly relief not exceeding Rs 1,000 per month up to a maximum of three months has to be provided.
5. Up to Rs 6,000 depending upon the actual damage, for any damage to private property.

Rules

Under section 23, the Public Liability Insurance Rules were passed in 1991. These rules provided detailed procedure for application, documents to be attached with application seeking relief, powers of collector to conduct summary inquiry, establishment and administration of fund, manner of giving notice of intention to complain, extent of liability, contribution of owner to environmental relief fund and prescribed forms for application for compensation and notice.

Notifications

The Government of India issued a notification through the Ministry of Environment and Forests, in 1992 listing out the industries dealing with hazardous substances, and directed the owners of such industries to take out compulsory insurance, in case the quantity of the hazardous substance exceeds the limits prescribed under this notification. By another notification in 1993, the Central Government authorized some officers with specific jurisdiction to perform duties under the Act. The state government and district collector

among others are authorized. The Central Government delegated under section 19 its powers to the state government and Central Pollution Control Board.

6.4.(ii). ENVIRONMENTAL DISPUTE REDRESSAL THROUGH TRIBUNALS

The limitation of the existing rule of civil law sanctions and particularly, the rule on civil liability and compensation to effectively deal with environmental cases has been judicially noticed. This made the court to bring forth the idea of establishment of environment court, environmental protection council and an autonomous environment protection authority. The courts called upon the Government to consider the establishment of the court. This was called upon because the environmental cases required the appraisal and assessment of scientific and technical data, which could be resolved only by the help of professionally competent experts.

The courts have also recognized that it is undesirable to leave the resolution of complicated environmental disputes to officers drawn from the executive.

This has set the stage for the preparation of Environment court. The Bill entitled National Environmental Tribunal Bill was introduced in Lok Sabha on August 5, 1992. With some minor changes, the Bill was finally passed by both the Houses of Parliament and received the assent of the President on June 17, 1995.

6.4.(iii). THE NATIONAL ENVIRONMENTAL TRIBUNAL ACT 1995

The National Environmental Tribunal Act, 1995 is a comprehensive piece of legislation dealing with the disposal of compensation petition by the valiant victims of environmental catastrophe. Five chapters and 31 sections broadly envelop rubrics of glossaries; liability to pay compensation and its procedure; composition of tribunal; jurisdiction, penalties and other miscellaneous provisions. The preamble asserts that it owes genesis to the

United Nations Conference on Environment and Development held at Rio de Janeiro in 1992.

The preamble suggests 'to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance'. To achieve this purpose the tribunal will 'effectively and expeditiously' dispose of the cases by giving relief and compensation for damages to person, property and environment.

The National Environmental Tribunal Act passed after four years of enactment of the Public Liability Insurance Act, is more a repetition than an improvement.⁵²

Scope of the Act

National Environmental Tribunal Act (NETA) gives a descriptive interpretation to the term accident, but the scope of the Act has been restricted to handling any 'hazardous' substance. Under section 1(a), "Accident means an accident involving a fortuitous or sudden or unintended occurrence while handling any hazardous substance resulting in continuous or intermittent or repeated exposure leading to death or injury to any person or damage to any property or environment but does not include an accident by reason only of war or radioactivity". In his respect, the definition of 'handling' is also important. Under section 1(e), 'handling' in relation to hazardous substances means the manufacture, processing, treatment, packaging, storage, transportation by vehicle use, collection, destruction, conversion, offering for sale, transfer or the like, of such hazardous substance.

The above two definitions illustrates the narrow scope of the Act and its limited applicability. This means that people, who are exposed to daily intake of pollutants due to effluents discharged, will not be covered, as that would not amount to 'accident'. In case of exposure to radioactivity, no adverse effect is noticed immediately, the toxic effects taking time to manifest.

⁵² Md. Zafar Mahfooz Nomani, "Law Relating to Environmental Liability and Dispute Redressal: Emergence and Dimension", *Indian Bar Review*, Vol 23(3 & 4) 1996, p.133 at 157.

For the sustenance of claim for compensation for death and injury to person and damage to property and environment, two types of proofs are required. Firstly, the death, injury and damage have resulted out of accident while handling hazardous substances. Secondly, such death, injury and damage should fall under all or any of the heads specified in the schedule.⁵³ The ground stated under the schedule broadly covers the pecuniary and non-pecuniary damages; mitigation of loss to private and non-private properties, reimbursement of relief, aid, rehabilitation and litigational expenses of Government; and preservation of biological diversity.

The Act provides for liability to pay compensation in certain cases on the principle of 'No fault Liability' under section 3 of the Act, as for claiming compensation, the petitioner is not required to plead and establish that the death, injury and damage were due to wrongful act, neglect or default of any person, but the Act excludes workmen from its preview. Further, section 3(3) of the Act, which deals with apportionment of liability for compensation in case of combined effect of several activities, gives arbitrary powers to the Tribunal to quantify the amount of compensation. However, it is expected that a proper application of this provision would ensure a fair deal to every section of society.⁵⁴

Under section 4(1) of the said Act⁵⁵, though the principle of *locus standi* is liberalized, section 4(1) (e) restricts the scope. It gives powers to any representative body or organization functioning in the field of environment and recognized by the Central Government under all or any of the heads specified in the Schedule, to make an application for claim of compensation, which means that the Central Government may recognize or derecognize anybody for the purpose of making an application, according to its whims and fancies. Application for claim of compensation has been provided under section 4 of the Act. It provides that an application for claim may be made (a) by any person

⁵³ The National Environment Tribunal Act, Section 3(1).

⁵⁴ Vinod Shankar Mishra, "Emerging Right to Compensation in Indian Environmental Law", Indian Bar Review, Vol 28 (4) 2001, p. 67.

⁵⁵ The National Environment Tribunal Act

who has sustained injury, (b) by owner of the property to which damage has been caused, (c) where death has resulted from the accident, by all or any of the legal representative of the deceased, (d) by any agent authorized by the owner whose property is damaged or any of the legal representative of the deceased, (e) by any representative body or organization, functioning in the field of environment, recognized by the Central Government or (f) by the Central Government or a state government or a local authority under all or any of the heads specified in the schedule.

The enumeration of grounds in the schedule takes a holistic account more especially by virtue of protection clause of non-pecuniary compensation and relief. Any other claim arising out, or connected with, any activity of handling hazardous substances⁵⁶, further broadens the scope of relief. This makes the schedule illustrative as well as exhaustive. Another notable feature is the incorporation of the provision relating to public participation in espousing the cause of victims⁵⁷. Incentive to community participation will go a long way in influencing the trial through meaningful debate, public opinion, media spotlights and public pressures in an expeditious and effective manner. In this way, the concept of 'social auditing'--- hitherto not well recognized under environmental law--- will receive a momentum. To keep the ferment of social litigation in high esteem, the Act provides free of cost maintainability of suit from persons and representative bodies having a meager income⁵⁸

The Tribunal can also initiate *suo moto* actions under section 4(2). Under section 4 of the Act, the application for relief has to be made within five years of the occurrence of the accident. The limited period of five years from the time of the accident means that those cases of slow pollution or cases where the after-effects of an accident are seen after five years, should be outside the purview of the Act.

Under section 4(3), the tribunal has jurisdiction in respect of matters specified in the Public Liability Insurance Act, and reference to the collector

⁵⁶Id., Section 3(1), The Schedule (n).

⁵⁷Id., Section 4(e).

⁵⁸Id., Section 4(5).

shall be construed as including reference to the tribunal, which means that the tribunal and the collector have concurrent jurisdiction.

The tribunal being a civil court will primarily be guided by the Code of Civil Procedure; the provisions of this Act and above all the principle of 'natural justice'⁵⁹. It may also award interim relief in exceptional circumstances to mitigate losses and damages⁶⁰. Regarding the jurisdiction of the tribunal certain qualms exist. It owes to the concurrent jurisdiction of Public Liability Insurance Act and National Environmental Tribunal Act. The power of tribunal has been put at par with that of collector under Public Liability Insurance Act. The tribunal shall have the power in respect of matters specified in the Public Liability Insurance Act as the collector has and may exercise, for this purpose, the provision of that Act shall have effect subject to the modification that the references therein to the collector shall be construed as including reference to the tribunal⁶¹. However, the jurisdiction and power of tribunal and collector are overlapping, repetitive and somewhat ambiguous. Public Liability Insurance Act has been saved under section 30 of National Environmental Tribunal Act but in case of inconsistency in the former the latter has precedence.

Section 9, talks about the compensation of the tribunal. According to this section, the tribunal will consist of a vice chairperson, a judicial member and a technical member, and in certain cases a single member bench may also be constituted. Thus the composition of the National Environment Tribunal (NET) and its benches would not vest on a uniform pattern. Section 9(4) of the Act which gives power to any person to hear a case and decide it, would imply that even a technical person who is not proficient in the field of law and whose job is basically to assist in conducting research and other investigations, would be given the power to dispense justice. It, therefore, leaves room for arbitrary decisions.

The composition of tribunal viz., chairperson, vice-chairperson and members is an unsavoury mixture of judicial, technical members and

⁵⁹Id., Section 5.

⁶⁰ Id., Section 6.

⁶¹ Id., Section 4(4).

bureaucrats. The chairperson will be a member of higher judiciary but for a vice-chairperson the deck has been cleared for the bureaucrats having knowledge and experience in legal administrative, scientific and technical aspect of environment. Going by the qualification specification, the bureaucrats are *persona grata* as they alone possess the repository of legal, administrative, scientific and technical acumen. The most debilitating provision is the composition of bench where in exceptional circumstances, the chairperson may authorize the vice-chairperson (which may be a technical member) and to a technical member to adjudicate on intricate environ-legal or techno-legal issues⁶². In these circumstances, even a technical person who is not proficient in law and whose job is basically to assist in conducting research and other investigations would be given the power to dispense justice. It, therefore, leaves room for arbitrary decisions.

Penalties

Under section 25, whoever fails to comply with any order made by the tribunal shall be punishable with imprisonment for a term which may extend to three years, or with a fine which may extend to ten lakh rupees or with both. The sum is too meager to comprehend and several big industries might escape from the clutches of the Act, by paying the paltry amount.

Section 26 provides for offences by company and lays down the principle of vicarious liability for the principal officer. The proviso to section 26 provides that nothing contained in this sub-section shall render any person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

Conclusion

On July 17, 1995, the National Environmental Tribunal Act (NETA) came into being. This Act is based on the provisions of Article 253 of the

⁶² Id., sections 9(3)(c); 9(4).

Constitution of India, which had been resorted to earlier by Parliament to formulate the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986. The Act specifically states that it is intended to give effect to the recommendations made at the United Nations Conference of Rio de Janeiro in 1992. The object of the Act is to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance, and for the establishment of a National Environment Tribunal for effective and speedy disposal of cases arising from such accidents.

6.4.(iv).THE NATIONAL ENVIRONMENT APPELLATE AUTHORITY ACT OF 1997

This statute requires the Central Government to constitute a national environment appellate authority for hearing of appeals against orders granting environmental clearance in areas where restrictions are imposed on setting up any industry or carrying on any operation or process. The Act⁶³ requires the Union Government to establish a body known as National Environment Appellate Authority (NEAA), chaired by a retired judge of the Supreme Court or a Chief Justice of a High Court and has its head office at Delhi⁶⁴. The National Environment Appellate Authority is authorized to exercise the powers conferred upon it and to perform the functions assigned to it under the Act⁶⁵.

Constitution of the Authority

The authority consists of a chairman, a vice-chairman and up to three other members as the Central Government deems fit⁶⁶. The Central Government is empowered to determine and provide categories of officers and other employees to assist the National Environment Appellate Authority, as it deems fit under section 5(4) of the Act. The officers and employees of the authority are required to discharge their functions under the superintendence of

⁶³ National Environment Appellate Authority Act, 1997

⁶⁴ Id., Section 3(2).

⁶⁵ Id., Section 3(1).

⁶⁶ Id., Section 4.

the chairperson⁶⁷. The chairperson of the National Environment Appellate Authority is empowered to exercise financial and administrative powers, as may be vested in him under the rules framed under the National Environment Appellate Authority Act 1991⁶⁸. However, the chairperson may delegate his financial and administrative power, as he deems fit to the vice chairperson, or any other officer of the National Environment Appellate Authority, subject to the condition that the delegate must exercise the delegated powers under the direction, control and supervision of the chairperson⁶⁹. The chairperson, vice chairperson and other members shall hold office for a term of three years from the date of assumptions of office and eligible for re-appointment for another term of three years⁷⁰. However, a chairperson is not entitled to hold office after he has attained the age of 70 years⁷¹ and a vice chairman or other member cannot hold office after he has attained the age of 65 years⁷².

Jurisdiction and Procedure of the Authority

No civil court or other authority has jurisdiction to entertain any appeal in respect of any matter which the National Environment Appellate Authority ('the Authority') is empowered to deal with under the National Environment Appellate Authority Act 1997⁷³.

In addition to its statutory jurisdiction the Authority may play an advisory role in respect of the scientific and technical issues referred to it by the Supreme Court⁷⁴ or the High Courts in environmental cases⁷⁵. The opinion rendered by the Authority is subject to the approval of the referring court⁷⁶.

The National Environment Appellate Authority is not bound by the procedure laid down in the Code of Civil Procedure 1908 and is required to act

⁶⁷ Id., Section 5(1) (a).

⁶⁸ Id., Section 6(1).

⁶⁹ Id., Section 6(2).

⁷⁰ Id., Section 7.

⁷¹ Id., Section 7 proviso (a).

⁷² Id., Section 7 proviso (b).

⁷³ Id., Section 15.

⁷⁴ See Articles 32 and 136 of the Constitution of India.

⁷⁵ See Article 226 of the Constitution of India.

⁷⁶ *Andhra Pradesh Pollution Control Board v. M V Nayudu*, AIR 1999 SC 812.

in accordance with the principles of natural justice. The Authority is empowered to regulate its own procedure including fixing the venue, the time of its inquiries and whether to hold an inquiry in public or in private.

The Authority is conferred with the same powers as are vested in a civil court under the Code of Civil Procedure 1908 with regard to the trial of a suit in respect of the following matters⁷⁷ namely:

- (1) summoning and enforcing the attendance of any person and examining him on oath;
- (2) requiring the discovery and production of documents;
- (3) receiving evidence on affidavits;
- (4) requisitioning any public record or document or copy of such record or document from any office;
- (5) issuing commissions for the examination of witnesses or documents;
- (6) reviewing its decisions;
- (7) dismissing a representation for default or deciding it ex parte;
- (8) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
- (9) any other matter which is to be or may be prescribed by the Central Government in the rules.

All proceedings before the Authority are deemed to be judicial proceedings within the meaning of the Indian Penal Code⁷⁸.

Penalty

A person who fails to comply with an order made by the National Environment Appellate Authority is punishable with imprisonment for a term that may extend up to seven years or with a fine up to Rs 1,00,000 or both⁷⁹. Where the offence has been committed by a company, every person who at the time when the offence was committed was directly in charge of and was

⁷⁷ Supra note no. 63 at Section 12.

⁷⁸ National Environment Appellate Authority Act Section 16. See Sections 193, 219 and 228 of the Indian Penal Code 1860.

⁷⁹ Supra note no. 63 at Section 19.

responsible to the company for the conduct of its business, as well as the company, is deemed to be guilty of the offence and is liable to be proceeded against and punished⁸⁰. However, where a person proves that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of the offence, he may not be liable to any punishment⁸¹.

Where an offence is committed by a company and it is proved that the offence was committed with the consent or connivance of or was attributable to any neglect on the part of any director, manager, secretary or other officer of the company, the person is also deemed to be guilty of the offence and is liable to be proceeded against and punished⁸².

A suit, prosecution or other legal proceeding cannot lie against the Central Government, the chairperson, vice-chairperson, other member of the National Environment Appellate Authority or any other person authorized by the chairperson, vice-chairperson or other member for anything which is done or intended to be done in good faith in pursuance of the National Environment Appellate Authority Act 1997 or the rules framed under the Act.⁸³

Appeal

Section 11 of the National Environment Appellate Authority Act requires an appeal to be filed within 30 days of the impugned order granting conditional or unconditional environmental clearance or where the delay is explained, within 90 days. The appellate jurisdiction is restricted to cases where environmental clearance is granted and does not extend to cases where clearance is refused. The categories of 'aggrieved persons' who are conferred a right of appeal are enumerated in section 11(2). They include a person likely to be affected by the environmental clearance and an association of persons 'likely to be affected by such order and functioning in the field of environment'. The Appellate Authority is required to dispose of the appeal

⁸⁰ Id., Section 20(1).

⁸¹ Id., Section 20(1) proviso.

⁸² Id., Section 20(2).

⁸³ Id., Section 18.

within 90 days of its filing. Section 15 of the National Environment Appellate Authority bars a civil court or other authority from entertaining any appeal in matters falling within the jurisdiction of the Appellate Authority.

Therefore, the National Environment Appellate Authority Act of 1997 creates an appellate forum where affected citizens may assail the environmental approval granted for siting a development project. The appellate authority examines the validity of decisions taken by the environment impact assessment (EIA) authority under the EIA regulations of 1994. This law, in tandem with the public hearing requirements under the EIA regulations, introduces a measure of transparency in the EIA procedure. It also provides a speedy dispute resolution mechanism to enable the project proponent to assess where he or she stands on environmental issues.

The Authority under National Environment Appellate Authority is empowered to hear appeals filed by persons aggrieved by the order granting environment clearance in the area where industrial activity is restricted under sections 3(1) and 3(2)(v) of the Environment (Protection) Act. This includes project clearance granted by the Impact Assessment Agency.

6.4.(v). ENVIRONMENT IMPACT ASSESSMENT

Environment impact assessment (EIA) is an exercise to evaluate the probable changes in various socio-economic and bio-physical characteristics of the environment which may generally result from a proposed programme, project or legislation.⁸⁴ EIA is widely regarded as the most comprehensive instrument for environment planning. It is undertaken to reduce to a minimum the possibility of an action causing unanticipated changes in the environment. It assists decision makers and planners to take into account the environmental costs and benefits of the proposed projects.

⁸⁴ R.Jain, L.Urban and G.Stacy, *Environmental Impact Analysis: A New Dimension in Decision Making*, 1981, p.3.

The need to introduce EIA in India is evident from the alarming state of nation's environment, and has been recognized by the planning commission.⁸⁵ The Ministry of Environment and Forests (MEF) is the Impact Assessment Agency (IAA) envisaged under the Environment Impact Assessment (EIA) Regulation of 1994.

Therefore, the Union Ministry of Environment is responsible for evaluating EIA reports submitted by project proponents. Generally, for large projects the review is carried out in consultation with committee of experts.

A meaningful EIA involves the multi-disciplinary decision-making process requiring application of a variety of knowledge and expertise. It involves many problems. The threshold question whether the project causes such significant adverse effects that make it necessary to have an impact assessment is one. The innumerable secondary socio-economic effects of a project such as concentration of population, loss of job opportunity, shrinking of civic amenities and increase in crime rates are another dimension. Cumulative impacts upon the environment caused by proposed project in company with existing industries supply still another problem.

Essentially, great care should be taken in developing impact assessment agencies as semi-independent autonomous authorities impervious to the influence of external forces but positively alive to the ecological and environmental mores of the land and ethos of the people. It is doubtful whether a super structure of a single agency like the MEF is suitable for the purpose especially when conclusion with the committee of experts is now made rather discretionary than mandatory.⁸⁶

The reports and the Environment Impact Assessment is required to protect the environment from being further polluted. Pollution is a consequence of abusing environment and natural resources by human beings, which should be monitored properly by proper planning.

6.5. Conclusion

⁸⁵ Planning Commission, Government of India, The Seventh Five Year Plan, (1985-90), p.389.

⁸⁶ P.Leelakrishnan, "Environment Act and Delegated Legislation: The Environmental Impact Assessment", Indian Bar Review, Vol. 23 (3 & 4) 1996, p.80.

The civil and criminal liability for polluting the atmosphere and air remained embedded in our law. Since the induction of English Common law into our legal system, neither the damages awarded in most of the civil cases decided were exemplary, nor did the penal provision of section 133 of Code of Criminal Procedure have deterrent effect. Therefore, before the enactment of special laws the legal response to the corporate criminal responsibility was ineffectual. The law was not sufficient to put a check on the activities of large corporations endangering the environment.

The Air Act contains three penal provisions to deal with various environmental violations. Section 37 penalises basic offence under section 22, with an imprisonment for a term not less than one year and six months but which may extend to six years and with fine. It has additional fines, which are to be imposed when the failure continues and exceed the punishment to a minimum of two years, which may extend to seven years. Section 38 provides penalty for auxiliary offence and section 39 contains penal clause meet residual contravention. Though with the help of these provisions no person was convicted till this date. This shows that the sections have remained as a paper tiger.

The large corporations are unmindful of serious environmental problems. They have consistently shown a pattern of irresponsibility in dealing with dangerous substances. The Bhopal Tragedy is a burning example. In this case, no charge was brought under the Air Act even though there was certain negligent Acts, which could be brought under the purview of the Air Act⁸⁷.

Probably, the Corporations are well aware that they cannot be imprisoned for violation of environmental laws. At the most they may be made to pay monetary penalties, but the fines imposed on the corporations are simply

⁸⁷ For the effects of methyl isocyanate gas on the victims of Bhopal Tragedy and subsequent legal battle before the Supreme Court, see generally, *Union Carbide corporation and Others v. Union of India and Others*, (1989) 1 SCC 674; *Charan Lal Sahu v. Union of India* (1990) 1 SCC 61.; *Union Carbide Corporation and Others v. Union of India* (1991) 4 SCC 84. In the last mentioned decision the Supreme Court held, *inter alia*, that the quashing of the criminal proceedings against the Union Carbide's Chairman and UCIL's officers by an earlier order of the Court was, in the particular facts and circumstances, not justified. The court directed the criminal proceedings to be proceeded with. The chief judicial Magistrate of Bhopal had conducted trial for offences under sections 304, 326, 324, 429 I.P.C. r/w section 35 I.P.C. There was no charge under Air Act.

regarded as a part of the cost of doing business⁸⁸. Sometimes the nexus between industry and government also enables them to escape liability.

Air pollution has different dimensions like noise pollution, vehicular pollution and other pollution of atmosphere causing depletion of ozone, radiation pollution, pollution by hazardous substances, and other pollution which generally increases or caused abnormality in the composition of gases in the atmosphere. The legislations on these aspects have not been enacted into a comprehensive piece. The laws on the different aspects have been enacted at different times. This has made the legislative structure complex.

Under Public Liability Insurance Act 1991 and National Environment Tribunal Act 1995 a victim may claim compensation for injury resulting from industrial disaster.

The Public Liability Insurance Act is passed in a hasty manner without giving full consideration to all aspects of the problem. This is the reason why the provisions of this Act suffer from several pitfalls though the Act basically has a laudable object of providing immediate relief to victims. No doubt the Act provides for strict non-fault liability of the owners of hazardous substances but its scope is not wide which applies to 'handling' of hazardous substances. Further the term 'hazardous substance' which exceeds such quantity as specified by the central government by notification.⁸⁹ It means every substance or preparation which by reason of its chemical or physico-chemical properties or handling is liable to cause harm to human beings or other living creatures, plants, micro-organism, property or the environment, cannot be treated as hazardous substance under this Act except when it exceeds in quantity specified by the central government.⁹⁰

However, the Public Liability Insurance Act saves the right of claimant to plead for compensation under any other law subject to deduction for awards made under the instant Act. The owner's liability is two fold. Firstly he is

⁸⁸ Byan, "The Economic Inefficiency of Corporate Criminal Liability", 73 *Journal of Criminal Law and Criminology*, p.502.

⁸⁹ Section 2(d), Public Liability Insurance Act 1991.

⁹⁰ Section 3(ii), Public Liability Insurance Act 1991

required to provide out of fund known as environment relief fund. Secondly the owner has to take insurance policies before starting hazardous process. It is to be remembered that since the quantity of compensation payable under this Act is not adequate, Rs. 25,000/- being maximum, a victim is invariably to seek more compensation under other law.

The Act is a welcome legislation providing for strict liability of the owners of hazardous substances but it however, suffers from many shortcomings. The adjudicatory powers to award compensation have been vested in the collector who is a revenue official of the government and adjudication of claim by him will not be conducive to administration of the Act.

The Act does not give relief to a victim who suffers temporary disability. A person under temporary disability also deserves relief, which he is not entitled to under the Act. The figures of compensation for damage to person or property for all practical purposes do not make any sense and seem to have been provided by keeping in view the Workman's Compensation Act. However, there is a need to express that if the owner was found to be guilty of recklessness, negligence, or any act of commission or omission a higher amount of compensation shall be payable at direction of the adjudicating authority.⁹¹

Earmarking of a separate environment relief fund is another safeguard for immediate relief to victims. The concurrent remedy under the Act⁹² and any other law for claiming larger amount of compensation subject to apportionment and final adjustment is another beneficent provision.

Public Liability Insurance Act, apart from providing immediate relief, touches some of the pertinent issues relating to strict monitoring and vigilance of the hazardous operations. The penalties provided and gradation of offences to deal with accident is based on strict liability principle.⁹³ Like its preceding

⁹¹ Furquan Ahmad, "Pollution from hazardous industries and its effective control", Indian Bar Review, Vol 21 (1) 1994, p.136.

⁹² Public Liability Insurance Act

⁹³ Id., Section 14,

enactment Public Liability Insurance Act exercises power of entry,⁹⁴ inspection, search, seizure⁹⁵ and direction to achieve the object of the legislation.⁹⁶ The collector is also statutorily empowered to make application for restraining owner from handling hazardous process.⁹⁷ The court can take cognizance of offences on the complaint made by central Government or any authority.⁹⁸ It discourages the public complaint, which might prove a disincentive to the public participation in setting the machinery of the court in motion.⁹⁹

Breach of duty to take insurance policies, renewal and compliance attracts one and half-year imprisonment and a minimum fine of Rs. 1 lakh. The chances of non-compliance exist in all probability especially in cases where the amount of total compensation awarded exceeds Rs. 1 lakh. Moreover, no punishment has been prescribed to deal with the cases of non-compliance of liability to pay immediate relief under section 3. This provision keeps the no-fault or strict liability principle in abeyance.

The constitution of an advisory committee to formulate better package of insurance policy will offer best of the benefits to victims. The compensation of committees consisting three representatives of Central Government, two representatives of owner and two experts of insurance or hazardous substances.

On the face of it National Environmental Tribunal Act paints a rosy picture but it has inherent limitations, which dilute the principles of absolute liability. The scope of the Act has been narrow down due to the restrictive meaning to the word accident and handling. Due to which the people who are exposed to daily intake of pollutants due to effluents and emissions discharged will not be covered, as that would not amount to accident.

The Tribunal has also incorporated the basic philosophy of public interest litigation, by granting access to representative body or organization.

⁹⁴ Id, Section 10.

⁹⁵ Id, Section 11.

⁹⁶ Id, Section 12.

⁹⁷ Id, Section 13.

⁹⁸ Id, Section 18.

⁹⁹ Supra note no. 52 at 154-155.

The Central Government has unfettered discretionary power to recognize or derecognise organization to be entitled to make an application for compensation. It may have a positive aspect that this requirement would discourage the fake person to move the tribunal to protect their private interest. The negative aspect may recognize or derecognise any body for the purpose of making the application, according to the central governments whims and fancies.

Section 9(5) deals with installing the principal bench of the tribunal at New Delhi and other benches at such other places. This will cause hindrance to provide speedy relief since the claimants will have to commute all the way from the place of the accident to the place where the bench is set up, thereby causing unnecessary delay in the disposal of the case.

Section 5(3) and section 19 read together, underline the provision that the setting up of Tribunal will oust the jurisdiction of any other court. This will prove to be a major drawback, as suits for negligence and nuisance may still be brought in non-accident situations, for instants, for injuries caused by repeated exposure to atmospheric pollutants. The disadvantage of such a suit, however, will be that the victim will have to prove negligence and will not have the benefit of strict liability law.

The penalty provided under section 25 is low for non-compliance with any order made by the tribunal. As the big industries, may make payment of the paltry amount and escape the clutches of the Act. Section 26 provides for offences by company and lays down the principle of vicarious liability for the principal offender. The proviso to section 26 provides that nothing contained in this sub-section shall render any person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

Thus, legal and constitutional prescriptions pertaining to the environment do exist in the formulation of National Environmental Tribunal Act, but they are inadequate to meet the demands of a comprehensive national environment order.

It may be pointed out at this juncture that only criminal sanction and fines on industries and giant corporations would not bring deterrent effect. To prevent pollution from industries a proper economic policy option based on analysis of cost-benefit of environment pollution should be put forth. This would prove to be an effective measure to control pollution. The gravity of such cost should be more than the cost incurred to install treatment plants. It is not an easy because it requires to be assessed on the basis of economic calculus. The monetisation of tangible cost of environmental damage should also be assessed to make the law effective¹⁰⁰. It also has to be seen that polluter pays principle is properly utilized. The recovery of the loss caused to the environment must not give a blanket license to the polluter "to pollute and pay".

It is important to note that the Indian judiciary has tried to simplify the procedural formulations and advocated for the establishment of an authority / commission to assess and determine the loss caused by the environmental pollution. It has been suggested that the State should activate itself to recover damages from polluters who have damaged the atmosphere. The 'Environment Protection Fund' should be used compensate the community as a whole and to provide all infrastructure which are necessary for clean and provide healthy environment.

The benefit of both Public Liability Insurance Act and National Environmental Tribunal Act is limited to industrial disaster. The legislatures have also adopted measures under the Factories Act to compensate the victim of occupational hazards and laid down provisions for health check up and insurance. But what about the people of the locality who might also suffer from certain diseases due to the industrial activities and other hazards? The State owes responsibility to keep the air pure and fresh for public use based on public trust doctrine. Therefore, the State cannot shake off its responsibility to look after the interest of the public. State must draft legislation to give health

¹⁰⁰ See Chhatrapati Singh, Legal Policy for Environment Protection, in P. Leelakrishnan, Law and Environment, (1992), pp 40-45.

insurance to such persons and frame a policy for routine health check up of these people. The public must be given information about the atmosphere in order to enable them to go for routine check up at the Health Care Center provided by the State.

JUDICIAL APPROACH TO CONTROL THE PROBLEM OF AIR POLLUTION

An independent non-political judiciary is crucial to the sustenance our democratic form of government. The vitality of the democratic process, noble ideals of justice, liberty and equality in the constitutional edifice, as well as the rule of law are all dependent on the tone of the judiciary. Democracy signifies a government of the people, by the people and for the people, and the noble ideals should be easily accessible to all its members if a government claims to be truly democratic.

The Constitution of India honours separation of powers between the Legislative, Executive and the Judiciary and no organ is allowed to assume powers, which essentially belongs to other. But a strict and rigid separation of powers is not feasible and as such an interface is acceptable and pre- envisagedly provided for in exceptional areas.

The main and prior function of the judiciary is to deliver justice to all without fear or favour. The courts are intermediary between people and other organs of the State. It has powers to scrutinize legislations and administrative actions on the anvil of the Constitution and the law, in matters brought before it for adjudication or reference. This is termed as the Court's power of judicial review and has been proclaimed to be a basic feature of the Constitution.¹

The Indian Judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental right. The judiciary has expanded the frontiers of fundamental rights and in the process rewritten some parts of

¹ *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125, See also *K. Ramaswami J. in S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

the Constitution through a variety of techniques of judicial activism.² In this process the Supreme Court held that Article 21 include in its sweep a right to clean environment and that the permanent assets of the mankind cannot be allowed to be exhausted in our generation.

The Supreme Court and High Courts in each States are in the apex of the judicial reform and have made immense contributions towards the development of various concepts of environmental jurisprudence. A study on the problem of air pollution would remain incomplete if the judicial activism and the judicial reforms to control air pollution is not understood clearly. The judiciary has dug out every legislative measures scattered in our statute books and put the gloss of all the principles and doctrine from National and International concepts and amalgamated those to develop environmental law rapidly to meet the need of the country. The pace of the development of law to control air pollution was slow prior to the Bhopal gas disaster and oleum gas leakage. The law during this period and judicial approach shows that prior to the enactment of Air (Prévention and Control of Pollution) Act 1981.

Most of the cases brought before the court deal with the problem of air pollution by giving common law remedies. The reliefs were penal or civil depending on the nature of the case, i.e. whether it related to negligence, public nuisance, private nuisance or strict liable. The cases relating to these offences have been discussed under the chapter common law principles. The remedies given in civil matters were damages, injunction, interim orders, declaration and decrees. Only air pollution causing public nuisance came under the purview of Penal provisions under sections 268 to 294A of the Indian Penal Code and under section 133 of the Criminal Procedure Code.

The provision of the Criminal Procedure code was applied to abate nuisance through judicial activism. In the case of *Govind Singh v. Shanti Swarup*³, the Supreme Court of India while upholding the Magistrates observations rightly remarked that: We are of the opinion that in the matter of

² See Hon' Justice P.N.Bhagwati, "Enforcement of Fundamental Rights: Role of the Courts", Indian Bar Review, Vol 24 (1 & 2) 1997, p.19.

³ AIR 1979 SC *

this nature (Public nuisance) where what is involved is not merely a right of the private individual but the health, safety and convenience of public at large, the safer course should be to accept the view of the learned Magistrate, who saw for himself the hazard resulting from the working of bakery.

*Municipal Council, Ratlam v. Shri Vardhichand*⁴ and other cases like *Krishna Gopal*, followed this case. The Supreme Court and the High Courts have used section 133 of Code of Criminal Procedure as a potent weapon to abate pollution.

The legislature often fails to keep pace with the changing need and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is therefore, not only necessary but also obligatory on the court to step into fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation delegated to them to further the object of the legislation and to promote the goals of the society or to put it negatively, to prevent the frustration of the or perversion of the goals and values of the society. So long as the courts keep themselves bothered to the ethos of the society and do not travel off its course, their role in this respect has to be welcomed. The oleum gas leak case⁵ and the Bhopal gas⁶ tragedy are the burning example of such a situation.

7.1. Evolution of Absolute Liability Rule

The Supreme Court evolved the Absolute liability rule in *M.C.Mehta v. Union of India*.⁵ In this case, the liability stricter than that of the rule in *Rylands v. Fletcher* emerged. On 4th and 5th December, 1985 oleum gas leaked from one of the units of Delhi Cloth Mills Ltd. called, Shriram Food and Fertilizer Industries located in thickly populated area of Delhi and allegedly affected large number of people and one advocate practicing in the Tis Hazari Court died on account of inhalation of Oleum gas. The matter was brought before the Supreme Court through Public Interest Litigation and raised some seminal

⁴ AIR 1981 SC 1622.

⁵ AIR 1987 SC 965 ; (1987) 1 SCC 395.

⁶ *Union Carbide Corporation v. Union of India*, AIR 1990 SC 273 ; *Union Carbide Corporation v. Union of India*, AIR 1992 SC 248.

questions concerning the true scope and ambit of Articles 21 and 32 and sections 2(2) and 23 of Air (Prevention and Control of Pollution) Act, 1981.

P.N.Bhagwati, C.J., who delivered the judgment observed:-

“It is undoubtedly true that chlorine gas is dangerous to the life and health of the community and if it escapes either from the storage tanks or from the filled cylinders or from any other point in the course of production, it is likely to affect the health and well-being of the workmen and the people living in the vicinity.” Regarding quantity of chlorine available in air which may pose health problem he remarks “...chlorine is a hazardous gas and though smaller concentrations of chlorine in the air may cause only irritation and coughing larger concentrations, whether above 25 parts per million (PPM) or above 40 parts per million are likely to cause serious danger to life.... There can be no doubt that there would hazard to the life and health of the community, if there is escape of chlorine gas from the caustic chlorine plant”.

But in order to balance the development and the fundamental right enshrined in Article 21 of the Constitution, the Court said:-

“We cannot ignore the interest of the workmen while deciding this delicate and complex question. It could not be disputed... that the effect of permanently closing down the caustic chlorine plant would be to throw about 4,000 workmen out of the employment and that such closure would lead to their utter impoverishment”.

The court found that unit complying all the provisions contained in Section 2(b), 19(1), 21 and 23(b) of Air Act, allowed the industry to function.

Referring to the escape of this poisonous gas, the Supreme Court held that the principle evolved in nineteenth century in the *Rylands* case was inadequate to meet the needs of a modern scientific world with hazardous and dangerous activity becoming very common and hence laid down the new rule, where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to any one on account of an accident or in the operation of such hazardous or inherently dangerous activity resulting for example, escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all

those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*.

This rule was approved in *Charan Lal Sahu v. Union of India*⁷ where the court pointed out that this rule is 'absolute and non-delegable' and the enterprise cannot escape liability by showing that it had taken reasonable care and there was no negligence on its part. The Supreme Court also explained the basis of this rule as follows:

1. If an enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident (including indemnification of all those who suffer harm in the accident) arising on account of such hazardous or inherently dangerous activity as an appropriate item of its over-heads; and
2. The enterprise alone has the resource to discover and guard against hazards or dangers and to provide a warning against potential hazards.

The rule in *M.C.Mehta v. Union of India*, will not depend on the non-natural use of land and escape from that land of the defendant, to impose this stricter liability, which were necessary aspects of the rule in *Rylands v. Fletcher*. The only specific and significant requirement is that the enterprise must have engaged in hazardous and inherently dangerous activity and the harm should have resulted out of such activity. The rule in the *M.C.Mehta* makes no such distinction between persons within the premises where the enterprise is carried on and persons outside the premises, for the escape of the thing causing harm from premises is not a necessary condition for the applicability of the rule.

Another important distinction between the two rules is regarding the award of damages. Damages available where the rule in *Rylands v. Fletcher* applies, will be ordinary or compensatory but in cases where the rule in *M.C.Mehta*

⁷ AIR 1990 SC 1480.

applies, the court can allow exemplary damages and, the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it. However, this was considered to be obiter by the Supreme Court in the *Charan Lal Sahu* case, while the same court said that it was not obiter and was appropriate and suited to the conditions prevailing in India, in *Indian Council for Enviro Legal Action v. Union of India*⁸.

7.1.(i). Judicial Response to The Tragedy In Bhopal

The Bhopal gas leakage is the most tragic industrial disaster which occurred as a result of leakage of Methyl Iso-cyanate(MIC), a highly toxic gas from a plant set-up by the Union Carbide India Limited (UCIL). To understand the magnitude and impact of Bhopal Catastrophe, one should be aware of what happened in Bhopal. Why did the hearts of the judges bleed when calamity like Bhopal disaster occurred?

We would also stand still to learn that the demon of death silently invaded millions of hearts and lungs without knocking the doors during the midnight of 2 and 3 December 1984, in Bhopal. It is not only future generation being deprived of the healthy nature but that an MNC leaked poisonous gas, which was decimating the natural life of the present and future. Over 16,000 children, men and women were laid dead and more than five lakhs were maimed. During maintenance operations in the methyl-iso-cyanide (MIC) plant, a large quantity of water entered one of the storage tanks containing 60 tons of MIC, triggering off a runaway reaction. A deadly cocktail of MIC and other chemicals such as hydrogen cyanide and phosgene was carried by the northerly wind to the neighbouring communities. People woke up with invisible clouds of poison gas, stinging eyes and burning throats. The suffocating gas invaded lungs and created enormous fluids inundating their lives with their own body fluids. Running here and there for life did not save their lives, as the killer gas was all pervading.

⁸ AIR 1996 SC 1480.

A small leak at 11.00 pm occurred from an MIC storage tank 610. Workers noticed it but thought it to be a normal and small leak, to the source of which could not be located. The sting of MIC was getting stronger and temperature and pressure were rapidly rising in tank. At around 12.30 am a gigantic hiss came out, a runaway chemical chain reaction, triggered by the entrance of water, and created tremendous heat and pressure. Forty tons of deadly gases burst past the rupture disc, overwhelmed the plant's safety systems, and shot into the atmosphere. Most of the workers fled in panic. Larry Everest narrated: 'Throughout the slums and shanty settlements that surround the Union Carbide plant on three sides, thousands were awakened by the suffocating, burning effects of the gas, the cries of neighbours, the clamor of running, stumbling feet, or by the howls of animals in their death throes. Mothers did not know their children had died. Children didn't know their mothers had died. Men did not know their whole families had died. Anyone who was left alive ran away blindly'.⁹ The toxic cloud was so dense and searing that people was reduced to near blindness in their rush through narrow, ill-lit alleys. Some who managed to hang onto life panicked leaving loved ones behind. Families who tried to stay together were often separated momentarily in the blinding gas and then unable to regroup. Soon there was a massive exodus away from the Union Carbide Factory, now a fount of death, a stream of humanity of tens of thousands strong-walking, running, clinging to taxis, trucks, three wheeled autorickshaws or any other means of escape they could find. Bhopal looked like a battle zone in a chemical war. It was littered with the dead lying in alleys, ditches, roadways, or still trapped in their huts, in the contorted positions of sudden death. They lay intermingled with the goats, cows, sheep, and other animals that had also perished. The gas cloud had devastated everything living in its path, even killing plants and turning leaves black. People were just lying on the road like dogs and cats. The survivors wandered among the carnage desperately seeking family and loved ones they

⁹ 'India disaster: Chronicle of Nightmare', *New York Times* 10 December 1984 as quoted by Mr Everest.

had lost in the chaotic night. The total number of dead may never be known. People continue to die from the effects of the gas. Estimates of the number severely debilitated, run as high as 60,000. And one can only speculate on what the long-term effects of such a massive exposure to toxins will be. There were mounting incidents of spontaneous abortions and stillbirths. Thousands could not work. All in all it was the worst industrial disaster in history.

The reason for such a great human tragedy and continuing misery is just an irresponsible and callous mismanagement spread over at every MIC plant operation. There was no proper and prompt sealing of the carbide plant. The leak was underestimated to be a routine one. Neither the Union Carbide nor the civic administration could rise up to the occasion and offer effective management of the sudden crisis. The administrative officers ran for safer places instead of doing their duties. There was a total breakdown of the system and machinery. Every one was allowed to die as none was operating the system that collapsed.

There was improper maintenance of the plant as its five-stage security system was prone to failures and contamination. There were serious defects in their design. The Union Carbide Corporation was well aware of the unacceptable state of safety systems and criminally preferred to continue the operations without caring for life, nature and future. The Union Carbide Corporation had every reason to know the possibility of the worst disaster in case of a gas leak.

The Union Carbide Corporation wanted to cut costs to enhance the profits. The cost cutting drive includes pruning the staff, reducing the quality of construction material, shrinking the safety measures and continuing adoption of hazardous operating procedures, as their alternatives are expensive.

It is only when an accident of the magnitude and impact like the Bhopal catastrophe takes place those environmentalists, social workers, the general public and government institutions wake up to a new awareness. Along with launching rehabilitative measures, they start thinking about new ways and means of preventing similar tragedies in the future. This process leads to

legislative and administrative activism. Industrial accidents involving environmental hazards also give rise to judicial concern.

The Union of India on 8 April 1985 in exercise of its powers under section 3 filed a suit in the United States District Court of New York against the Union Carbide Corporation for an estimated \$3 billion. Some American lawyers earlier filed suits in different federal courts, which were superseded and consolidated by a suit filed on 28 June 1985. The Union Carbide strongly contended that the Indian government was to blame. The Union Carbide Corporation wanted dismissal of suits on the ground of *forum non conveniens* pointing out that the suits can be more conveniently tried in Indian courts.

On 12 May 1986, JF Keenan J ruled that India and not the US was the appropriate forum for Bhopal compensation litigation. It dismissed the suits on the following grounds:

1. Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defences based upon the statute of limitations;
2. Union Carbide shall agree to satisfy any judgment rendered by an Indian court, and if applicable, upheld by the appellate courts in that country, where such judgment and affirmance comport with the minimal requirements of due process;
3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.

There were appeals and cross appeals to the US court of appeals, which were decided on 14 January 1987, upholding the plea of *forum non conveniens*. In the first pre-trial hearing in the consolidated Bhopal litigation in the US federal courts, John F Keenan, asked Carbide as 'a matter of fundamental human decency' to provide an interim relief payment of \$5-10 million. Carbide agreed to provide \$5 million for this purpose, provided a satisfactory plan of distribution and accounting of the funds was devised.

After the dismissal of the suits in America, the Union of India filed a suit in the district court of Bhopal. The Supreme Court of India had in the meantime evolved the principle of absolute liability imposing a stricter liability on the enterprise handling hazardous activity, in *M.C.Mehta v. Union of India*¹⁰.

On 17 December 1987, Deo J passed a significant order directing Union Carbide to pay Rs 350 crores as interim relief. The order was unprecedented and decidedly controversial. Being an interim order, it could not be decreed. And without a decree the Union Carbide Corporation refused to pay it. The order was challenged before the Madhya Pradesh High Court at Jabalpur on the grounds that the trial judge was not authorized to pass the order under any provisions of the Indian Civil Penal Code. On 4 April, SK Seth J of the High Court upheld the liability of Union Carbide¹¹ for the Bhopal disaster but reduced the interim compensation to Rs 250 crores and against that order the Union Carbide went for appeal to the Supreme Court. The Supreme Court¹² directed Union Carbide to pay up US \$470 million in 'full and final settlement' of all claims, rights and liabilities arising out of the disaster in 1984. The entire suit was ordered to be settled with a view to provide 'immediate and substantial relief to the victims', essentially on the following conditions:

1. The Union Carbide Corporation shall pay a sum of US \$ 470 million (approximately 750 crores) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster;
2. All civil proceedings arising out of the Bhopal Gas disaster shall stand concluded in terms of the settlement and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending. Further directions for implementation of the settlement were made on 15 February 1989.

¹⁰ Supra note No. 5.

¹¹ *Union Carbide Corporation v. Union of India* 1988 MPLJ 540.

¹² *Union Carbide Corporation v. Union of India* AIR 1990 SC 273.

The Union Carbide accepted the decision as fair and reasonable. However, the countries as a whole, particularly the victim groups were bewildered. Review petitions were filed on behalf of the victims against the settlement. Review petitions were decided by the Supreme Court on 3 October 1991¹³. By this decision, the settlement was upheld subject to certain modifications as follows:

1. The quashing of the criminal proceedings was set aside.
2. For a period of eight years, facilities for medical surveillance of the population of Bhopal exposed to MIC should be provided by periodical medical check up. For this purpose, a hospital with at least 500 beds strength, with the best of equipment and facilities, should be established. The facilities shall be provided free of cost to the victims for a period of 9 years from now. The state government shall provide suitable land free of cost and Union Carbide Corporation Union Carbide India Limited shall bear the expenses of establishing the hospital maintaining it for a period of eight years.
3. In respect of the population of the affected wards, (including those who filed claims) the Government of India shall take out appropriate medical group insurance cover from the Life Insurance Corporation of India or the General Insurance Corporation of India for compensation to those who, though presently asymptomatic and had filed no claims for compensation, might become symptomatic in future and to those later-born children who might manifest congenital or prenatal MIC related afflictions. There shall be no upper individual monetary limit for the insurance liability. The period of insurance shall be for a period of eight years in future. The number of persons to be covered by this group shall be about one-lakh persons. The premium shall be paid out of the settlement fund.
4. In the event of the settlement fund being found inadequate to meet to compensation, the Union of India will meet the deficiency.

¹³ *Union Carbide Corporation v. Union of India* AIR 1992 SC 248.

The government was directed to appoint 40 claim commissioners with necessary staff to start adjudication of the claims under the scheme. It was also directed that in the matter of disbursement of compensation, the guidelines laid down by the Gujarat High Court in the case of *Moolji Bhai Azrambhai Harizan v. United India Insurance Company Ltd.*¹⁴ should be followed.

The settlement raised serious controversy all over the nation. Questions were raised on the amount of compensation, which worked out to around Rs 10,000 per victim if it had been divided equally amongst all. In the same year, an article in the Times of India stated that approximately US \$ 40,000 was spent on the rehabilitation of every sea otter affected by the Alaska oil spill. Each sea otter was thus given rations of lobsters costing US \$ 500 per day. Thus, it was commented that, the life of an Indian citizen in Bhopal was clearly much cheaper than that of a sea otter in America.

However, there was a strong argument in favour of the settlement also. The time to be consumed in hearing appeals until the case is finally disposed of, it was contended that the settlement was reasonable. If every trial had taken its own course, the enforcement of the judgment would become a big practical impossibility. Even if the *Mehta Rule* was strictly applied, only Union Carbide India Limited could have alone become liable and not the Union Carbide Corporation. The Union Carbide India Limited had just Rs 100 crore worth assets in India and so even if a decree in the suit were passed against the Union Carbide Corporation, the proceedings in America for realization of that decree would have become inevitable.¹⁵

By applying the principle of vicarious liability the state that held shares in Union Carbide, also could have become jointly liable for the damage caused. Considering the possibility of delay and the above facts, the settlement was considered to be useful and satisfactory.

¹⁴ (1982) (1) 23 Guj LR 756.

¹⁵ Ramaswamy Iyer, *The Law of Torts*, 9th edn., pp.737-739.

7.1.(ii). Constitutional Validity of the Bhopal Act

In order to avoid the multiplicity of parties, the Parliament passed the Bhopal Gas Leak Disaster (Processing and Claims) Act 1985. The Act conferred on the Government of India, the responsibility of suing *parens patriae* on behalf of the victims. The Bhopal litigation which gave the *parens patriae* jurisdiction was challenged on various grounds in *Charan Lal Sahu v. Union of India*¹⁶. In this case the question arose as to whether the Bhopal Gas Leak Disaster (Processing and Claims) Act 1985 is constitutionally valid? After summing up the events before and after the disaster, the court went on to quote the provisions of the Bhopal Act. The court examined the various contentions of the victims and the government of India. The court observed:

In our opinion, conceptually and jurisprudentially, there is no bar on the State to assume responsibilities analogous to *parens patriae* to discharge the State obligations under the Constitution. What the Central Government had done in the instant case seems to us to be an expression of its sovereign power. This power is plenary and inherent in every sovereign state to do all things, which promote the health, peace, morals, education and good order of the people and tend to increase for the wealth and prosperity of the state.

The court held that the Act is constitutionally valid and that it proceeds on the hypothesis that until the claims of the victims are realized or obtained from the delinquents, namely, Union Carbide Corporation and Union Carbide India Limited by settlement or by adjudication and until the proceedings in respect thereof continue the Central Government must pay interim compensation or maintenance for the victims.

The Bhopal gas leak disaster and its terrible aftermath reveals the urgent need for the government to lay down certain norms and standards to follow before granting such licences or permissions and the government should insist as a condition precedent to the grant of such licences or permissions, creation of a fund in anticipation by the industries to be available for payment of damages out of the said fund in case of leakages or damages in case of accident

¹⁶ AIR 1990 SC 1480.

or disaster flowing from negligent working of such industrial operations or failure to ensure measures preventing such occurrence. The government should also ensure that the parties must agree to abide to pay such damages out of the said damages by procedure separately evolved for computation and payment of damages without exposing the victims or sufferers of the negligent act to the long and delayed procedure. Special procedure must be provided for and the industries must agree as a condition for the grant of licence to abide by such procedure or to abide by statutory arbitration. The basis for damages in case of leakages and accident should also be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to pay.

Charan Lal Sahu was heard after the Supreme Court pronounced the compromise judgment of the Supreme Court on Bhopal compensation. No wonder, which the questions relating to the validity of the compromise came up in the case although the court was mainly concerned with the validity of the Bhopal litigation legislation. Significantly, one may notice that the later judgement that reviewed the compromise judgment modified one important aspect. This was the court's reluctance to exclude the criminal liability of Union Carbide Corporation at any cost.

7.1.(iii). The Review Judgement

In *Union Carbide Corporation v. Union of India*,¹⁷ the main ground of challenge raised in the petition for review was that the court could not quash all pending proceedings, civil and criminal, and come to a compromise in an appeal against an interim order in a suit.

The court opined that such technicalities do not fall under the preview of the constitutional interpretation as the main matter was being disposed of with the consent of parties in a special leave petition with the goal of doing complete justice under Article 142 of the Constitution of India. The power to do

¹⁷ (1991) 4 SCC 584

complete justice could be exercised with the aid of the principles under the Code of Criminal Procedure, which enables withdrawal of prosecution. The bar against future prosecution neither clothed the Union Carbide Corporation with immunity nor amounted to a stifling of prosecution, but was only a reiteration of the consequences of termination of prosecution, which was a motive, not a consideration, for entering into the agreement. Despite these perspectives, the court found no grounds for justifying withdrawal of prosecutions.

Setting aside the quashing of prosecution, the Supreme Court said that the offences relate to and arise out of a terrible and ghastly tragedy... It is a matter of importance that the offences alleged in the context of a disaster of such gravity and magnitude should not remain uninvestigated.¹⁸

The court rejected another contention that the giving of a notice, which is essential in a representative suit, was not given and hence the compromise was invalid. It was pointed out that the provision for notice in the Code of Civil Procedure for representative suits should not *proprio vigore* apply to a compromise judgement and that notice of proceedings in the review is enough compliance on the matter.

On the aspect of notice to victims Justice Venkatachaliah referred again to *Charan Lal Sahu v. Union of India*¹⁹. The court said that a settlement without notice to the victims could be valid under the Bhopal Act, provided that the Act was valid. The *Charan Lal Sahu* view was quoted to point out that the urgent need to help the victims would make a post-decisional hearing sufficient and would not result in injustice to the victims.

On the third important issue as to what would be the outcome if the settlement was found inadequate, the Court held that the Union of India, as a welfare state, has the responsibility to make good the deficiency and safeguard the interest of the victims. This is the point on which Justice Ahmedi dissented saying that it is impermissible in law to impose such a burden and thereby saddle the Indian tax payer with the liability, particularly when the Union of

¹⁸ P. Leelakrishnan, *Environmental Law Case Book*, 2004, pp 320-321.

¹⁹ (1990) 1 SCC 613, para 111-124.

India was not found to be a tortfeasor. He seems to have even suggested a fresh settlement or trial if the settlement fund was found inadequate.

Medical Surveillance

The Supreme Court ordered the establishment of a full-fledged hospital equipped as a speciality hospital for treatment and research of MIC related afflictions. The court also directed that the state government and capital outlays should give the land and operational expenses should be borne by the Union Carbide Corporation and Union Carbide India Limited.

7.1.(iv). Need for Group Insurance for Prospective Victims

The likelihood of future complications was one of the aspects, which the court took into account. The court was concerned as to how should cases of yet unborn children of mothers exposed to MIC toxicity where the children are found to have or develop congenital defects be taken care of. The court suggested that such contingencies shall be taken care of by obtaining an appropriate medical group insurance cover from the General Insurance Corporation of India or the Life Insurance Corporation of India for compensation to this contingent class of possible prospective victims.

The court also directed the Union of India to obtain appropriate medical group insurance cover to take care of compensation for such prospective victims, for which the premiums were ordered to be paid from the settlement fund. Thus the persons and children born to exposed mothers who may become symptomatic in future were taken care of.

The opinion of the court was influenced by the report of the Scottish Law Commission that it is highly probable that in appropriate circumstances, Common Law would provide a remedy for a plaintiff suffering from a pre-natal injury caused by another's fault.

7.1.(v). Difficulties faced in Mass Disaster

The Bhopal gas disaster raised many issues but many of them remain unanswered. It is still not clear about who must bear the legal responsibility. Initially for the worst industrial catastrophe in history there was the phenomenon of shifting of burden from the company to government and

government to company. Investigations following the Bhopal catastrophe showed that both the government and company went far beyond the mere neglect of elementary safety measures. In an analysis in the British trade publication *Project Management*, a UN expert enumerated 16 factory shortcomings, 13 operational errors, 19 failures in communication and 26 system shortcomings. Many of these were the fault of company management, but many were also government's fault. Some mistakes by the company like, turning off the cooling system supposed to keep the MIC at a temperature of zero degrees Celsius to prevent a reaction, six months before the accident is astonishing.²⁰ It was also alleged that Carbide plant in Bhopal was operated at an unacceptably low standard, which was known and ignored by the government.²¹ Although Government was responsible to some extent, it escaped its liability and brought the suit as exclusive plaintiff in all litigation arising from the disaster.

Leaving aside the question that should be blamed, one would be eager to learn what redressal was provided through judicial and legal activism. The disaster no doubt had many issues involved in its for delivering justice. The main issues were how zealously did the Indian Government pursue the case? Was the compensation awarded to the victims appropriate? Ultimately did the victims of Bhopal disaster receive justice in its true sense?

The individual based compensation scheme was criticized and community based compensation was said to be more beneficial by Kibel and Rosencranz²². It was opined that although individual-based compensation scheme may appear as an appropriate, effective and fair response, the scheme possesses many flaws. These flaws render the scheme dysfunctional, and prevent the Indian Government from achieving basic medical, social and justice-related goals. The three primary flaws concern (1) administrative burden and time delay; (2) the susceptibility of claimants to exploitation and

²⁰ Shyam Divan, Armin Rosencranz, *Environmental Law and Policy in India*, 2nd edn., p.550.

²¹ T.R.Chauhan, *Inside the killer Carbide Plant- A Bhopal Worker's Story*, 1994, see Shyam Divan, Armin Rosencranz, *Environmental Law and Policy in India*, 2nd edn., p.551.

²² Kibel and Rosencranz, "A blanket spread to thin: Compensation for Bhopal's Victims", *Economics and Political Weekly*, 2 July 1994, p.1643.

manipulation; and (3) most importantly, the failure to provide for the future of the Bhopal Community and affected unborn generations...

There is an alternative to the flaws, and limitations of individual based distribution scheme 'community based' compensation. The effects of awarding compensation directly to victims was cited primarily to have negative effects, through a survey conducted by Ram Shankar Tiwari²³ and other authors. It was opined that there was a palytic effect on the community's work initiative; people who were self-employed before the disaster had sold off their assets and were living of the money. Intra-family dispute had increased due quarrels over respective shares. There was and increase in divorce and remarriage in order claim greater or multiple compensation awards. Finally there was an alarming trend amongst compensation recipients to spend the money immediately, rather than invest the funds in long term assets. Tiwari and his colleagues suggested that money be distributed in cash only, to the extend needed to pay medical bills, with the rest distributed in the form of insurance policies or government bonds for the victims.

The compensation machinery has also did not provide relief properly. The media reports recount numerous instances of kickbacks paid by victims to government officials, a racket involving counterfeiting of claim documents and even corruption by a compensation judge. The claimants, inability to pay bribe (has often resulted) in denial of compensation.²⁴ The department of Bhopal Gas Tragedy Relief and Rehabilitation has been frequently in news with condemnatory reports on corruption and inefficiency. In June 2000 the Union Government announced the institution of a high level investigation into expenditures made by the department.

The other main issue was the creation of the Bhopal Hospital Trust. To meet the needs of the gas victims, the Supreme Court, on 3rd October 1991, ordered the Government of India to construct a 500-bed hospital. The cost of the hospital construction was at first extracted from the eventual liquidation of

²³ Sam Basir, "India-Bhopal: Relief Money May Spark Socioeconomic Crisis", Inter Press Service, 9 December 1994., See Divan, Rosencranz, *Environmental Law and Policy in India*, 2nd edn. P.559.

²⁴ The Bhopal Gas Tragedy: A Report from Sambhavna Trust, 15 (1998).

Union Carbide India Limited's shares by the Bhopal District Court when Carbide refused to put up money. Shortly after the Bhopal District Court attached Carbide's UCIL shares, Carbide registered a charitable trust in London to provide medical relief to Bhopal.

An analysis of the above facts gives us the picture of the real scenario of the Bhopal Gas tragedy. The management of the disaster in its entirety might seem to be mismanagement for any observer. Although efforts were made by the legislature and the judiciary to deliver justice, it could not be achieved completely. However, such a disaster has at least made the people aware of chemical disasters, which might occur from industries. The legislature had to wake up and draft many laws to deal with such situation. The Government also has become more conscious and therefore, many policies have been adopted for hazardous industries. The judiciary too have got activated and many steps in a positive direction was taken, like the holding of most trial of safety measures was done, while passing an order for reopening *Sriram*. There have been many principle and doctrines, which have been evolved by the courts. After the Bhopal disaster, a case²⁵ was filed by Law Society of India before the Kerala High Court to restrain a giant public sector fertilizer company from operating its 10,000-ton ammonia storage tank in Cochin. The petitioners claimed that an accidental leakage of ammonia could devastate the entire city and its environs. The court investigated two broad questions in this case. The first question was the possibility of the operational failure of 10,000 tones of ammonia storage tank and the consequent leak of ammonia and the degree of pollution of air and the resultant ecological imbalance they may cause thereby and as a result of this environment pollution the hazards that have to be faced by the people of Wellington Island and the city of Cochin. The second question was whether there is any reasonable catastrophic failure, of the tank resulting in a crack or break or a rupture which would result in an uncontrollable major leak of ammonia with its resultant devastation of the entire population in Wellington Island and the city of Cochin and surrounding places on account of the seminal

²⁵ *Law Society of India v. Fertilizers and Chemicals Travancore Ltd*, AIR 1994 Ker 308.

sensitive and strategical sitting of the tank in the port area very close to the runway of the airport and very near to the Southern Naval Command.

The findings of the court were that the catastrophic failure of the tank was not an unreal or remote possibility, but a credible and contingent possibility to be reasonably anticipated on the facts unfolded in the case. In case of a catastrophic accident, the city of Cochin would turn into a city of the dead and the nearby place, a morbid graveyard. The happen of the accident would be unpredictable and therefore the court felt it was unwise to forget or slur it. The court opined that once it happens, it is irreversible, so prudence dictates not complaisance, but positive action. The court concluded that the location of the tank endangered public safety. The court held that Deprivation of life under Article 21 of the Constitution of India comprehends certainly deprivations other than total deprivations. The guarantee of life is certainly more than immunity from annihilation of life. Right to environment is part of right to life. A state of perpetual anxiety and fear of extermination of life is not an environment adequate for health and well being of human race. Therefore, the continuation of the operation of the ammonia storage tank is a plain and clear violation of the fundamental right guaranteed under Article 21 of the Constitution and so we are obliged to stop it. The respondent was ordered to de-commission and empty the ammonia storage tank at wellington Island within three months from date of order. The respondent was also directed to pay Rs 5,000/- to the petitioner as cost of litigation.

This is off course, one of the rare case where economic interest were subordinated to safety concerns and a giant public sector fertilizer company was restrained from operating its 10,000 ton ammonia storage tank in Cochin. This case is one of the examples of judicial activism against hazardous industry, which was prone to create future disaster. These facts reflect that the public today have become aware of their rights against hazardous industries and have succeeded.

The Bhopal Tragedy was not caused merely as a failure of technology, but as a failure of knowledge. People realized that environment awareness was

essential. If the right people had right information of what was happening at UCIL, it could have stop the happening of the accident or the gravity of the disaster could be lessened. In United States the community right-to-know provisions have received a boost after Bhopal. Our courts too have taken initiative towards the same direction. In *Sriram Gas Leak* case, the court recognized the need to introduce full fledged courts on environment to make the coming generations aware and to make them capable to adjudicate the environmental problems. In *M.C.Mehta v. Union of India*²⁶, the division bench of Rang Nath Mishra, C.J., G.N. Ray and A.S. Anand JJ. Of the same court stressed on the need to show films and documentary for short duration on the television and in cinema halls and, that the All India Radio may assist this process of education, and direction was issued to the Central Government and the State Government to ensure compliance of the conditions laid down by the court. The Court in this case opined that law is a regulator of human conduct but no law can indeed effectively work unless there is an element of acceptance by the people in society. No law works out smoothly unless the interaction is voluntary. In order that human conduct may be in accordance with the prescription of law it is necessary that there should be appropriate awareness about what the law requires and there is an element of acceptance that the requirement of law is grounded upon a philosophy, which should be followed. This would be possible only when steps are taken in an adequate measure to make people aware of the indispensable necessity of their conduct being oriented in accordance with the requirements of law. It was further observed that in a democratic polity dissemination of information is the foundation of the system. Keeping the citizens informed is an obligation of the Government. It is equally the responsibility of society to adequately educate every component of it so that the social level is kept up. Supreme Court, therefore, accepted on principle the prayers made by the petitioner, for issuing appropriate directions to cinema exhibition halls to exhibit slides containing information and messages on environment free of cost; direction for spread of information

²⁶ AIR 1992 SC 382.

relating to environment in national and regional languages and for broadcast thereof on the All India Radio and exposure thereof on the television in regular and short term programmes with a view to educating the people of India about their social obligation in the matter of the upkeep of the environment in proper shape and making them alive to their obligation not to act as polluting agencies or factors; and to make environment as a compulsory subjects in schools and colleges in a graded system to that there would be a general growth of awareness and issued certain directions to the Government to that effect.²⁷

It may be pointed out here that there should be similar steps taken to make the people aware in rural India, through traditional media or folk media would accept such communication.

The courts have also give remedies from the Air Act and other provisions. *Chaitanya Pulvarising Iindustry v. Karnataka State Pollution Control Board*²⁸ case is of peculiar nature where the court held that remedy against non-compliance of condition laid down by the Board is to close down the industry.

After coming to the Air Act 1981, some areas were declared to the Air Pollution Control area where petitioner's industry was situated. The industry failed to obtain the consent of the Board under Rule 19 of the Act and the Board ordered for closure of the industry.

The Act is designed to prevent, control and abatement of air pollution, the provisions relate to preservation of quality of air and control of pollution. Keeping in view these objects the Act has provided for measures, which are preventive in nature, in the cases of industries to be established, and in the case of industries already established, they are remedial. In the case of industries established, it insists on obtaining consent of Board, making the industry amenable to the administrative control of the Board. Once consent is given, the Board can issue order, directions, etc. which are to be complied with by the industry... Non compliance of these conditions is made punishable under

²⁷ Id., pp 384-85.

²⁸ AIR 1987 Kant 82.

section 37... the direction to close down the factory solely because it has not obtained consent of the Board is clearly illegal... the petitioner has failed to comply with its order, it may take action under section 37... but that would not justify the passing of a prohibitory order which apart from causing loss to the owner has a serious consequence paralyzing the industry affecting the livelihood of employed persons, the consequence may be more hazardous than the air pollution. Therefore, the harsh step of prohibiting the working of the Factory is neither warranted nor has it the legal sanctity.

In *Mathew Lukose v. Kerala State Pollution Board*²⁹ a petitioner was filed in the Kerala High Court against pollution caused by a Chemical Company. This progressive judgment reaffirmed that Article 21 of the Constitution includes right to clean air, water and a wholesome environment. Justice Sankaran Nair displays his grasp and undertaking of environment issues as he discusses the intensity of pollution problem in comparison with international tolerable limits.

Recalling the effects of air pollution, Sankaran Nair J. observed that the importance of environment and proper environmental management policy couldn't be under-rated. Awareness of this, when necessary, must be enforced by sanctions. Environmental deficit and degradation cause disastrous consequences like global warming, green house effect and depletion of ozone layer... cloud formation due to air pollution can also trap sunlight and heat of the earth. Photochemical smogs with lethal consequences due to air pollution are well known. Ozone depletion has caused deleterious effects.

In *Animal Feeds Diaries and Chemical Limited v. Orissa State (Prevention and Control of Pollution) Board*³⁰ following questions were before the court whether---

- (i) Member Secretary of the Board is authorized to issue directions under section 31 of the Air Act.

²⁹ 1991 Forest Law Times 10.

³⁰ AIR 1995 Ori. 84.

- (ii) The area where petitioner's factory was situated had been declared to be an air control area.
- (iii) On the emission of foul odour from the petitioner's factory, Board could issue direction to close down the factory.

On making evaluation of the section 31-A of the Air Act, which hives power to the Board to delegate its power and function to any officer or authority who shall comply the direction, the court held that in want or evidence of directions of the Board being delegated to officers/ authorities, the direction issued by the member secretary to close down factory was not valid.

But regarding third question the court held after examining the report that- there is possibility of preparation of poultry feed and foul odour was coming from the room where dry fishes have been stored... under section 19 of the Act, after an area is declared by the State Government to be air pollution control area, the State Government can prohibit the use of such fuel which will have effect of air pollution... Air pollutant has been defined in section 2(b) to mean any solid, liquid or gaseous substance present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plant or property or environment. Air pollution as defined in section 2(b) to mean the presence in the atmosphere any air pollutant.... The Act is designed to prevent control and abatement of air pollution. The provisions under this Act relate to preservation of quality of air and control of air pollution, keeping these objects, in view the Act has provided for measures, which are preventive in nature in the case of industries to be established, and the cases of industries already established. The measures are remedial and that is why in case of an established industry consent of the Board is insisted upon. The Board can issue such direction within the ambit of section 31-A only on being satisfied that industry in question emits, "air pollutant" by which there has been an air pollution. Possibility of emission of foul odour or emission of foul odour itself without a finding that there has been emission of air pollutant would not clothe the jurisdiction with the Board to issue any direction, and in

the absence of any finding that petitioner's factory emits any air pollutant as defined in section 2(a) of the Act it was not within the jurisdiction of the Board to issue the direction to shift or close down the industry in exercise of power under section 31-A of the Act.

The Herculean task undertaken by the apex branch of Indian judiciary to clean up the foul and miserable air in India has been made possible by the now settled principle of dilution of rules of *locus standi*. Besides asserting the apex court have also contributed towards development of innovative steps by using section 133 Code of Criminal Procedure and other legislative measures, including the Right to environment as within the ambit of Right to life.

7.2. Cases initiated on Writ Applications

In the case of *Rural Litigation and Entitlement Kendra, Dehradun v. The State of U.P.*³¹, a writ petition was filed under Article 32 of the Constitution, calling for the Hon'ble Supreme Court's intervention in stopping stone quarrying, which it was alleged were violation of Articles 21 and 48A.

The limestone quarrying in the Dehradun Valley triggered the first public interest environment case in the Supreme Court. In *Court on its own motion v. State of Himachal Pradesh*³², a division bench of Himachal Pradesh High Court guided a public interest litigation to prevent stone crushing in the hills around Shimla. The court took suo moto cognizance of the reports.

The stone quarrying had the effect of causing irreparable damage to the Hills, villages and surrounding farmland in the Doon valley. It was probably the first case of its kind praying for the Supreme Court to intervene in the matter when all efforts through local government and the local bureaucracy had failed.

To ascertain the facts as alleged in the Public Interest Petition, the Supreme Court appointed a committee to study the impact of lime quarrying and mining operations in the area. After the submissions made by the

³¹ AIR 1985 SC 652.

³² 1994 Far L T 103.

Committee and its recommendations, in an unprecedented move, the Court ordered closure of the quarries, banned the use of explosives and ordered land reclamation and employment programs to prevent joblessness and unemployment, as a result of such closure.

Court took *suo motu* cognizance of the reports appearing in the daily edition of the Tribune on 31 December 1992 and Indian Express on 10 January 1993 that illegal mining and installation of stone crushers have caused havoc at twelve places in the suburbs of Shimla, including Kamla Nagar, Tara Devi, Dhalli Nal Dehra and Chooria Chowki, Kamla Nagar is also known as Bhatha Kuffar. Interim injunctions prohibiting quarrying were issued against the mine lessees against the mine lessees but were partially modified.

The court recorded the opinion of the Controller of Mines that the air pollution was caused mainly due to mechanical operation of stone crushers and not from manual extraction of stones, in which case the emission of dust remains within the standards of Ambient Air Quality. In a development parallel to the case, the state government constituted a high level committee headed by the Chief Secretary to look into environmental degradation caused by mining operations and polluting industries in the state. The committee recommended that Shimla and its suburbs be declared an Environment Protection Zone by the Central Government under rule 5 of the Environment (Protection) Rules of 1986. The High Court impleaded the committee and sought its recommendations in relation to the quarries around Shimla. In light of the deliberations of the committee, the state government urged the High Court to confirm the interim injunction in the interest of local residents, tourists and the environment.

From the material on record, it is proved that the Government had practically closed its eyes to environment degradation and ecological imbalance being caused by mining and industrial activities in and around Shimla, which has been acknowledged as Queen of the Hills for the last one century. Though the Government has brought on record its declaration made in the Industrial Policy on 1991, that environment friendliness is viewed as basic

criteria for selection of industrial projects in the State and industries causing air and water pollution, degradation of forests and soil erosion will be discouraged and industries detrimental to tourism will not be set up within the public view of National State Highways and main tourist traffic routes, yet no effective measures were taken to implement this policy.

Court opined that it will be in the interest of justice and fair play to allow respondents to work their mines and operate their stone crushers for a period of only six months from the date of this order or till Shimla Environment Protection Zone is created, whichever is earlier subject to their strictly complying with all the laws, rules, instructions and directions applicable and providing all measures under the Act of 1981 to prevent Air Pollution and also subject to their undertaking that they will implement the scheme of afforestation in the mined areas at their own cost.

The Stone crushing operations around Delhi caught the attention of the Supreme Court on an application under Article 32 of the Constitution, where M.C.Mehta objected to the quarrying because the dust particles polluted the air and the quarries violated town planning regulations.³³ The court directed the Central Pollution Control Board to inspect the plants and verify the allegations. On 15 May 1992, the court issued a detailed order 'for the reasons to be recorded and pronounced at a later stage'. Quarries in Delhi and in the surrounding areas of Haryana were told to close down in three months. Quarry owners operating without licences from the town planning authorities or who were issued closure orders under section 31A of the Air Act or section 5 of the Environment (Protection) Act of 1986, were directed to forthwith cease operations. The Haryana authorities were asked to allot alternative sites in a new 'crushing zone' located at a suitable distance from the capital.

The shifting of quarry operators away from Delhi to Haryana was fraught with danger. This led to the revival of the case in Supreme Court by M.C.Mehta, namely, *M.C.Mehta v. Union of India (Delhi Stone Crushing)*³⁴.

³³ *M.C.Mehta v. Union of India (Stone Crushing)* 1992 Supp (2) SCC 85 and 86.

³⁴ 1996 (1) SCALE 29 (SP)

The Court directed a team of scientists and environmental engineers from the Central Pollution Control Board to inspect the new locations. The report submitted to the court projected a dismal picture. The air pollution was intense, chiefly because the dust containment systems, although installed, were not being operated by any of the quarry owners and a water shortage prevented the sprinklers from being used. The report revealed that the mining operations were being conducted haphazardly and warned of an imminent ecological disaster. The Supreme Court directed the parties to arrange for the sprinkler water supply. The quarry owners were granted two months time to install necessary pollution control devices and the state government was asked to lay a road to the quarrying zone besides implementing the suggestions and directions given by the Central Board.

The Supreme Court and the High Courts were restraining the contamination of atmosphere by dust in the above cases. However, in *Navin Chemical's Case*,³⁵ the Allahabad High Court declined to interfere under Article 226 of the Constitution in a petition filed by a pharmaceutical manufacturer against Detchem Mineral Corporation, who were grinding and pulverizing stone next to the drug unit. Navin Chemicals complained that the atmospheric pollution caused by Detchem was interfering in its manufacture of sensitive life saving drugs. Reviewing the material on record, the court declined to interfere since the Uttar Pradesh Pollution Board was alert to the matter. In declining relief, the court may have been influenced by the Board's contention that Navin Chemicals too was guilty of breaching the Air Act.

The failure of the Karnataka government and the state board to frame a suitable zoning policy for stone quarrying and crushing, compelled the High Court to issue general directions in *Obayya Pujari v. Karnataka State Pollution Control Board*³⁶. The petition challenged the board's consent permitting stone crushing. Extending the scope of the petition to cover stone crushing operations across the state, the High Court directed the government to immediately

³⁵ *Navin Chemicals Manufacturing and Trading Ltd. v. New Okhla Industrial Development Authority*, 1987 ALL.L.J. 13

³⁶ AIR 1999 Kar 157.

formulate a policy regulating the business and to identify 'safer zones' for such operations. The Karnataka High Court drew upon the Punjab and Haryana High Court decision in *Ishwar Singh v. State of Haryana*³⁷, to highlight the environmental damage caused by unregulated stone quarrying.

Public Interest Litigation has helped the growth of environmental jurisprudence in a tremendous fashion. The causes in environmental issues are taken up by a wide spectrum of people in society, Lawyers, association of lawyers, environmentalists, scientists, professors, groups and centers dedicated to environment protection and welfare forum. The courts have adopted a policy of appointing expert committees when they were not sure of the technical and highly complex questions of potential degradation of the environment.

In *M.C.Mehta v. Union of India*³⁸, the petitioner a lawyer environmentalist placed before the court the materials, which warned the damage of Taj Mahal from air pollutants. The Court observed that the Taj, apart from being a cultural heritage, is an industry by itself. More than two million tourists visit the Taj every year. It is a source of revenue for the country. This Court has monitored this petition for over three years with the sole object of preventing and protecting the Taj from deterioration and damage due to atmosphere and environmental pollution. It cannot be disputed that the use of coke/coal by the industries emits pollution in the ambient air. The objective behind this litigation is to stop the pollution while encouraging development of industry. The old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer. The development of industry is essential for the economy of the country, but at the same time the environment and the ecosystem have to be protected. The pollution created as a consequence of development must be commensurate with the carrying capacity of our ecosystems. The Court in this case elicited the expert opinions to direct relocation of industries from Taj Trapezium.

³⁷ AIR 1996 P&H 30.

³⁸ AIR 1997 SC 734.

The breadth of judicial activity in the *Taj Trapezium* case is unmatched. The Court supervised the installation of pollution abatement equipment; shut down violators; cajoled GAIL to pipe gas to the industries; urged development of a green belt around the monument; relocated industries; fashioned a labour compensation and entitlement scheme; expedited the construction of a highway to divert traffic away from Agra; prodded the government to speed up work on barrages that would revive the flow in the Yamuna; and generally monitored development activity in the Trapezium. The judgment vigorously applied 'precautionary principle'; casting the burden on industry to show that operating with the aid of coke/coal was environmentally benign.³⁹

The Supreme Court's scheme to clean the air in the Taj Trapezium was the introduction of natural gas to replace dirtier fuels such as coke and coal. On 31 August 1999 the court reviewed the progress in respect of gas supply to the Trapezium and directed 53 iron foundries, which had not agreed to accept the gas to close down. Seventy-eight iron foundries that used cupola-based technology submitted that despite their best efforts no reliable technology was available to convert their units to gas. These foundries claimed that the new technology was in the last stages of development and that they would switch over to natural gas as soon as the technology became available. The Supreme Court declined to accept the plea for an indefinite extension. The court directed the district magistrate to ensure that no coal or coke was supplied to the cupola-based foundries after 15 September 1999. The foundries were permitted to operate after they converted to natural gas.⁴⁰

In May 1999, the Centre constituted the Taj Trapezium Pollution (Prevention and Control) Authority under section 3 of the Environment (Protection) Act of 1986. The Commissioner, Agra Division, heads the Authority, comprising eight government officials. It has wide powers to implement schemes for protecting the Taj Mahal and improving the environment including necessary measures to ensure compliance with emission

³⁹ Supra note no. 20 at pp 268-269.

⁴⁰ *M.C.Mehta v. Union of India* AIR 1999 SC 3192.

standards by motor vehicles. The Authority is empowered to issue statutory directions under section 5 of the Act and initiate prosecutions under section 19.⁴¹

However, the Supreme Court is reluctant to entertain Article 32 petitions, which relate to local air pollution problems. For example, a public interest petition received by post alleging air pollution by a cement factory at Ariyalur in Tamil Nadu was directed to be sent to the Madras High Court and to be disposed of under Article 226 of the Constitution⁴².

Open spaces for recreation and fresh air were given priority over urbanization and development in many cases. The importance of park and setting up green belts is necessary for reducing air pollution in urban and industrial areas.

In *Damodar Rao v. S O Municipal Corporation, Hyderabad*⁴³ the Andhra Pradesh High Court held that open space was the lungs of a populated urban residential area and it could not be used for constructing government buildings. Such conversion of the land use would affect the right to life under Article 21 of the Constitution.

Later, the Supreme Court in *Banglore Medical Trust v. B.S.Mudappa*⁴⁴ prevented the use of open space for siting a private medical complex in Bangalore city. The court opined that open spaces for recreation and fresh air, ... are matters of great public concern and of vital interest to be taken care of in a development scheme.

The Bombay High Court followed the Supreme Court's decision with same vigour⁴⁵. The Allahabad High Court also in the case of *D.D. Vyas v. G.D.A.*⁴⁶ observed that in crowded towns where a resident does not get anything but atmosphere polluted by smoke and fumes emitted by endless vehicular traffic and the factories, the efficacy of beautifully laid out parks is

⁴¹ S.O. 350 (E) dated 17 May 1999.

⁴² *V.Subramanian v. Union of India* 1990 (Supp) SCC 775.

⁴³ AIR 1987 AP 170.

⁴⁴ AIR 1991 SC 1902.

⁴⁵ *Hariyan Layout Sudhar Samiti v. State of Maharashtra*, 1997 (2) Mah LJ 98.

⁴⁶ AIR 1993 All 57.

no less than that of lungs to human beings. A public park is a gift of modern civilization, and is a significant factor for the improvement of the quality of life. The Court, further, held that open space for a public park is an essential feature of modern planning and development, as it greatly contributes to the improvement of social ecology.

7.3. Vehicular Pollution Cases

These cases reflect the repetition of history in our country as, these problems were faced by many countries when transformation from the agrarian existence to industrial society took place. However, the Nation's way of dealing with the problem is always unique. Each society has its own unique way of dealing with the problem of pollution. The problem of vehicular pollution has also emerged with other problem of urbanization. Our apex court tackled this problem; it was indeed a painstaking job to regulate vehicular pollution.

In *M.C.Mehta v. Union of India*⁴⁷, the Supreme Court keeping in view the mandate of Articles 47 and 48A of Part IV of the Constitution, held that the law casts an obligation on the State to improve public health and protect and improve the environment and as such directions were used to tackle the problem arising out of chaotic traffic and vehicular pollution. The Court opined that it was by reason of the lack of effort on the part of the enforcement agencies; notwithstanding adequate laws being in place, the court has been concerned with the state of air pollution in the capital of India. The Quality of air was steadily decreasing due to lack of concern or effort on the part of governmental agencies. No effective steps were taken by the administration in this behalf.

The Court had directed the Delhi Administration to file an affidavit on 23 rd September 1986 and directed the Delhi Administration to file an affidavit specifying steps taken by it for controlling pollution, emission of smoke, noise, etc from vehicles plying in Delhi.

⁴⁷ AIR 2002 SC 1696.

It was through the intervention of the Supreme Court that certain measures were taken in controlling pollution to some extent. The measures were (a) lowering of sulphur content in diesel, first to 0.50% and then to 0.05%; (b) ensuring supply of only lead free petrol; (c) requiring the fitting of catalytic converters; (d) directing the supply of pre-mix 2T oil for lubrication of engines of two-wheelers and three-wheelers; (e) directing the phasing out of grossly polluting old vehicles; (f) directing the lowering of the benzene content in petrol; and (g) ensuring that new vehicles, petrol and diesel, meet Euro-II standards by September, 2000.⁴⁸

It was during the proceeding of the Court that an authority was constituted under section 3 of the Environment (Protection) Act of 1986, to be called the Environment Pollution (Prevention and Control) Authority for the National Capital Region (EPPCA). Acknowledging this step as appropriate and timely, the Supreme Court clarified that the jurisdiction of the new authority would extend to the entire sphere of environmental pollution problems faced by the National Capital Region, not just vehicular emissions.⁴⁹

The court considered the Report of Bhurelal Committee and selected CNG as an alternative fuel to diesel. The Court fixed the time limit within which the switch over to CNG was to take place on 28th July 1998. The court referred to the order dated 21st October 1994 where it had observed-- "on an earlier occasion when these matters came up before this court it was suggested that to begin with of Government vehicles and public undertaking vehicles including public transport vehicles could be equipped with CNG cylinders with necessary modification in the vehicles to avoid pollution which is hazardous to the health of the people living in highly polluted cities like Delhi and the other metros in the country."

On 28 July 1998 the court yet again expressed distress at the apathy of the state, but this time followed the litany with sweeping directions to axe New Delhi's obsolete commercial fleet. All commercial vehicles including taxis,

⁴⁸ 1999 (6) SCC 14.

⁴⁹ *M.C.Mehta v. Union of India* AIR 1998 SC 617 and 773.

which were 15 years old, were ordered off the road by 2 October 1998. The court also endorsed a time frame fixed by the EPPCA for eliminating leaded petrol; converting autorikshaws, taxis and buses to clean fuels; reducing the age of the commercial fleet; and strengthening the clean-fuel distribution network.

The Court also required all private vehicles registered after 1 June 1999 to conform to Euro I norms and those registered after 1 April 2000 to meet the Euro II norms. Diesel taxis were prohibited in the NCR unless they conformed to Euro II norms. The Euro norms are European Community standards that have been enforced across Europe. On 13 May 1999,⁵⁰ the court clarified that what it meant by the 'Euro I norms' were the India 2000 norms, notified by the Central Government on 28 August 1997. In other words, the court advanced the statutory emission norms that were to come into effect on 1 April 2000 to 1 June 1999; and introduced more stringent emission standards (Euro II) with effect from 1 April 2000. The Euro II norms were re-christened 'Bharat Stage II' standards by the Central Government and were notified through the Central Motor Vehicles (Third Amendment) Rules of 2000.

Even though the time for phasing out diesel buses had expired but in view of the situation created by the Government or not cooperating or complying with the courts order, a different formula has to be worked out so as to cause as little inconvenience to the traveling public as possible, while at the same time punishing the wrong doer. Directions are, therefore, to be issued regarding the lifting of 1500 buses plus phasing out of 800 buses per month. The permits to be given are to be time bound and the continued operation of the diesel buses till they are replaced would require them to pay Rs 500/- per bus per day for 30 days of operation and thereafter Rs 1,000/- per day and the same is to be deposited with the Director of Transport, Delhi.

Lack of adequate supply of CNG has been a cause of concern and has been referred to in the various orders passed by this court from time to time. In the absence of proper response from the governmental authorities, there is no alternative but to issue the following directions:

⁵⁰ 1999 (6) SCC 14.

The Union of India will give priority to transport sector including private vehicles all over India with regard to the allocation of CNG. This means that first the transport sector in Delhi, and in the other air-polluted cities of India.

I.A. of the Union of India for extension of time to run diesel buses is dismissed with costs of Rs 20,000/-. The NCT of Delhi shall phase out 800 diesel buses per month starting from 1 May 2002. Allocate and make available 16.1 lakh Kg per day (2 mmscmd) of CNG in the NCT of Delhi by 30 June 2002 for use by the transport sector.

7.4. Noise Pollution

The Environment (Protection) Act of 1986 (EPA) recognizes noise as an environment pollutant and empowers the Central Government to frame rules prescribing the maximum permissible limits for noise in different areas. On 14 February 2000, the Centre framed the Noise Pollution (Regulation and Control) Rules. Two types of noise standards are prescribed: Ambient air quality standards in respect of noise and emission limits for designated types of machinery, appliances and firecrackers. Separate ambient levels are fixed for industrial, commercial and residential areas and silence zones.

The 1987 amendments to the Air Act specifically extended the provisions of the Air Act, including increased penalties and the issuance of injunctions by magistrates, to noise pollution. The definition of 'air pollutant' was expanded to include noise. Besides the central statutes, local municipal legislation and the police Acts also regulate certain types of activity, which generates noise. For example, in several states regulations governing the use of loudspeakers are framed under the local police Act.

*Rabin Mukherjee v. State of West Bengal*⁵¹ is an important case in the field of noise pollution. This case specifically deals with noisy electric and air horns used in buses and trucks. In this case writ application was moved by the petitioners for protection of their own rights and also in public interest being aggrieved by the nuisance and noise pollution which are being created by the

⁵¹ AIR 1985 Cal 222.

transport operators by indiscriminate installation and use of electric and artificially generated air horns which cause unduly rash, shrill, loud and alarming noise. In the writ petition, the petitioners prayed for a writ in the nature of mandamus commanding the respondents to enforce the provisions of the Bengal Motor Vehicles Rules, 1940 and to enforce the restrictions against the use of such electric and other loud and shrill horns including air horns by the operators of transport vehicles. In this case Rule 114 (d) of the Bengal Motor Vehicles Rules, 1940 was involved which provides that every transport vehicle should be fitted with a bulb horn. The Hon'ble Justice stated that considering the facts and circumstances of the case and considering the mandatory provision of Rule 114(d) of the said Rules and considering the fact that in a congested State like the State of West Bengal, sudden blowing of such horn by transport vehicles produces rude shock in the human system and is acknowledged to have serious effect on various aspects of human life including blood pressure, mental and nervous system

The court directed the transport authorities to strictly enforce the provisions of the Bengal Motor Vehicles Rules, which restricted the use of loud and shrill horns.

In *Om Birangama Religious Society v. State*⁵² the petitioner prayed for a mandamus directing the magistrate to accord the necessary permission under the Police Act to permit the use of microphones and loudspeakers during daily pujas and other religious activities. In this case the concept of reasonable restriction was discussed. Article 19(1)(a) provides fundamental rights on all citizens to freedom of speech and expression and that this right is only subject to restriction imposed under Article 19(2) of the Constitution. Justice Banerjee used the case to frame detailed guideline for the issue of loudspeaker permits and asked the authorities to accord permission in accordance with guidelines.

⁵² (1996) 100 CWN 627

The Kerala High Court in *P.A. Jacob v. Superintendent of Police*⁵³ opined that the fundamental right to freedom of speech guaranteed under Article 19(1)(a) did not include the right to use a loudspeaker.

In *State of Bombay v. Narasu Appa Mali*, the court observed that religious ceremony nowhere provides that on religious festival days loudspeaker is a must without which festivals cannot be observed. The prayer to grant permission to use loudspeaker during Navratri festival was not granted. The court held that such permission would violate the Environment Act and Rules.

In *Savla and Associates v. National Capital Territory of Delhi and others*⁵⁴ the petitioner carrying profession of Advocate and Solicitors, brought an action for the problem created by some car mechanics that were operating from the pavements/ road in the close vicinity of the office premises and thereby causing nuisance. The creation of noise and ruckus by heavy instruments as big hammers used for denting and painting continuously just below the office of the petitioners jolts the entire office staff of petitioner out of concentration. Therefore, the petitioner brought an action under Section 25 and Rule 6 of Noise Pollution (Regulation and Control) Rules 2000. The court looked into the seizure of vehicles by Police under section 283 of Penal Code in pursuant to complaint of the petitioner and the High Court the Municipal Corporation to adhere to removal of the encroachment and take action as an when called for.

Some cases on noise pollution have been discussed under the Chapter of Constitutional Provisions. We find the courts have given instruction from time to time to control noise pollution. The society should become aware of the consequences of noise pollution. We still find loudspeakers being used everywhere during religious ceremonies. The difficulty still lies with implementation.

7.5. Review Power of Appellate Authority under the Air Act

⁵³ AIR 1993 Ker 1.

⁵⁴ AIR 2003 Del 73.

In *Manoj Kumar Roy v. Appellate Authority*⁵⁵, the question whether, an authority vested with quasi-judicial and administrative powers reviews its own decisions even if the statute does not confer such a review power on it? The petitioner's grievances was brought before the Calcutta High Court where the petitioners were compelled to bring a Complaint before the Pollution Control Board due the noise and air pollution caused by huge air conditioning machine installed in the showroom of Digjam, close to their building. A division bench of the Supreme Court, also known as 'Green Bench' accepted the suggestion of one of the parties in that a cooling tower should be built at the top of the building where the air conditioners have been installed to avoid emanation of hot air from two air conditioners.

The High Court opined that in the context of the clear proposition laid down by the Supreme Court, it is difficult for this court to accept the contention that the power of review of the state appellate authority must be implied from the power of review given to the national environmental appellate authority under express statutory provision. The power of review has to be expressly conferred or the same should appear by way of necessary implication from the language of the statute. The same cannot be conferred by way of a side wind on the basis of certain observations, which are made in a judgment in which the power of review is not even remotely discussed. All that has been stated in the Supreme Court judgment was a mere observation of the Supreme Court on the necessity of immediate constitution of an appellate body and nothing else.

7.6. Conclusion

It is concluded that the judiciary has tried to taken painstaking job and menace of Air pollution. We can find the despair of the Supreme Court in several cases like *M.C. Mehta v. Union of India* (vehicular pollution case) where the courts directions were not complied with in the same spirit, as the court had desired. In some case like *Taj Trapezium* case the court could succeed in taking appropriate measures.

⁵⁵ AIR 2002 Cal 216.

From the above discussion it becomes quite apparent that the matter of control and management of air pollution has been given primary importance only in the Air Pollution Control Act of 1981. All prior laws, which find certain provisions having a bearing on the subject, were codified with the primary objective of regulating factories, industries, mines and boilers etc. The matter of control of air pollution has been given only secondary importance in these earlier enactments.

The legislative measures can succeed only through the involvement of the industries and the people. An aware and informed public opinion can play a positive role in promoting environmental pollution control programmes to help supplement official efforts to check the dangerous increase in the level of air pollution. Hence, the courts have rightly opined that the common man should be given education so that he can make his individual positive contribution towards control of pollution. Further, it is very necessary to arouse civic consciousness by introducing the subject of environmental issues in educational institutions; through radio, television, newspaper, periodicals etc.

Even traditional methods like puppet shows performance in local language etc should be adopted in rural areas to educate those rural people who are totally unaware of the consequence of pollution. Similarly, contribution can also be made by the industries both in financial as well as physical terms. They themselves can take the measures for the control of pollutants by introducing built-in-systems and thus can involve themselves for the solution of the problem by joining with local and other appropriate authorities. The industries should be encourage to undertake social responsibilities, this can be done by announcement of awards by the Government to those industries who have maintained the environmental norms and have contributed towards eradication of air pollution by maintaining green belt and other devices.

In the context of air pollution, it is also a fact that some people will be more sensitive than others to a given amount of pollution. For example, people with pre-existing chronic bronchitis, emphsema, or asthama suffer more when the sulphur oxide and particulate levels go up. than people without these

diseases. Therefore, initiative should be taken while controlling air pollution, to protect the more sensitive groups from being unduly affected by a level of air pollution or any other environmental insult.

The provision under the Air (Prevention and Control of Pollution) Act 1981 have failed to bring the expected control of air pollution, mainly due to the failure of enforcement agencies in enforcing properly and effectively the existing legislative measures rather than the absence of effective legislative provisions. The main reasons for such failure are:

- (i) Failure of different bodies entrusted with the enforcement of air pollution control law, to act or to act in concert and co-operation.
- (ii) Lack of aware and informed public opinion.
- (iii) Lack of political will.
- (iv) Lack of money, technical knowledge and personnel.
- (v) Inadequacy of penal provisions in the Air Act 1981.

Further, there are no arrangements to orient and train the existing staff in the municipal bodies and the Pollution Control Boards for the purpose of undertaking conscious pollution control measures.

Air Pollution is a social problem not of a particular community or locality but of the public at large. Everybody is affected by this problem. The consequences of disturbance in ambient air quality are known now. It cannot be disputed that the industries, vehicles are other day-to-day activities with the help modern gazettes emit pollution in the ambient air. If this process continues the day will come when people will be gasping for fresh air. There should be effort made to stop pollution of air before it is too late. We must stop pollution while encouraging development. Since development is essential for the economy of the Country. Our policy should adhere to the concept of sustainable development.

The efficiency and aggressiveness of our courts would certainly be increased if we create an autonomous body i.e. National Environment Protection Council (NEPC) comprising of experts having high degree of scientific and technical knowledge. The suggestions of these experts and their

neutral scientific expertise would help the courts reach a better and faster decision in each case as it would provide a good input for judicial decision-making.

Our courts, by various judgements, have given birth to a new right i.e. a right to have clean environment. This right has to be placed in our Constitution. The Supreme Court had already held in the case of *Subhash Kumar v. State of Bihar*⁵⁶ that the right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of life. The right of enjoyment of life must include the right to have a clean environment. This right can be described as: All citizens shall have the right to clean and healthy environment through out the territory of India. Nothing in this Article shall prevent the Parliament from making any law imposing reasonable restriction only in the extra ordinary circumstances and in the interest of general public.

It is not an easy task to revive the average citizens sense of responsibility and wholehearted participation to curb the menace of air pollution. But we must put in hard work to make all members of the society aware of the pollution of atmosphere. Man had started polluting the atmosphere slowly from the day he invented fire. It is time that people should realize how important it is to preserve the ambient air quality. The legislature, executive and the judiciary along with the voluntary organizations and all the agencies of social control must join their hands and work hard within the given constraints to curb the problem of air pollution.

⁵⁶ AIR 1991 SC 424.

CONCLUSION

The concern for preservation and betterment of environment has gained attention all over the world for the last few decades, when it became clear that natural wealth of a nation is not unlimited. After the Stockholm Declaration in 1972, the nations throughout the world started giving priorities to laws by way of their legislative agenda. India being a signatory was energized to frame laws relating to control and prevention of pollution in the environment.

Certain notable air pollution episodes like the poisonous smog of London, the killer smog of Donora, Meuse Valley disaster, Belgium, Bhopal gas tragedy in India, posed an international concern on the major thread on the world by air pollution. In India, although the legislative measures on air pollution was passed in the year 1981 under the Air (Prevention and Control of Pollution) Act; it became a matter of great concern after the Bhopal gas leak disaster. To prevent and control air pollution, there have been legal principles and provisions which have evolved from common law principles and other laws existing in Indian jurisprudence. Prior to the enactment of the Air (Prevention and Control of Pollution) Act 1981, scores of legislations have been passed, some of which are still enforced. An analysis of certain portions of these legislation are required to understand how far the Acts are effective and what more is required to be incorporated into these Acts to prevent Air pollution to include all aspects other than those dealt with under special legislation.

On analysing of the provisions of Indian Penal Code, 1860 an earliest legislation dealing with public nuisance, one finds that the Code specifically mentions that making the atmosphere noxious to health is an offence punishable, with a fine that may extend to five hundred rupees. This section is potential against the offenders who might be creating pollution by

impregnating the air in the cities or other places with noisome and offensive stink and smell held to be common nuisance. Public smoking of tobacco was held to fall within the mischief of Penal provisions relating to Public nuisance. These petty offences when taken together bring into a major problem and therefore, can be penalized under the Indian Penal Code. However, the punishment provided is meager for potential polluters and incapable of controlling the gigantic problem of air pollution.

The Criminal Procedure Code 1973, under Section 133 provides to control the problem of Public nuisance. It is an emergency provision which can be called in aid to remove public nuisance caused by effluents discharge and air discharge creating risk to the general public. The overriding effect of the Special Act have been resolved by the Court, where it has been observed that by virtue of the promulgation of the Air Act and Water Act, the provision of other Act will not be effected rather only those portions will not be applicable which are inconsistent with the provisions of the Special Act. The Code can be used to ensure the maintenance of law and order to prevent any nuisance instead of providing any substantial relief to the victims.

The law of easement guarantees beneficial enjoyment to the owner of a land, free from air, water and noise pollution, without disturbing the natural environment. The right to pollution free passage of air and comfortable living has been given to the owner of a land under the Indian Easement Act 1882.

The control of air pollution being one of the aspects related to the safety and health of community also brings the prevention of air pollution under the objects of the Police Act 1861. Though there is no direct provision dealing with the problem of Air pollution, section 34 may be mentioned where power has been conferred upon police officer for punishing certain offences on road etc. The Act empowers the police officer to take into custody, without a warrant who has caused any offensive matter seen from any house, factory dung heap and the like. The Act no doubt controls the spreading of obnoxious smell by throwing filth or dirt in public places, but there is no provisions for smokes released by the use of wood or coal fires and heating in the densely populated

area where the shops and residents often create a thick pall at air pollution. Inclusion of the aforesaid subject under section 34 would help to curb pollution of air provided the fine not exceeding Rupees fifty is enhanced by an amount to create a deterrent effect. The aspect of noise from loudspeakers and sound magnified devices is covered under the Police Act, where noise arising for music may be effectively dealt with recourse to section 30(4) of the Act. However, the aforesaid provision of the Act is quite inadequate as it merely meets the problem of musical noise on occasions of festival and ceremonies in public places, but is silent when such noise is caused from private premises throughout the day on occasion other than festivals and ceremony.

The Factories Act 1948 and the Workmen's Compensation Act 1923 are social piece of legislation meant to give relief to workers engaged in factories and establishment. The Workmen's Compensation gives relief to a person from an employer for any injury or disease caused during the course of employment. The Supreme Court has pointed out the importance of clean air at workplace and directed all the asbestos industries to be bound by rules "safety" in the use of asbestos issued by International Labour Organization. The elimination of air borne particles of asbestos from the working environment in appropriate concentration as recognized by the competent authority was directed by the Supreme Court to be followed by the employers. Smoky factories often create air pollution at work place. Chapter three of the Factories Act provides for maintenance of proper environment of work in factory.

In 1987 new provision under section 36 have been incorporated where the conditions are imposed to avoid the risk caused by gas, fumes, vapour and dust in any confined place. After the Bhopal disaster the public opinion emerged to the effect that hazardous processes should not be allowed to be installed in the residential areas of the cities and towns. If such factories where already existing, effective measures should be taken to control their working as far as practicable to minimize atmospheric pollution or avoid chances of dangerous industrial accidents causing adverse effect on society. Due to such state of affairs in 1987 the provision relating to hazardous processes have been

inserted in Chapter IV-A. Under section 41-A, a site appraisal committee for initial location of a factory involving hazardous processes was required to be appointed by the State Government to advise the state Government in the process of granting permission to such factories. The offences under the Act are not a part of general penal law but arise from the duty provided in a beneficial, social defense legislation, which creates absolute or strict liability.

The Mines Act 1952 provides the provisions for regulation for industries and mines. The rules under the Act cover the powers of Government to restore abandoned mines to prevent pollution. The Act should also contain some effective provisions to control pollution of atmosphere by dust particles through the method of using sprinklers to put water and the noise during blasting of mines should also be controlled.

The Insecticides Act, 1968 contains provisions to check hazards caused to the atmosphere due to aerial application of insecticides. The rules for preventing inhalation of toxic dust, vapours and gas are important to curb the hazards caused by air pollution. The Rules 36, 37 and 44 provide certain preventive measures relating to storage of insecticide, medical examination of all persons and segregation and disposal of pesticide in an environment friendly manner. The Act is found ineffective until and unless certain pesticides found hazardous to health are banned and proper steps are taken to check maladies caused by using of pesticides without caring for side effect on environment. The Central Government has set up Environment Pollution Advisory Board in Ministry of Agriculture to review from time to time the environment repercussions and to suggest measures wherever necessary. This Committee is required to work effectively to take suitable measures to check the contamination of air and water by use of pesticides because people can avoid huge doses of insecticide but it is impossible to avoid exposure to contaminants in food, in air and in drinking water. Atomic Energy Act help to prevent radiation hazard from radioactive substances or radioactive generating plants.

These legislations give us an impression that the sources of air pollution are many and there have been different legislative measures for different

sources and different activities. The direction of these legislations should be towards a common goal i.e., to curb the menace of air pollution. The authorities under these different Acts are also different. A proper coordination amongst these authorities are required to achieve success towards the protection from air pollution.

On analyzing the provisions of the Air (Prevention and Control of Pollution) Act 1981 the definition under section 2(b) the term 'air pollution' is found to include as any substance or element in the air present in a concentration more than a certain value which may affect man, other living beings and property. The Act defines "air pollutant" under section 2 (a). The term "air pollutant" means any solid, liquid or gaseous substance(including noise) The definition puts stress on two things (i) the high concentration of solid liquid or gaseous substance including sound at a very high pitch (known as noise) and (ii) the substance should tend to be injurious to human beings, flora, fauna, property or environment. Therefore, small quantities of pollutant as it is considered to be within the permissible are tolerable limit under the Act. It is interesting to note that most pollutants which are released in permissible limit are considered not to be deleterious or injurious to the health of human beings, fauna, flora, property or environment and keeping it in mind the legislation endeavors to maintain pollution only to outdoors i.e. ambient air. However, the definition does not include indoor air pollution and it is only concerned with the outdoor air pollution or ambient air.

Therefore the fumes in the kitchen, smoking in closed office rooms maladourous emissions in the auditorium are not covered under the definition. Unfortunately, it is seen that most of the people spend more than 90% time in their homes, educational institutions, offices and theatres. If the indoor air quality is not maintained it will also have grave effect on the public health. Certain legislative provisions are required to be incorporated in the Act to maintain Indoor Air Quality as well. These may include compulsory planning of houses to maintain proper ventilation in urban area. Similarly in rural areas the person remaining at home in a pall of smoke during cooking and other

domestic cores should be made aware of the consequence of such pollution. They should be encouraged to use alternative non-conventional source of energy under the Air Act.

Going through the provision relating to the constitution of the Board, it is found that the authority under the Central Pollution Control Board constituted under section 3 of the Water Act has also been entrusted to perform its functions for the prevention and control of air pollution. The Administrative core of the controlling authority has raised objections because of the reasons mentioned below. It is interesting to note that in the water Act of 1974, Central Board was formed with the object of controlling water pollution. The chairman of the Board is required to have special knowledge or practical experience in respect of matters relating to the use and conservation of water pollution. The Board, for performing the functions of the Air Act, does not include any person having special or practical knowledge on the prevention and control of air pollution. Since the technical organization to control air pollution requires different technique it would be proper to include or add a person having special knowledge relating to air pollution in the Board and similar provision is suggested for the state Board constituted under the water pollution Act.

It can be pointed out here that the members of the Board represent the Government, local authorities, industries, government undertaking etc the composition of the Board neither includes persons from technical organization who could undertake suitable technique for control of the pollutants at source nor does it include legally trained persons who could bring the machinery into action. It may be further suggested that the increasing pollution in India requires the Boards to be made more powerful. This is possible only when the members are nominated in the Board through on honest endeavor such members must be persons having sufficient knowledge on sustainable development and also have on urge towards development by balancing it in term of environment. There are situations when the state Board becomes reluctant to check air pollution in these circumstances there must be agencies formed through people representative to

look into the function of the state Board and draw the attention of the central Board in such circumstances. Similar provision should also be incorporated for central Board if it fails to come forward to exercise its authority

The Board shall also have the function to inform the public about the rate of surface air pollution and ambient air quality from time to time, like any meteorological report. In order to enable people to protect the environment from being polluted more and more. It will also enable the public to take care of health by undergoing health check up, in those places where the ambient air quality has deteriorated. This would also make the people conscious and enable them to take measures to reduce the pumping or pouring of more pollutants into the atmosphere. Such on information would enable people to take precautions by all possible means. The provisions of freedom of Information Act, 2002 must be complied with, to enable every citizen to secure access to information to oversee the public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration. One must keep in mind that the environment around is also another home where we live in and it would be a prime duty of every individual to keep it clean. In 'Stockholm Declaration' too it is mentioned that every individual bears a solemn responsibility to protect and improve the environment for present and future.

Declaration of Pollution Control Area is provided under section 19 of the Air Act 1981 which helps to deal with the major regulatory mechanism contemplated by the Act. The provision to declare any area to be "air pollution control area." Sub section (1) empowers the 'state Government,' in consultation with the State Board, to declare any area or areas within the state as air pollution control area/areas for the purposes of the Act. Such declaration will be made by notification in the official Gazettes in such manner as may be prescribed by the rules made under the Act.

It is pertinent to note that though the concept of 'Pollution Control area' is the focal point of the whole framework of the Act, the term has nowhere been defined in the Act. It is relevant to know that even though this

omission was pointed out in the course of the Rajya Sabha debates, no steps were taken to overcome the shortcoming. The Act also lays down no guidelines regarding the standards that qualify an area to be designated as a Pollution Control Area. Further, it may be pointed out that unlike the other sections in the Act, the applicability of this section, extends to not only pollution control area, but also to areas not being so designated and the significance of the section lies in the fact that it empowers the board to take action even in cases where pollution is 'apprehended to occur.' While selecting a site from the point of air pollution control, the following factors should be taken into consideration to avoid costly control measures, improve public relations and prevent litigations.

In general, while considering each possible site for location of a plant, the site advantage vis-a-vis the out of control air pollutants should be carefully investigated.

A pre-operational survey is recommended if a new plant is to be located in an area which is already industrialized, to know the existing level of contaminants, under prevailing meteorological conditions. This type of survey gives an idea regarding the nature of pollution due to existing industries, i.e. whether the existing level of pollution is high, medium or low. The results of such a survey with respect to known operational data on the magnitude of contemplated emissions from the new sources, would provide information on the extent to which waste products could be safely discharged into the atmosphere without resulting in too much contamination.

The knowledge of the specific effects of the major pollutants and land use of the area surrounding the site is necessary for site selection. The effects of contaminants likely to be discharged from the proposed industrial plant is important, in particular, from the point of its effects on human health, animals and damage to crops. A particular pollutant discharged may be more toxic and harmful to vegetation and animals than to people for example Hydrogen sulphide has little effect on vegetation but is obnoxious and even dangerous to human life in comparatively low concentrations while a rural

and predominantly agricultural area is more affected by fluorides and sulphur dioxide than an urban population.

In order to minimize air pollution problems by site selection the prime factors, which have to be considered, are the climate and meteorology of the location under consideration. The dispersive ability of the air at each possible site has to be determined. Meteorological factors should be favourable for the air to dilute the pollutional load down to acceptable levels of contamination. The ideal site for location of an industry is a level terrain in a region where the average wind speed is of the order of 16 km/hr. or more and where temperature inversions rarely occur.

The adverse influence of topography and whether factors in relation to pollution control should be carefully considered, and critically examined, before selecting a site for a new industrial plant. This is because air movement is greatly influenced by the topography in the neighbourhood of site under consideration, like valleys, mountains etc.

Where supply of clean air is an essential requirement for some industries and factories, this aspect has to be looked into for site election. The industries and factories dealing with the manufacture of transistor, electronic components, antibiotics, and vaccines require clean air for manufacture. Also clean air is required for cooling the reactors of atomic energy plants and if polluted air were used, the impurities present would become radioactive and their escape into atmosphere would create a hazard. The location of industries in areas heavy air pollution will materially add to cleansing the air.

To control air pollution proper planning and zoning of industrial areas and residential areas can play an important role. Residential areas and certain heavy industries should not be located too close to each other. It is always better to have green belt between industrial and residential areas. The concerned municipality of the industrial area should encourage the creation of green belt. While selecting site for location of any plant the norms of the Environment Impact Assessment must be done. For selecting such a site it should be mandatory to take into consideration the opinion of the public

through public participation according to the Environment Impact Assessment Regulations 1994.

The Air Act under section 20 mentions about the pollution caused by vehicular traffic is required to be controlled and for this purpose the provision under section 17(i) (g) should be complied with. In this regard, the state Government is empowered to give such instruction as may be deemed necessary to the authority, in charge of motor vehicles under the Motor Vehicles Act, 1988 and such authority shall be bound to comply with such instructions. It may be mentioned that the Air Act as its caption suggests deal with any activity that pollutes the air and as such provides for steps and measures for dealing with such activities, namely, the industries, vehicles etc. But once we dwell upon the Act we will find that taking into consideration the various industries and their polluting factor the pollution in totality is not considered in the Act. There is little more than one section in the whole Act that mentions the pollution of vehicular traffic. This provision is also not an active provision, which acts as an instrument to penalise the erring vehicles. This section only confers upon the state board in consultation with the Central Board, the power to prescribe standards for emissions of air pollutants from vehicles and the state Government in consultation with the state Board is empowered to give instruction to the registering authority of vehicles in order to comply with the standards laid down by the state Board.

The specific section or sections related to vehicular pollution is section 17(i) (g) which states that it is the function of the state Board or rather it is the power of the state Boards to lay down in consultation with the Central Board, standards for emission of air pollutants into the atmosphere from industrial plants or automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft. This section seems to be more substantive in attaining the object of preserving the quality of air and preventing and controlling vehicular air pollution. By virtue of these sections the State Pollution Control Board in simple prescribes Standards for emission of air pollutants from vehicles (automobiles). These

standards vary from place to place, urban areas have much higher standards as compared to the rural areas because of the density of traffic and such standards are followed more stringently in cities than in small rural towns. The state Government in consultation with the state Board gives such instructions as may be deemed necessary to ensure that such pollution standards are complied with. These instructions are given to the Transport authorities such authority shall, notwithstanding anything contained in that Act or rules made there under, be bound to comply with such instructions. However, the process does not deal the problem of vehicular pollution effectively due to the involvement of many authorities, who might fail to have proper coordination. The provision must incorporate some person to look into proper coordination and also to provide more deterrent penalty for polluting air by vehicular exhaust.

The Hot Mix Plant case gives an the impression that the Court here has tried to balance the environmental problem with the necessity of running an International Airport in the Capital of India In doing so the Supreme Court has also directed that the Hot Mix Plant set up by a company shall be examined by Central Pollution Board on environmental feasibility that the main opposition was from M.C.Mehta. The case created doubt in the mind of people as that why the Central Pollution Control Board was not putting forward the issue like the USPA? Why was it reluctant in exersing its power or putting forward all the materials available for having clean air around as? This Halfhearted attempt of the Central Pollution Control Board also would create doubt on its report; it shall perform in ascertaining environment feasibility of the Hot Mix Plant. It may be suggested here that there should be certain monitoring agencies to vigilate on the reports submitted by the Board. There are other cases where we find that state Board is at times not performing its duty properly. There must be some checks and balance for assessing the words of the Board .If the work of development by the Statutory authorities are being performed properly the problem of curbing pollution

would be properly done. The steps taken for curbing pollution must be more effective.

Section 31-A empowers a Board to issue any directions in writing to any person, officer or authority. This section provides, notwithstanding anything contained in any other law but subject to the provision of this Act, and to any direction that the Central Government may give in this behalf, a Board may, in exercise of its powers and performance of its functions under this Act, issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions. This section is effective in controlling air pollution as the Board is armed with unrestricted power to take necessary action without delay.

The provision under the Air (Prevention and Control of Pollution) Act 1981 have failed to bring the expected control of air pollution, mainly due to the failure of enforcement agencies in enforcing properly and effectively the existing legislative measures rather than the absence of effective legislative provisions. The main reasons for such failure are:

- (i) Failure of different bodies entrusted with the enforcement of air pollution control law, to act or to act in concert and co-operation.
- (ii) Lack of aware and informed public opinion.
- (iii) Lack of political will.
- (iv) Lack of money, technical knowledge and personnel.
- (v) Inadequacy of penal provisions in the Air Act 1981.

The initial legislative approach was fragmented and piecemeal. These legislations aimed at controlling specific types of pollution rather than preserving and protecting environment in totality. The necessity for a comprehensive legislation with integrated approach towards environmental protection was felt and it was adopted in the form of Environment Protection Act, 1986. The Act provides a law that covers not merely land or water or air but all the aspects of the environment. It may be pointed out here that the

Bhopal Gas Disaster 1984, was also another incident, which brought about the need for a comprehensive legislation dealing with the environment as a whole.

The Environment (Protection) Act 1986 has enacted to give effect to the solemn resolutions at the 1972 Stockholm Conference on Human Environment. The predominant characteristic of the Environment Act is the centralization and the concentration of all power in one authority, the Central Government. The authorities constituted to implement the environment are also subject to the supervision and control of Central Government. The vesting of such authority is advantageous in one respect but is also not above criticism. It helps in formulation of a National environmental policy and its implementation at the national level. Yet, it is criticized for undue centralization as it may lead to serious undesirable consequences and the Central Government may fail to consider vital environmental impact assessments while formulating plans and programmes and making decisions in its enthusiastic and rapid race towards development. Even if it chooses to appoint officers and confer upon them powers under section 4 of the Environment (Protection) Act, there is no guarantee that they will have functional freedom. This is so because they are made subject to general control and direction of Government. Even delegation of powers and functions by Central Government to any officer by Central Government to any officer, State Government or other authority may not bring about different results.

This Act is said to be a more effective and bold measure to fight environmental pollution. The Act has adopted a new stand with regard to the question of locus standi so that now even a citizen has right to approach a Court. Section 19(b) requires such person to give a sixty days notice, this aspect is criticized as an 'eye wash' because sixty days notice enables the polluter to continue pollution for sixty days and the sufferers or persons concerned have no alternative than to wait helplessly. It also allows the offending industry sufficient time to clean up. Therefore, most concerned

citizens or groups prefer to obtain redress through PIL and this provision remains like a vestigial organ.

The Act strengthens penal provisions, but contains a provision that takes away this deterrent effect by providing if the concerned act or omission is an offence under any other Act, the offender can be proceeded under that Act. Therefore, if any punishment is to be imposed for air pollution the provisions of the Air Act are to be taken into consideration and not the Environment (Protection) Act. Therefore, since the provisions of the Air Act do not lay much emphasis either on imprisonment or fine the offenders are being persuaded and not penalized under the Air Act. This takes away the life out of this enactment.

The Act has also failed to make any provision to provide for effective participation by individuals and voluntary organizations in development of an environmental policy and enforcement of emission standard. There should be provisions for public scrutiny over a project, as it will provide an opportunity for all concerned to study, assess and express their views on environmental consequences of the proposed actions. Some who would put forward an argument that the public may be ignorant of technical issue involved may oppose this type of public participation. The attitude that the public should not be unduly alarmed by probability of future danger involved in a project has actually been used to conceal relevant and vital information from public. This phenomenon has in returned aggravated the problem of pollution. The expansion of health ailments, respiratory and other diseases are increasing day by day. The authorities entrusted with the work can no longer be permitted to sit back with folded hands. The raise in the respiratory ailments, including lung cancer hovering over more than half of the city's school children in Calcutta and other metropolitan cities gives the reflection that nothing has been done to reduce pollutants from the city's air. Therefore, it is the people or innocent children who are the immediate victims of environmental hazards. Inevitably the Right to information is kept away and it may be pointed out that concealing relevant information would

not leave the public remain unaware of the facts. The legislature should encourage public participation to guarantee fairness and resolve the problem of pollution through effective means. Therefore, Government should disseminate environment information as a matter of legal right of individuals and also by way of environmental education to the people. The policy should also put more stress on the air pollution because if the pollution of atmosphere occurs in a rapid pace, the day would not be far when we would find people gasping for breath in the metropolitan cities. The more vulnerable to atmospheric pollution would be the children because their lungs are at a formative stage and they inhale more air relative to their body size. Further, due to their height they are close to ground level and more exposed to pollutants. A study conducted by Chittaranjan National Cancer Institute shows that 52% school children's in West Bengal were suffering from respiratory ailments. This situation is alarming. It shows how recklessly we are violating minors Oposa's theory of intergenerational equity and responsibility. Before the condition worsens both the Environment (Protection) Act and Air Act should work in consonance and have punitive measures imposed for violation of the emission standards and other standard to maintain ambient air quality. One of the defects of the Environment (Protection) Act is that it fails to provide for an independent statutory agency. The Environment (Protection) Act should also be amended to provide provisions for enforcement by taking adequate help from the specialized agencies performing tasks under the Environment Impact Assessment Regulations of 1994.

The Act is required to impose punishments to deter people if any law is silent and it should not provide for opting to the special legislation of the other Act, if the punishment specified in that Act has less severe penal provisions. Scanning of existing laws on air pollution therefore, reveals that the laws are guided by the principle of sustainable development, where balanced between economic development and environment concerns is to be made. The law partially lends credence to public participation. However,

legal propensity remains neither towards substantive nor procedural participation. The enforcement and inspectorate mainly State Pollution Control Boards and environmental authority are delegated with powers to undertake all measures to protect and improve environment. The slackness coupled with woefully understaffed machinery exhibits negligible records in actualizing the objects in these laws. It is under this backdrop public has been empowered to complain to Board by giving affording 60 days prior notice. While granting license the Board is not under a duty to solícite public opinion regarding environmental enignity of industries. The 1988 amendment to Water & Air Act has provided a fillip to public participation in activating the machinery of court.

The Environment Protection Act empowers the Central Government to make rules by exercising the powers conferred under section 6 and 25. In pursuant to this power the Environment Protection Rules 1986 and the other rules on noise and ozone have been passed for controlling air pollutants. The rules framed for control of noise pollution is Noise Pollution (Regulation and Control) Rules 2000. Ozone Depleting Substances (Regulation and Control) Rules 2000 was framed keeping in mind the principle of Right to Development which lays emphasis that the Right must be so fulfilled as to equitably meet development and environmental needs of the present and future generations. The Rules prohibit the use of ozone depleting substances.

In the entire sphere of power and functions of the Boards the general public and environmental action groups have not been made a working partner. The Air, Water and Environments Acts generally assign power to Boards to plan Nationwide programme by laying down of standard of quality activising State Government with respect to suitability of localities of industries and to take all measures which are expedient for control of air pollution. In Identification, demarcation and declaration of air pollution area the State Government is only supposed to consult State Board. Such an important step is to be taken without any public feedback and hearing. So much so while granting consent, the Board is not under a duty to solícite the

opinion of voluntary groups and local people. This is equally true in case of watch and vigilance.

Environmental laws are many. In spite of so many laws, the implementation process is moving at snail's pace. According to Krishna Iyer, J. the impotency of law is to be tackled by including environmental issues under the umbrella of public interest litigation. A right to information emphatically exercised and backed by powerful public support would bring in some fear to violators of law. In India we have the National Commission for Women and the National Human Rights Commission, which have played a very big role in curbing the atrocities taking place in these respective fields. Such a Commission should be set up especially for environmental issues- they cannot be clubbed with other litigations. Special courts or tribunals can be empowered to adjudicate upon such matters. Justice Krishnaswami Iyer also recommends the existence of a seasoned and knowledgeable person to play the role of an 'Environment Ombudsman'. Participative social active groups can become catalyst to encourage and activate people and link them with the legal process. It is very important to create awareness among people as well as prevent them from misuse of nature.

There should be provisions like that of Wildlife Protection Act, 1972 showing more sensitiveness towards public participation. In the constitution of Wildlife Advisory Board the State Government is empowered to nominate ten persons who in the opinion of State Government are interested in protection of Wildlife including three representatives of Tribal. To boost general public the Act contains a very salubrious provision to reward person who helps in the detection of the offence. It provides that out of the Fine collected from the culprit 25 percent should be paid as a reward to the person who renders assistance in detection of the offence.

There are similar provisions provided in the Forest Act 1927 where mandatory duty on the person exercising any right in reserved forest to assist Forest and Police officials with information regarding the likely offences.

Therefore, the Air Act must have legal provisions engraved into it to check pollution with the help of public. Public participation to assist the Board to ascertain pollution is required to be embedded into the Air Act. The Forest Conservation Act, 1981, is equally sensitive to solicit the opinion of non-government specialists in the Advisory Committee. The National Environment Tribunal Act, 1995, passed facilitate information sharing in environmental dispute resolution inducts one environmentalist in the Tribunal.

One of the surest ways of controlling and monitoring pollution would be to give powers to workers to stop a plant if emission levels cross the prescribed limits. The Clean Air Act of USA provides for this. The US Act also provides that no worker raising the issue of pollution or calling for stoppage of work due to apprehension of excessive emission shall be discharged or discriminated against. Swedish law allows workers to strike work in the event of flouting of environment regulations by the management. Far from trying to solve this problem, the Environment Act refuses to even address itself to this question.

Industries under the Pollution Acts are accountable only if the Pollution Board officials decide to do so. Lack of infrastructure, political pressure and corruption has resulted in the Boards allowing the industries to go scot-free. The Environment Act does not solve any of these problems.

The individual's right also does not stand on a better footing. This is because the individual cannot proceed with his complaint, if on receiving 60 days notice; the Government communicates to the individual its decision not to file a complaint. This section has been partly borrowed from Section 7604 of the American Clean Air Act. Under the U.S. Act 60 day's notice has to be given. However, if the Government communicates its refusal to file a complaint, the individual can proceed with his own case. An individual will be stopped only if 'the State has commenced and is diligently prosecuting an action in Court'. Even in such cases, any individual can intervene as a matter of right. Under our Act, citizens, worker and environmental groups are

neither given access to any data nor any right to commence independent action. This is a major flaw in the Act.

The doctrinal roots of modern environmental law are found in the common law principles of nuisance. Most of pollution cases in Tort law fall under the categories of nuisance, negligence and strict liability. The Right to clean air was recognized by the common law since long. However, common law remedies for nuisance as applicable to environment pollution are not sufficient and certain gaps remain, which have been fulfilled through legislative remedies or judicial activism.

The Common Law action for negligence may be brought to prevent environmental pollution. A major achievement made in *Donoghue v. Stevenson*'s case was that the fallacy of privity of contract was done away with by allowing the consumer to bring an action in tort against the manufacturer, with whom there was no privity of contract. In such cases, pecuniary compensation payable for the commission of the wrong may be either substantial or exemplary. While the former is for the purpose of restitution, the object of the latter is to deter the wrongdoer. The casual connection between the negligent act and the plaintiff's injury was often the most problematic link in pollution cases. The party seeking to recover compensation for damage had to prove that the party against whom he complained was in the wrong. If, eventually, the case was evenly weighed on both sides, and the court was not satisfied that it was occasioned by the negligence or default of the other party, the action could not succeed.

In course of time, there were situations where a person was made liable for some harm, even though he was neither negligent in causing it, nor intending to do so. The liability recognized was strict liability from this principle the present concept of absolute liability evolved.

Therefore, the rule of strict liability in *Rylands v. Fletcher* can very well be applied in cases of escape of dangerous substances causing pollution, as has been rightly observed by the Supreme Court in *Shriram*'s case the Supreme

Court had rightly observed in *Vellore Citizens Welfare Forum's* case that the Constitutional and Statutory provisions protect a person's right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right to clean environment.

It is important to note that the Indian judiciary has tried to simplify the procedural formulations and advocated for the establishment of an authority / commission to assess and determine the loss caused by the environmental pollution. It has been suggested that the State should activate itself to recover damages from polluters who have damaged the atmosphere. The 'Environment Protection Fund' should be used to compensate the community as a whole and to provide all infrastructure which are necessary for clean and provide healthy environment. These provisions are related to the concept of sustainable development and 'polluter pay's principle. However, the State till this date could not implement these aspects in reality.

Subhash Kumar signifies an important milestone in the development of environment law in India. It heralds the emergence of right to clean and unpolluted environment as an integral part of fundamental right enshrined in Article 21. In *Prof. M.V.Nayadu* the Supreme Court held that healthy environment and sustainable development are fundamental human rights implicit in the right to life. The Court observed that- In today's emerging jurisprudence, environment rights which encompass a group of collective rights are described as 'third generation rights'. The first generation rights are generally political rights such as those found in the International Convention on Civil & Political Rights while 'second generation rights' are social and economic rights as found in the International Covenant on Economic, Social and Cultural Rights. The Supreme Court has discussed and evolved the 'polluters pays principle', 'precautionary principle' and also provided for public trust doctrine in various cases. These principle are required to be incorporated into the legislatures of India for making them effective.

An independent non-political judiciary is crucial to the sustenance our democratic form of government. The vitality of the democratic process, noble ideals of justice, liberty and equality in the constitutional edifice, as well as the rule of law are all dependent on the tone of the judiciary. Democracy signifies a government of the people, by the people and for the people, and the noble ideals should be easily accessible to all its members if a government claims to be truly democratic.

The civil and criminal liability for polluting the atmosphere and air remained embedded in our law. Since the induction of English Common law into our legal system, neither the damages awarded in most of the civil cases decided were exemplary, nor did the penal provision of section 133 of Code of Criminal Procedure have deterrent effect. Therefore, before the enactment of special laws the legal response to the corporate criminal responsibility was ineffectual. The law was not sufficient to put a check on the activities of large corporations endangering the environment.

The Air Act contains three penal provisions to deal with various environmental violations. Section 37 penalises basic offence under section 22, with an imprisonment for a term not less than one year and six months but which may extend to six years and with fine. It has additional fines, which are to be imposed when the failure continues and exceed the punishment to a minimum of two years, which may extend to seven years. Section 38 provides penalty for auxiliary offence and section 39 contains penal clause meet residual contravention. Though with the help of these provisions no person was convicted till this date. This shows that the sections have remained as a paper tiger.

The large corporations are unmindful of serious environmental problems. They have consistently shown a pattern of irresponsibility in dealing with dangerous substances. The Bhopal Tragedy is a burning example. In this case, no charge was brought under the Air Act even though there was certain negligent Acts, which could be brought under the purview of the Air Act.

Air pollution has different dimensions like noise pollution, vehicular pollution and other pollution of atmosphere causing depletion of ozone, radiation pollution, pollution by hazardous substances, and other pollution which generally increases or caused abnormality in the composition of gases in the atmosphere. The legislations on these aspects have not been enacted into a comprehensive piece. The laws on the different aspects have been enacted at different times. This has made the legislative structure complex.

The Public Liability Insurance Act, 1991 has been passed in a hasty manner without giving full consideration to all aspects of the problem. This is the reason why the provisions of this Act suffer from several pitfalls though the Act basically has a laudable object of providing immediate relief to victims. No doubt the Act provides for strict non-fault liability of the owners of hazardous substances but its scope is not wide which applies to 'handling' of hazardous substances. Further the term 'hazardous substance' which exceeds such quantity as specified by the central government by notification. It means every substance or preparation which by reason of its chemical or physico-chemical properties or handling is liable to cause harm to human beings or other living creatures, plants, micro-organism, property or the environment, cannot be treated as hazardous substance under this Act except when it exceeds in quantity specified by the central government. However, the Public Liability Insurance Act saves the right of claimant to plead for compensation under any other law subject to deduction for awards made under the instant Act. The owner's liability is two fold. Firstly he is required to provide out of fund known as environment relief fund. Secondly the owner has to take insurance policies before starting hazardous process. It is to be remembered that since the quantity of compensation payable under this Act is not adequate, Rs. 25,000/- being maximum, a victim is invariably to seek more compensation under other law. The Act is a welcome legislation providing for strict liability of the owners of hazardous substances but it however, suffers from many shortcomings. The adjudicatory powers to award compensation have been vested in the collector who is a revenue official of the government and adjudication of claim by him

will not be conducive to administration of the Act. The Act does not give relief to a victim who suffers temporary disability. A person under temporary disability also deserves relief, which he is not entitled to under the Act. The figures of compensation for damage to person or property for all practical purposes do not make any sense and seem to have been provided by keeping in view the Workman's Compensation Act. However, there is a need to express that if the owner was found to be guilty of recklessness, negligence, or any act of commission or omission a higher amount of compensation shall be payable at direction of the adjudicating authority. Earmarking of a separate environment relief fund is another safeguard for immediate relief to victims. The concurrent remedy under the Act and any other law for claiming larger amount of compensation subject to apportionment and final adjustment is another beneficent provision. Public Liability Insurance Act, apart from providing immediate relief, touches some of the pertinent issues relating to strict monitoring and vigilance of the hazardous operations. The penalties provided and gradation of offences to deal with accident is based on strict liability principle. Like its preceding enactment Public Liability Insurance Act exercises power of entry, inspection, search, seizure and direction to achieve the object of the legislation. The collector is also statutorily empowered to make application for restraining owner from handling hazardous process. The court can take cognizance of offences on the complaint made by central Government or any authority. It discourages the public complaint, which might prove a disincentive to the public participation in setting the machinery of the court in motion. Breach of duty to take insurance policies, renewal and compliance attracts one and half-year imprisonment and a minimum fine of Rs. 1 lakh. The chances of non-compliance exist in all probability especially in cases where the amount of total compensation awarded exceeds Rs. 1 lakh. Moreover, no punishment has been prescribed to deal with the cases of non-compliance of liability to pay immediate relief under section 3. This provision keeps the no-fault or strict liability principle in abeyance. The constitution of an advisory committee to formulate better package of insurance policy will offer

best of the benefits to victims. The compensation of committees consisting three representatives of Central Government, two representatives of owner and two experts of insurance or hazardous substances.

On the face of it National Environmental Tribunal Act paints a rosy picture but it has inherent limitations, which dilute the principles of absolute liability. The scope of the Act has been narrow down due to the restrictive meaning to the word accident and handling. Due to which the people who are exposed to daily intake of pollutants due to effluents and emissions discharged will not be covered, as that would not amount to accident. The Tribunal has also incorporated the basic philosophy of public interest litigation, by granting access to representative body or organization. The Central Government has unfettered discretionary power to recognize or derecognise organization to be entitled to make an application for compensation. It may have a positive aspect that this requirement would discourage the fake person to move the tribunal to protect their private interest. *The negative aspect may recognize or derecognise any body for the purpose of making the application, according to the central governments whims and fancies.* Section 9(5) deals with installing the principal bench of the tribunal at New Delhi and other benches at such other places. This will cause hindrance to provide speedy relief since the claimants will have to commute all the way from the place of the accident to the place where the bench is set up, thereby causing unnecessary delay in the disposal of the case. Section 5(3) and section 19 read together, underline the provision that the setting up of Tribunal will oust the jurisdiction of any other court. This will prove to be a major drawback, as suits for negligence and nuisance may still be brought in non-accident situations, for instants, for injuries caused by repeated exposure to atmospheric pollutants. The disadvantage of such a suit, however, will be that the victim will have to prove negligence and will not have the benefit of strict liability law. The penalty provided under section 25 is low for non-compliance with any order made by the tribunal. As the big industries, may make payment of the paltry amount and escape the clutches of the Act. Section 26 provides for offences by company and lays down the principle of

vicarious liability for the principal offender. The proviso to section 26 provides that nothing contained in this sub-section shall render any person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Thus, legal and constitutional prescriptions pertaining to the environment do exist in the formulation of National Environmental Tribunal Act, but they are inadequate to meet the demands of a comprehensive national environment order.

It may be pointed out at this juncture that only criminal sanction and fines on industries and giant corporations would not bring deterrent effect. To prevent pollution from industries a proper economic policy option based on analysis of cost-benefit of environment pollution should be put forth. This would prove to be an effective measure to control pollution. The gravity of such cost should be more than the cost incurred to install treatment plants. It is not an easy because it requires to be assessed on the basis of economic calculus. The monetisation of tangible cost of environmental damage should also be assessed to make the law effective. It also has to be seen that polluter pays principle is properly utilized. The recovery of the loss caused to the environment must not give a blanket license to the polluter "to pollute and pay".

The benefit of both Public Liability Insurance Act and National Environmental Tribunal Act is limited to industrial disaster. The legislatures have also adopted measures under the Factories Act to compensate the victim of occupational hazards and laid down provisions for health check up and insurance. But what about the people of the locality who might also suffer from certain diseases due to the industrial activities and other hazards? The State owes responsibility to keep the air pure and fresh for public use based on public trust doctrine. Therefore, the State cannot shake off its responsibility to look after the interest of the public. State must draft legislation to give health insurance to such persons and frame a policy for routine health check up of these people. The public must be given information about the atmosphere in

order to enable them to go for routine check up at the Health Care Center provided by the State.

The legislative measures can succeed only through the involvement of the industries and the people. An aware and informed public opinion can play a positive role in promoting environmental pollution control programmes to help supplement official efforts to check the dangerous increase in the level of air pollution. Hence, the courts have rightly opined that the common man should be given education so that he can make his individual positive contribution towards control of pollution. Further, it is very necessary to arouse civic consciousness by introducing the subject of environmental issues in educational institutions; through radio, television, newspaper, periodicals etc.

Even traditional methods like puppet shows performance in local language etc should be adopted in rural areas to educate those rural people who are totally unaware of the consequence of pollution. Similarly, contribution can also be made by the industries both in financial as well as physical terms. They themselves can take the measures for the control of pollutants by introducing built-in-systems and thus can involve themselves for the solution of the problem by joining with local and other appropriate authorities. The industries should be encourage to undertake social responsibilities, this can be done by announcement of awards by the Government to those industries who have maintained the environmental norms and have contributed towards eradication of air pollution by maintaining green belt and other devices.

It is not an easy task to revive the average citizens sense of responsibility and wholehearted participation to curb the menace of air pollution. But we must put in hard work to make all members of the society aware of the pollution of atmosphere. Man had started polluting the atmosphere slowly from the day he invented fire. It is time that people should realize how important it is to preserve the ambient air quality. The legislature, executive and the judiciary along with the voluntary organizations and all the agencies of

social control must join their hands and work hard within the given constraints to curb the problem of air pollution.

The provisions incorporated in the various legislations have provided for different authorities under the different Acts. Going through these provisions it is apparent that the different Acts have been piece meal and have concentrated on the aspects of pollution related to such Act. Many of these Acts like the Factories Act 1948, Insecticide Act 1968, Mines Act 1952, Boilers Act 1923 etc. have different authorities to deal with the aspect of hazards and public health due to air pollution. Similarly, special legislations also have different administrative authorities. It is observed that there is lack of coordination among Inspectors and other administrative authorities under different Acts. There should be an effort to make these authorities work jointly to curb the menace of air pollution. This can be done through supervision of a common body like the Pollution Boards. There should be measures taken to consolidate all the laws relating to air pollution within a comprehensive legislation. The monitoring instruments and the process followed in India requires to be revised and upgraded. A large number of critical pollutants are not being monitored, this aspect has to be looked into. The number of air quality monitoring stations compared to the gravity of pollution is less. Therefore, the number of air quality monitoring stations should be increased to a substantial extent. The air quality monitoring in India has selective approach towards certain areas, this approach is required to be changed and a comprehensive national survey should be made to mitigate air pollution in India.

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