A COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH

v.

M/S. DOABA STEEL ROLLING MILLS.

(Civil Appeal Nos. 3400 of 2003)

B JULY 6, 2011

[D.K. JAIN AND H.L. DATTU, JJ.]

HOT REROLLING STEEL MILLS ANNUAL CAPACITY DETERMINATION RULES, 1997:

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Rule 5 read with rr. 4(2), 3(2), 3(3)—Re-determination of annual capacity of production of specified goods—Applicability of r.5—HELD: Rule 5 will be attracted for determination of annual capacity of production of the factory D *when any change in the installed machinery or part thereof is intimated to Commissioner of Central Excise in terms of r. 4(2)—Central Excise Act, 1944—s.3(A) (2).*

CENTRAL EXCISE ACT, 1944:

E *Section 3A—Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods—Purpose of—Explained – Held: Section 3A is an exception to s. 3, the charging section, and being in nature of a non obstante provision, provisions of s.3A override* F *those of s.3 – Determination of annual capacity of production of specified goods is to be done as per specific formula prescribed in r.3(3) of the 1997 Rules – That being so, it must logically follow that r. 5 cannot be ignored in relation to a situation arising on account of an intimation under r. 4(2) of* G *the 1997 Rules.*

Section 3A(2)—Re-determination of annual production—Held: Second proviso to sub-s.(2) of s.3A contemplates re-determination of annual production in a case when there is an alteration or modification in any factor relevant to

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production of specified goods, but such re-determination has again to be as per the formula in r.3(3) of the 1997 Rules.

INTERPRETATION OF STATUTES:

Tax statute – Interpretation of – Held: A taxing statute should be strictly construed—Intention of legislature is primarily to be gathered from the words used in the statute.

APPEAL:

Appeal by revenue—Held: It cannot be said that merely because in some cases revenue has not questioned the correctness of an order on the same issue, it would operate as a bar for revenue to challenge the order in another case—However, it is high time when Central Board of Direct and Indirect Taxes comes out with a uniform policy laying down strict parameters for guidance of field staff for filing appeals.

The Assessee (respondent in Civil Appeal N o. 3400 of 2003) was engaged in the manufacture of hot re-rolled steel products of non-alloy steel in a hot steel rolling mill, classifiable under Chapter 72 of the Central Excise Tariff Act, 1985. On 5.1.1998, the Commissioner, Central Excise, determined the annual capacity of production of the respondent at 7683.753 MT, as per the formula laid down in sub-r. (3) of r. 3 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997. However, keeping in view r. 5, the annual capacity was fixed at 11961.135 MT. on the basis of actual production of the mills during the financial year 1996-97. At the request of the respondent, the Commissioner, by order dated 27.1.2000 re-determined the annual capacity of the mill at 7328.435 MT, applying the formula as laid down under r. 3(3), but relying on r. 5, he again computed the annual capacity at 11961.135 MT. The appeal filed by the assessee was allowed by the Customs Excise and Gold (Control) Appellate Tribunal holding that r. 5 of the Rules could not

A be applied in view of the change in technical parameters of the rolling mills. The Commissioner made an application to the High Court u/s. 35-H of the Central Excise Act, 1944 seeking a direction to the Tribunal to refer the question of law which according to him arose
B from the order of the Tribunal. The High Court rejected the application.

In the instant appeals filed by the revenue, the question for consideration before the Court was: whether
C r. 5 of the 1997 Rules would apply in a case where a manufacturer proposes to make some change in the installed machinery or any part thereof and seeks the approval of the Commissioner of Excise in terms of r. 4(2) of the said Rules?

D Allowing the appeals, the Court

HELD: 1.1. Rule 5 of the Hot Rerolling Steel Mills Annual Capacity Determination Rules, 1997 will be attracted for determination of the annual capacity of
E production of the factory when any change in the installed machinery or any part thereof is intimated to the Commissioner of Central Excise in terms of r. 4(2) of the said Rules. [para 23] [952-F-G]

Sawanmal Shibumal Steel Rolling Mills Vs. C.C.E., Chandigarh-I 2001 (127) E.L.T. 46 (Tri.-LB) *Commr. of*
F *Central Excise, Belgaum Vs. Bellary Steel Rolling Mills*, 2009 (245) E.L.T. 114 (Kar) - Cited.

1.2. It is clear from a bare reading of s.3A of the
G Central Excise Act, 1944 as inserted by Act 26 of 1997, that the reason which persuaded the Legislature to introduce this provision was attributed to large scale evasion of payment of Excise duty by certain sectors, like induction furnaces, steel re-rolling mills etc., where

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evasion of Excise duty on goods produced in such mills was rampant. [para 5] [942-F-G]

1.3. Section 3A was inserted in the Act to enable the Central Government to levy Excise duty on manufacture or production of certain notified goods on the basis of annual capacity of production to be determined by the Commissioner of Central Excise in terms of the Rules to be framed by the Central Government. Section 3A is an exception to s. 3 of the Act – the charging Section and being in the nature of a *non obstante* provision, the provisions contained in the said Section override those of s. 3 of the Act. Rule 3 of 1997 Rules framed in terms of s. 3A(2) of the Act lays down the procedure for determining the annual capacity of production of the factory. Sub-r. (3) of that Rule contains a specific formula for determination of annual capacity of production of hot re-rolled products. This is the only formula whereunder the annual capacity of production of the factory, for the purpose of charging the duty in terms of s. 3A of the Act, is to be determined. [para 18] [949-G-H; 950-A-D]

1.4. Second proviso to sub.s. (2) of s. 3A of the Act contemplates re-determination of annual production in a case when there is alteration or modification in any factor relevant to the production of the specified goods but such re-determination has again to be as per the formula prescribed in r. 3(3) of the 1997 Rules. It is clear that sub-r. (2) of r. 4, which, in effect, permits a manufacturer to make a change in the installed machinery or part thereof which tends to change the value of either of the parameters, referred to in sub-r. (3) of r. 3, on the basis whereof the annual capacity of production had already been determined, would obviously require re-determination of annual capacity of production of the factory/mill, for the purpose of levy of duty. It is plain that in the absence of any other Rule, providing for any

A alternative formula or mechanism for re-determination of production capacity of a factory, on furnishing of information to the Commissioner as contemplated in r. 4(2) of the 1997 Rules, such determination has to be in terms of sub-r. (3) of r. 3. That being so, it must logically B follow that r. 5 cannot be ignored in relation to a situation arising on account of an intimation under r. 4(2) of the 1997 Rules. Moreover, the language of r. 5 being clear and unambiguous, in the sense that in a case where annual capacity is determined/re-determined by applying C the formula prescribed in sub-r. (3) of r. 3, r. 5 springs into action and has to be given full effect to. [para 18] [950-D-H; 951-A-B]

1.5. The principle that a taxing statute should be strictly construed is well settled. It is equally trite that the D intention of the Legislature is primarily to be gathered from the words used in the statute. Once it is shown that an assessee falls within the letter of the law, he must be taxed however great the hardship may appear to the judicial mind to be. [para 19] [951-B-C]

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Commissioner of Sales Tax, Uttar Pradesh vs. The Modi Sugar Mills Ltd. (1961) 2 SCR 189; *Mathuram Agrawal Vs. State of Madhya Pradesh* (1999)8 SCC 667, referred to.

F *Cape Brandy Syndicate Vs. Inland Revenue Commissioners* ***1921 (1) KB 64, 71*** - referred to.

Commissioner of Customs, Bangalore Vs. ACER India (P) Ltd, 2007(11) SCR 558= (2008) 1 SCC 382 – cited.

G 1.6. All the orders impugned in the instant appeals are set aside and those of the Commissioners of Central Excise restored. [para 25] [953-F]

2. It cannot be said that merely because in some cases revenue has not questioned the correctness of an H order on the same issue, it would operate as a bar for the

revenue to challenge the order in another case. There can be host of factors, like the amount of revenue involved, divergent views of the Tribunals/High Courts on the issue, public interest etc. which may be a just cause, impelling the revenue to prefer an appeal on the same view point of the Tribunal which had been accepted in the past. However, it is high time when the Central Board of Direct and Indirect Taxes comes out with a uniform policy, laying down strict parameters for the guidance of the field staff for deciding whether or not an appeal in a particular case is to be filed. This Court is constrained to observe that the existing guidelines are followed more in breach, resulting in avoidable allegations of malafides etc. on the part of the officers concerned. [para 24] [953-B-E]

C.K. Gangadharan & Anr. Vs. Commissioner of Income Tax, Cochin **2008 (11) SCR 52 = (2008) 8 SCC 739 – cited.**

Case Law Reference:

2007 (11) SCR 558	**cited**	**Para 13**
2001 (127) E.L.T. 46 (Tri.-LB)	**cited**	**Para 14**
2009 (245) E.L.T. 114 (Kar)	**cited**	**para 14**
2008 (11) SCR 52	**cited**	**Para 15**
1921 (1) KB 64, 71	**referred to**	**Para 20**
(1961) 2 SCR 189	**referred to**	**Para 21**
1999 (4) Suppl. SCR 195	**referred to.**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3400 of 2003.

From the Judgment & Order dated 17.10.2001 of the High Court of Punjab & Haryana at Chandigarh in C.C.E.S. No. 4 of 2001.

A WITH

C.A. Nos. 8342-8344 & 8345 of 2004 & C.A. No. 4992-4993 of 2011.

B. Bhattacharya, ASG, Harish Chander, R. Nanda, Arti B Singh, B.K. Prasad, Anil Katiyar, P. Parmeswaran, D.S. Mahra, Balbir Singh, Rajesh Kumar, Rupinder Sinhmar, Deepak Sinhmar, Abhishek Singh Baghel, Sharad Sharma, Rajesh Kumar, Krishnakumar R.S., K.S. Mahadevan, Manjula Gupta for the appearing parties.

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The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted in SLP (C) Nos. 35323-35324 of 2010.

D 2. This batch of appeals, by grant of leave, arises out of judgements and orders dated 17th October 2001 in C.C.E.S.No.4 of 2001, 21st October, 2003 in C.E.C. 11, 12, 13 of 2003 and C.E.C. No.122 of 2003 passed by the High Court of Punjab & Haryana; 6th November 2009 in Review E application No.29356 of 2008 and 8th July 2010 in C.E. Reference application No.113 of 2000 both passed by the High Court of Judicature at Allahabad. By the impugned judgements, in the main reference applications, filed by the Commissioner of Central Excise, under Section 35H of the Central Excise Act, F 1944 (for short "the Act"), the questions referred by the Customs, Excise and Gold (Control) Appellate Tribunal, as it then existed, (for short "the Tribunal") have been answered in favour of the assessee and the review applications preferred by the Commissioner against the said judgments have been G dismissed.

3. Since all the appeals involve a common question of law, these are being disposed of by this common judgment. However, to appreciate the controversy, the facts emerging from C.A.No.3400 of 2003 are being adverted to. These are as H follows :

4. Section 3A of the Act, which has a chequered history of insertions and omissions in the Act, was inserted in the Act for the second time by Act 26 of 1997, with effect from 14th May, 1997, the provision relevant for the purpose of these appeals. The Section has again been omitted by Act 14 of 2001, with effect from 11th May, 2001. Section 3A of the Act enables the Central Government to charge Excise duty on goods on the basis of annual capacity of production of mills etc. in respect of the notified goods.

The relevant part of the Section reads as follows:

"*3A. Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods.*— (1) Notwithstanding anything contained in section 3, where the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.

(2) Where a notification is issued under sub-section (1), the Central Government may, by rules,—

(a) provide the manner for determination of the annual capacity of production of the factory, in which such goods are produced, by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be the annual production of such goods by such factory; or

(b) (i) specify the factor relevant to the production of

A such goods and the quantity that is deemed to be produced by use of a unit of such factor; and

(ii) provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory:

C Provided that where a factory producing notified goods is in operation during a part of the year only, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production:

D Provided further that in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.

E ......"

5. It is clear from a bare reading of the Section that the reason which persuaded the Legislature to introduce this provision was attributed to large scale evasion of payment of F Excise duty by certain sectors. Thus, the insertion of the Section in the Act was with a view to safeguard the interest of revenue in the sectors, like induction furnaces, steel re-rolling mills etc., where evasion of Excise duty on goods produced in such mills was rampant. The provision authorises the Central Government G to notify certain goods, for levy and collection of duty of Excise on such goods, in accordance with the provision of the said Section, having regard to the extent of evasion of duty as also other relevant factors. The scheme evolved under this provision, envisages the determination of annual capacity of production of such factory by an officer not below the rank of Assistant H

Commissioner of Central Excise in terms of the rules to be framed by the Central Government under sub-section (2) of Section 3A of the Act. The annual capacity of production of the factory is deemed to be the annual production of such goods by such factory, on which an assessee is liable to pay duty. The two provisos to sub-section (2) of Section 3A of the Act, provide for determination/re-determination of annual capacity of production in the event of operation of the factory during a part of the year or alteration or modification in any of the factors relevant to the production of the factory.

6. In exercise of the powers conferred by Section 3A(2) of the Act, by Notification No. 23/97-CE (NT) dated 25th July, 1997, the Central Government framed and notified Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 (for short "the 1997 Rules"), to be effective from 1st August, 1997, for determination of annual capacity of production of a factory producing re-rolled products as contained in the said notification. The Rules prescribed the formulae for determination of the annual capacity of production of a hot re-rolling mill, on the basis of the information to be furnished by the mill to the Commissioner of Central Excise; on the parameters referred to in Rule 3(3) of the 1997 Rules. The rate and the manner of payment of Excise duty under Section 3A of the Act was also indicated in the notification. Subsequently, another Notification No.32/97-CE (NT) was issued on 1st August, 1997 making the said Rules effective from the even date. For the sake of ready reference, Rules 3 and 4, in so far as they are relevant for these appeals, are extracted below:

> "3. The annual capacity of production referred to in rule 2 shall be determined in the following manner, namely:-
>
> (1) a hot re-rolling mill shall declare the values of 'd' 'n' 'l' and 'speed of rolling', the parameters referred to in sub-rule (3), to the Commissioner of Central Excise (hereinafter referred to as the

A Commissioner) with a copy to the Assistant Commissioner of Central Excise:

(2) on receipt of the information referred to in sub-rule (1), the Commissioner shall take necessary action to verify their correctness and ascertain the correct B value of each of the parameters. The Commissioner may, if so desires, consult any technical authority for this purpose;

(3) the annual capacity of production of hot re-rolled C products of non-alloy steel in respect of such factory shall be deemed to be as determined by applying the following formula :-

Annual Capacity =1.885 x 10-4 x d x n x i x e x w x Number D of utilised hours (in metric tonnes) Where :

d = Nominal diameter of the finishing mill in millimetres

n = Nominal revolutions per minute (RPM) of the drive

E i = Reduction ratio of the gear box

w =Weight in Kilogramme per metre of the re-rolled product.

value of 'e' in the formula shall be deemed to be 0.30 in F case of low speed mills, and 0.75 in case of high speed mills the value of 'w' factor in the formula for the high speed mills shall be deemed to be 0.45 and for the low speed mills shall be deemed to be as under, -

G .....

4. the Commissioner of Central Excise shall, as soon as may be, after determining the total capacity of the hot re-rolling mill installed in the factory as also the annual capacity of production, by an order, intimate to the H manufacturer.

Provided that the Commissioner may determine the annual capacity of the hot re-rolling unit on provisional basis pending verification of the declaration furnished by the hot re-rolling mills and pass an order accordingly. Thereafter, the Commissioner may determine the annual capacity, as soon as may be, and pass an order accordingly.

4 (1) The capacity of production for any part of the year, or any change in the total hot re-rolling mill capacity, shall be calculated *pro rata* on the basis of the annual capacity of production determined in the above manner stated in Rule 3.

(2) In case a manufacturer proposes to make any change in installed machinery or any part thereof, which tends to change the value of either of the parameters 'd' 'n' 'e' 'l' and 'speed of rolling' referred to in sub-rule (3) of sub-rule 3, such manufacturer shall intimate about the proposed change to the Commissioner of Central Excise in writing, with a copy to Assistant Commissioner of Central Excise, at least one month in advance of such proposed change, and shall obtain the written approval of the Commissioner before making such change. Thereafter the Commissioner of Central Excise shall determine the date from which the change in the installed capacity shall be deemed to be effective."

7. However, by Notification No. 45/97-CE (NT) dated 30th August, 1997, 1997 Rules were amended with effect from 1st September, 1997. By reason of the said amendment, apart from substituting a fresh sub-rule (3) of Rule 3, prescribing a new formulae to determine the annual capacity of production, not very relevant for the purpose of the present appeals, Rule 5 was inserted after sub-rule (2) of Rule 4, which reads as follows :

"5. In case, the annual capacity determined by the formula in sub-rule (3) of rule 3 in respect of a mill, is less than the

A actual production of the mill during the financial year 1996-97, then the annual capacity so determined shall be deemed to be equal to the actual production of the mill during the financial year 1996-97."

B 8. The respondent-assessee is engaged in the manufacture of hot re-rolled steel products of non-alloy steel in a hot steel rolling mill, classifiable under Chapter 72 of the Central Excise Tariff Act, 1944, for the purpose of levy of Excise duty etc. On 5th January, 1998 the Commissioner, Central C Excise, Chandigarh determined the annual capacity of production of the respondent at 7683.753 MT, as per the formula laid down in sub-section (3) of Rule 3 of 1997 Rules. However, keeping in view Rule 5, the annual capacity was finally fixed at 11961.135 MT on the basis of actual production of the mill during the financial year 1996-97.

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9. Vide letter dated 13th September, 1999, the respondent requested the Commissioner for re-determination of annual production capacity of their unit in terms of Rule 4(2) of the 1997 Rules on the ground that they have changed some E of the parameters of their mill. The request was acceded to and vide order dated 27th January 2000, the Commissioner, applying the formula as laid down under Rule 3(3), determined the annual capacity of the mill at 7328.435 MT but relying on Rule 5, he again computed the annual capacity at 11961.135 F MT, being equal to the actual production of the mill during the financial year 1996-97.

10. Aggrieved by the said order of the Commissioner, the respondent filed an appeal before the Tribunal. The Tribunal, vide order dated 6th April, 2000, allowed the appeal and held G that Rule 5 of the 1997 Rules cannot be applied in view of change in technical parameters of the rolling mill.

11. Dissatisfied with the said order, the Commissioner made an application to the High Court under Section 35H of H the Act, seeking a direction to the Tribunal to refer the question

of law, which according to him, arose from the order of the Tribunal. Vide order dated 17th October, 2001, the High Court rejected the reference petition holding that no question of law arose from the order of the Tribunal. The High Court has held that the provisions of Rule 5 cannot be invoked in a case where the annual capacity of the mill is to be determined in terms of Rule 4(2) of the 1997 Rules on account of change in parameters, observing thus:

> "It is the admitted position that the capacity for the year 1996-97 was fixed on the basis of the parameters adopted by the respondent at the relevant time. Subsequently, the parameters were altered. In view of the change in parameters, it is admitted position that the capacity was considerably reduced. In fact, it has not been disputed that the annual production had come down from 11961.135 Metric Tons to 7328.435 Metric Tons. This having happened, the Revenue could not have claimed excise duty for the capacity which was not in existence. The provisions of Rule 5 cannot be invoked in a case where after determination of the capacity for the year 1996-97, the Unit makes a change in the capacity and the production actually comes down. If such a course were permitted, the result would be grossly unfair."

Additionally, the High Court has also noted that a similar view had been taken by the Tribunal in the case of M/s Awadh Alloys (P) Ltd., since reported in 1999 (112) ELT 719 (Tri.), against the revenue but despite opportunity no information was furnished whether the said decision had been challenged by the revenue or not. We may however, note at this juncture itself that the finding of the High Court to the effect that on account of change in parameters, the annual production had come down from 11961.135 MT to 7328.435 MT is factually incorrect. The actual annual production determined initially as per the formula laid down in Rule 3(3) had worked out to 7638.753 MT, which on change in parameters now worked out at 7328.435 MT i.e. a difference approx. 300 MT only.

A 12. Hence, the Commissioner has preferred the present appeals against the orders of the High Courts, noted in para 2 (supra).

13. Mr. B. Bhattacharya, learned Additional Solicitor B General of India, appearing for the revenue, had strenuously urged that the view taken by the High Court to the effect that once the technical parameters, as stipulated in Rule 3(3) of the 1997 Rules, are altered in terms of Rule 4(2) of the said Rules, resulting in reduction in the production capacity, Rule 5 cannot be invoked, is clearly fallacious. According to the learned C counsel, for the purpose of Rule 4(2), the production capacity of the rolling mill has to be determined under the said Rule 3(3) as there is no other rule to take care of such a situation. It was argued that when the production capacity of a factory is to be determined under the said Rule, Rule 5 will automatically come D into play. Relying on the clarification issued by the Board vide Circular dated 26th February 1998, learned counsel argued that since reference to previous year's production in Rule 5 of the 1997 Rules is to the actual production of the mill and does not relate to the technical parameters of the machinery, the actual E production of the year 1996-97 would be relevant for determining the current year's duty liability under Section 3A of the Act, even when parameters of the machinery are altered. It was thus, asserted that since re-determination of capacity of production under Rule 4(2) has to be done by the formulae F prescribed in the said Rule 3(3), the provisions of Rule 5 cannot be disregarded. Commending us to the decision of this Court in *Commissioner of Customs, Bangalore Vs. ACER India (P) Ltd*[1]., learned counsel contended that the Rules relating to determination of capacity of production have to be strictly G construed.

14. *Per contra,* learned counsel appearing for the respondents, led by Mr. Balbir Singh, submitted that when there is any change in the parameters of a rolling mill, which are

H 1. (2008) 1 SCC 382.

different from the rolling mill in the financial year 1996-97, Rule 5 has no application. Highlighting the fact that the decision of a Full Bench of the Tribunal in *Sawanmal Shibumal Steel Rolling Mills Vs. C.C.E., Chandigarh-I*[2] as also the decision of the High Court of Karnataka in *Commr. of Central Excise, Belgaum Vs. Bellary Steel Rolling Mills*,[3] wherein it has been held that when there are alterations in the parameters, referred to in Rule 3(3) of the 1997 Rules, Rule 5 does not apply, learned counsel stressed that the revenue having accepted these decisions on the very same point, it is debarred from taking a contrary stand in these appeals.

15. In rejoinder, Mr. Bhattacharya, cited the decision of this Court in *C.K. Gangadharan & Anr. Vs. Commissioner of Income Tax, Cochin*[4] in support of his submission that the revenue is not precluded from questioning the correctness of the decision of the authorities below in these appeals despite the fact that orders/decision in the afore-mentioned cases have not been challenged.

16. Thus, the short question for consideration is whether Rule 5 of the 1997 Rules will apply in a case where a manufacturer proposes to make some change in the installed machinery or any part thereof and seeks the approval of the Commissioner of Excise in terms of Rule 4(2) of the said Rules?

17. Before addressing the contentions advanced by learned counsel for the parties, it is essential to note at the outset that in all these appeals, there is no challenge to the validity of Rule 5 of the 1997 Rules, inserted vide Notification dated 30th August, 1997 and, therefore, we are only required to interpret it and examine the width of its application.

18. As noted above, Section 3A was inserted in the Act

2. 2001 (127) E.L.T. 46 (Tri.-B).
3. 2009 (245) E.L.T. 114 (Kar).
4. (2008) 8 SCC 739.

A to enable the Central Government to levy Excise duty on manufacture or production of certain notified goods on the basis of annual capacity of production to be determined by the Commissioner of Central Excise in terms of the Rules to be framed by the Central Government. Section 3A of the Act is an B exception to Section 3 of the Act – the charging Section and being in nature of a *non obstante* provision, the provisions contained in the said Section override those of Section 3 of the Act. Rule 3 of 1997 Rules framed in terms of Section 3A(2) of the Act lays down the procedure for determining the annual C capacity of production of the factory. Sub-rule (3) of that Rule contains a specific formula for determination of annual capacity of production of hot rolled products. This is the only formula whereunder the annual capacity of production of the factory, for the purpose of charging duty in terms of Section 3A of the Act, is to be determined. Second proviso to sub-section (2) of D Section 3A of the Act contemplates re-determination of annual production in a case when there is alteration or modification in any factor relevant to the production of the specified goods but such re-determination has again to be as per the formula prescribed in Rule 3(3) of the 1997 Rules. It is clear that sub-E rule (2) of Rule 4, which, in effect, permits a manufacturer to make a change in the installed machinery or part thereof which tends to change the value of either of the parameters, referred to in sub-rule (3) of Rule 3, on the basis whereof the annual capacity of production had already been determined, would F obviously require re-determination of annual capacity of production of the factory/mill, for the purpose of levy of duty. It is plain that in the absence of any other Rule, providing for any alternative formula or mechanism for re-determination of production capacity of a factory, on furnishing of information to G the Commissioner as contemplated in Rule 4(2) of the 1997 Rules, such determination has to be in terms of sub-rule (3) of Rule 3. That being so, it must logically follow that Rule 5 cannot be ignored in relation to a situation arising on account of an intimation under Rule 4(2) of the 1997 Rules. Moreover, the H language of Rule 5 being clear and unambiguous, in the sense

that in a case where annual capacity is determined/ redetermined by applying the formula prescribed in sub-rule (3) of Rule 3, Rule 5 springs into action and has to be given full effect to.

19. The principle that a taxing statute should be strictly construed is well settled. It is equally trite that the intention of the Legislature is primarily to be gathered from the words used in the statute. Once it is shown that an assessee falls within the letter of the law, he must be taxed however great the hardship may appear to the judicial mind to be.

20. On the principles of interpretation of taxing statutes, the following passage from the opinion of *Late Rowlatt, J.* in *Cape Brandy Syndicate Vs. Inland Revenue Commissioners*[5] has become the *locus classicus* and has been quoted with approval in a number of decisions of this Court:

> "....in a taxing act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

21. In *Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd.*,[6] J.C. Shah, J. observed thus:

> "In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."

5. 1921 (1) KB 64, 71.
6. (1961) 2 SCR 189.

22. In *Mathuram Agrawal Vs. State of Madhya Pradesh*,[7] D.P. Mohapatra, J. speaking for the Constitution Bench, stated the law on the point in the following terms:

> "The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."

23. We do not find any reason to depart from these well settled principles to be applied while interpreting a fiscal statute. Therefore, bearing in mind these principles and the intent and effect of the statutory provisions, analysed above, the conclusion becomes inevitable that Rule 5 of the 1997 Rules will be attracted for determination of the annual capacity of production of the factory when any change in the installed machinery or any part thereof is intimated to the Commissioner of Central Excise in terms of Rule 4(2) of the said Rules.

24. As regards the argument of learned counsel for the respondents that having not assailed the correctness of some

7. (1999) 8 SCC 667.

of the orders passed by the Tribunal and a decision of the High Court of Karnataka, the revenue cannot be permitted to adopt the policy of pick and choose and challenge the orders passed in the cases before us, it would suffice to observe that such a proposition cannot be accepted as an absolute principle of law, although we find some substance in the stated grievance of the assessees before us, because such situations tend to give rise to allegations of malafides etc. Having said so, we are unable to hold that merely because in some cases revenue has not questioned the correctness of an order on the same issue, it would operate as a bar for the revenue to challenge the order in another case. There can be host of factors, like the amount of revenue involved, divergent views of the Tribunals/High Courts on the issue, public interest etc. which may be a just cause, impelling the revenue to prefer an appeal on the same view point of the Tribunal which had been accepted in the past. We, may however, hasten to add that it is high time when the Central Board of Direct and Indirect Taxes comes out with a uniform policy, laying down strict parameters for the guidance of the field staff for deciding whether or not an appeal in a particular case is to be filed. We are constrained to observe that the existing guidelines are followed more in breach, resulting in avoidable allegations of malafides etc.; on the part of the officers concerned.

25. For the foregoing reasons, the orders impugned in these appeals cannot be sustained. All these orders are set aside and that of the Commissioners of Central Excise are restored. The appeals are allowed accordingly with costs, quantified at '50,000/- in each set of appeals.

R.P. Appeals allowed.

A LAFARGE UMIAM MINING PVT. LTD.
T.N. GODAVARMAN THIRUMULPAD
v.
UNION OF INDIA & ORS.
(I.A. NOS. 1868, 2091, 2225-2227, 2380, 2568 and 2937)
B IN
WRIT PETITION (C) No. 202 OF 1995

JULY 6, 2011

[S.H. KAPADIA, CJI, AFTAB ALAM AND K.S.
C **RADHAKRISHNAN, JJ.]**

Environmental Law:

Environment and utilization of natural resources –
D *Balancing of equities – HELD: Time has come to apply the constitutional "doctrine of proportionality" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review – Utilization of the environment and its natural resources has to be in a way that*
E *is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices – In the circumstances, barring exceptions, decisions relating to utilization of natural resources have to be tested on the anvil of the well-recognized principles of judicial review – The court should review the*
F *decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint – Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play – Judicial Review –*
G *Doctrine of proportionality – Doctrine of margin of appreciation – Polluter pays principle – Intergenerational equity.*

Mines and minerals – Limestone mining project in East Khasi Hills District, Meghalaya – Environmental clearance

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and forest clearance – Mining lease agreement signed with Village Durbar – In the application for environmental clearance it was mentioned that the land in question fell under Karst topography – No objection granted by KHADC –Site clearance granted by MoEF – DFO concerned certified that mining site was not a forest area – Environmental public hearing held – Finally, EIA clearance given by MoEF on 9.8.200 – Subsequently, when it was pointed out that non broken area in the leased mine was forest within the meaning of Forest (Conservation) Act, 1980, ex post facto environmental clearance and forest clearance granted on 19.4.2010 and 22.4.2010, respectively – Validity of – HELD: The word "environment" has different facets – That the land in question falls under Kast topography is borne out by the certificate dated 27.8.1999 issued by KHADC – According to the NEHU Report, the site is located in the area on the outskirts of forest – Requirement of submitting the proposal for forest diversion is exclusively the obligation of the State Government – While granting environmental clearance dated 9.8.2001, there was an express finding that "no diversion of forest land was involved" – Since the area of mining lease did not fall in forest, State Government did not submit any proposal to Central Government u/s 2 of the 1980 Act – It is in view of the existence of 1958 Act that the native people as also the DFO understood the area in the light of the said Act – On facts of the case, it cannot be held that the decision to grant ex post facto clearances stood vitiated on account of non-application of mind or on account of suppression of material facts by the applicant – Similarly, it cannot be held that ex post facto clearances have been granted by MoEF in ignorance of the existence of forests due to mis-declaration – The ex post facto clearance is based on the revised EIA – In the circumstances, EIA Notification of 2006 would not apply - The order of the Court is confined to the instant case only – United Khasi-Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958 – s.2(6) – Forest (Conservation) Act, 1980 – s.2 – Mines and Minerals

A *(Regulation and Development) Act, 1957 – s.5(1).*

Environment and development – Limstone mining in tribal area – Role of triabals and rural public – HELD: Public participation provides a valuable input in the process of identification of forest – The natives and indigenous people are fully aware and they have knowledge as to what constitutes conservation of forests and development – They equally know the concept of forest degradation – They are equally aware of systematic scientific exploitation of limestone mining without causing of "environment degradation" – However, they do not have the requisite wherewithal to exploit limestone mining in a scientific manner – The word "development" is a relative term – One cannot assume that the triabals are not aware of principles of conservation of forest – In the instant case, limestone mining has been going on for centuries in the area and it is an activity which is intertwined with the culture and the unique land holding and tenure system of the area – On the facts of the case, the MoEF exercised due diligence in the matter of forest diversion.

Environment and sustainable development – Utilization of natural resources – Guidelines to be followed in future cases – The words "environment" and "sustainable development" have various facets – Care for environment is an ongoing process – Identification of an area as forest area is solely based on the Declaration to be filed by the User Agency (project proponent) – The project proponent under the existing dispensation is required to undertake EIA by an expert body/ institution – The MoEF/ State Government acts on the report (Rapid EIA) undertaken by the Institutions who though accredited submit answers according to the Terms of Reference propounded by the project proponent – At times the court is faced with conflicting reports – Similarly, the government is also faced with a fait accompli kind situation which in the ultimate analysis leads to grant of ex post facto clearance – Therefore, guidelines are required to be given so

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that fait accompli situations do not recur – Time has come for this Court to declare and it is hereby declared that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the grant of permissions u/s 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and improvement under the Environment (Protection) Act, 1986 – The principles/ guidelines mentioned in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation) Act, 1980 – This direction is required to be given because there is no machinery even today for implementation of the National Forest Policy, 1988 read with the Forest (Conservation) Act, 1980 – Further guidelines enumerated – National Forest Policy, 1988 – Environment (Protection) Act, 1986 Forest (Conservation) Act, 1980 – Environment (Protection) Rules, 1986 – r.5(3)(d).

The predecessor-in-interest of the applicant Lafarge Umiam Mining Pvt. Ltd. (LUMPL), namely, LMMPL, made an application on 1.9.1997 under Environment Impact Assessment (EIA) Notification, 1994 for granting environmental clearance for limestone mining project at Nongtrai, East Khasi hills District, Meghalaya. By application dated 23.9.1998 LMMPL applied for Site Clearance. The application stated that the site was not a habitat/corridor for endangered/rare/endemic species; an area of 100 hectares stood acquired by LMMPL on lease basis for mining for which an agreement was signed with Village Durbar; and that the limestone bearing area fell under the Karst topography. LMMPL, obtained "no objection" certificate dated 27.8.1997 issued by the Khasi Hills Autonomous District Council (KHADC), Shillong, a constitutional authority under the Sixth Schedule to the Constitution of India, site clearance was given by MoEF by letter dated 18.6.1999, certificate dated 13.6.2000 of the DFO concerned was issued certifying that the mining site

A was not a forest area as per Supreme Court's order dated 12.12.1996 nor did it fall under any of the notified reserved, and the environmental public hearing took place on 3.6.1998. Ultimately, EIA Clearance was given to LMMPL by MoEF on 9.8.2001. Under a transfer deed
B executed on 28.2.2002, the mining lease was transferred and assigned in favour of the applicant LUMPL and, accordingly, on 30.7.2002, the environmental clearance granted to LMMPL stood transferred to LUMPL (the applicant) by MoEF.

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Subsequently, by letter dated 1.6.2006 from the Chief Conservator of Forests (C) addressed to MoEF, it was pointed out that the mining lease area around the developed mine benches stood surrounded by thick
D natural vegetation cover with sizeable number of tall trees. The said vegetation included trees being cleared for developing the mining benches and for such clearance no permission under the Forest (Conservation) Act, 1980 was taken. LUMPL, irrespective of its claim to NOC issued by the DFO, submitted its application dated 3.5.2007 for
E forest clearance under the 1980 Act. By letter dated 11.5.2007 the Principal Chief Conservator of Forests, Meghalaya wrote to the State government that the project proponent had broken up an area of about 21.44 Ha; that the topography in the leased mine around the broken up
F areas was Karst topography; that non-broken up area in the leased mine was forest land falling within the purview of the1980 Act; that the project proponent be allowed to remove the already broken limestone from the site and it may be directed to apply for forest clearance under
G the1980 Act for the non-broken up part of the leased area. LUMPL filed the instant IA No. 1868 of 2007 seeking directions to MoEF to expeditiously process its application u/s 2 of the 1980 Act.

H On 6.9.2007 CEC submitted its report to the Supreme

Court stating that the project proponent should have taken permission under the1980 Act before starting operations in the area and as *ex post facto* approval was sought and since *fait accompli* situation had arisen, there was no option but to recommend the case for grant of permission for the use of forest land for mining lease subject to certain conditions mentioned therein. By interim order dated 5.3.2010 the project proponent was directed to stop all mining activities. On 5.4.2010 a report was submitted by the Regional Chief Conservator of Forests [also known as High Powered Committee (HPC)], stating, *inter alia*, that although the area supported rich flora, the same could be re-forested as a part of reclamation plan prepared and executed in a time bound manner; that the project was positive and beneficial to the residents of the village due to huge amount of cash going to the Village Durbar, reaching the individual household and improving the financial health of the population of the villages concerned. Accordingly, on 19.4.2010 the MoEF granted environmental clearance (with certain additional conditions) which was followed by forest clearance dated 22.4.2010 (ex-post facto clearance) granted by MoEF stipulating further conditions to be complied with by the project proponent.

The contentions of the parties boiled down to the issues: (i) nature of land and (ii) whether *ex post facto* environmental and forest clearances dated 19.4.2010 and 22.4.1010 respectively stood vitiated by alleged suppression by the appellant regarding the nature of the land.

Disposing of the IAs, the Court

HELD:

(a) Legal Position

A **1.1. Universal human dependence on the use of environmental resources for the most basic needs gave rise to the concept of "sustainable development". Care of the environment is an on-going process. It would depend on the facts of each case whether diversion in a** B **given case should be permitted or not, barring "No Go" areas (whose identification would again depend on undertaking of due diligence exercise). In such cases, the margin of appreciation doctrine would apply. [para 19] [1009-E-H; 1110-A-B]**

C *Narmada Bachao Andolan v. Union of India and Others* **2000 (4) Suppl. SCR 94 = (2000) 10 SCC 664 – referred to**

1.2. Since the nature and degree of environmental D **risk posed by different activities vary, the implementation of environmental rights and duties require proper decision making based on informed reasons about the ends which may ultimately be pursued, as much as about the means for attaining them. Setting the standards of** E **environmental protection involves mediating conflicting visions of what is of value in human life. [para 20] [1010-B-C]**

1.3. Time has come to apply the constitutional "*doctrine of proportionality*" to the matters concerning F **environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergen-** G **erational equity, but balancing of these equities may entail policy choices. In the circumstances, *barring exceptions*, decisions relating to utilization of natural resources have to be tested on the anvil of the well-recognized principles of judicial review. The court should** H **review the decision-making process to ensure that the**

decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play. [para 30] [1028-C-H]

R v. Chester City Council **(2011) 1 All ER 476 – referred to.**

1.4. Accordingly, the matter is disposed of keeping in mind various facets of the word "environment", the inputs provided by the Village Durbar of Nongtrai (including their understanding of the word "forest" and the balance between environment and economic sustainability), their participation in the decision-making process, the topography and connectivity of the site to Shillong, the letter dated 11.5.2007 of the Principal Chief Conservator of Forests and the report dated 5.4.2010 given by HPC (each one of which refers to economic welfare of the tribals of Village Nongtrai), the polluter pays principle and the intergenerational equity (including the history of limestone mining in the area from 1858) and the prevalent social and customary rights of the natives and tribals. [para 31] [1029-A-D]

(b) Nature of the land

2.1. According to the State of Forest Report, 2001, the North Eastern Hill State of Meghalaya is predominantly tribal with 86% tribal population. The area in question falls under Karst topography; and this fact is also borne out by the certificate dated 27.8.1997 issued by KHADC, Shillong which is a constitutional authority under the Sixth Schedule to the Constitution. According to the NEHU Report of 1997, the site selected for mining has commercially viable limestone deposit. The site was selected after thorough consultation with the village Durbar concerned which is the custodian of the land.

A **The village Durbar also felt that in the area unscientific limestone quarrying was going on resulting in loss of revenue both to the State as well as the inhabitants of the village, particularly, because the said mining was undertaken by unorganized sectors and, thus, it was**
B **decided to enter into the lease with the project proponent so that mining could be done on scientific basis. The site was also selected because of easy accessibility by road and less vegetation clearance stood involved. According to the NEHU Report, the site is located in the area on the**
C **outskirts of the forest. [para 21] [1011-B-H; 1012-A-C]**

(c) Validity of ex-post facto clearance:

3.1. By an order dated 12.12.1996, a Division Bench of this Court, in *T.N. Godavarman Thirumulpad, directed**
D **each State Government to constitute within a specific period an Expert Committee to identify areas which are forests irrespective of whether they are so notified, recognized or classified under any law and also identify areas which were earlier forests but stand degraded,**
E **denuded or cleared. This order dated 12.12.1996, thus, clarified that every State Government seeking prior approval u/s 2 of the Forest (Conservation) Act, 1980 Act shall first examine the question relating to existence of forests before sending its proposal to the Central**
F **Government in terms of the form prescribed under the Forest (Conservation) Rules, 1981 (Rule 4). Thus, the requirement of submitting the proposal for forest diversion under the 1980 Act is exclusively the obligation of the State Government. In the instant case, the project**
G **proponent had obtained EIA clearance given by MoEF dated 9.8.2001 which clearance stood transferred to the applicant only on 30.7.2002. While granting environmental clearance dated 9.8.2001 there was an express finding to the effect that "no diversion of forest land was involved". In terms of the order of this Court dated 12.12.1996, an**
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Expert Committee was in fact formed by the State of Meghalaya by notification dated 8.1.1997 with the Principal Chief Conservator of Forests as its Chairman. On 10.2.1997, the State of Meghalaya had addressed a specific letter to the Khasi Hills Autonomous District Council, stating that the land in question was reckoned as non-forest land and the Council was asked to clarify whether the area in question under the mining lease fell in the forest as per the records of the Council. The Council by its letter dated 28.4.1997 had informed the State Government that the area in question did not fall in the forest. Apart from the said letter, the Chairperson of the Expert Committee appointed by the State of Meghalaya being the Principal Chief Conservator of Forests also submitted his report in which it was expressly stated that the mining lease granted by the State Government did not fall in the forest. Since the mining lease granted by the State did not fall in the forest, the State Government did not submit any proposal to the Central Government u/s 2 of the 1980 Act as it treated the site in question as falling on the outskirts of the forests. [para 25] [1015-H; 1016-A-H; 1017-A-F]

**T.N. Godavarman Thirumulpad v. Union of India* 2005 (3) Suppl. SCR 552 = (2006) 1 SCC 1 – referred to.

3.2. It is almost after nine years that there was a change of view on the part of MoEF under which the report of the Expert Committee headed by the Principal Chief Conservator of Forests was given a go-by. Between 1997 and 2007, the view which prevailed was that the project site stood located on the outskirts of the forests. In this connection, it needs to be stated that on 1.6.2006 for the first time the Chief Conservator of Forests (C), came out with the change of view which was ultimately accepted in 2007 by MoEF. The most important fact is that subsequent to the letter dated 1.6.2006,

A addressed by the Chief Conservator of Forests (C), the Principal Chief Conservator of Forests agreed with the opinion of the Chief Conservator of Forests (C). This was by letter dated 11.5.2007. However, even according to the Principal Chief Conservator of Forests, who was the B Chairperson of the Expert Committee appointed by the State Government, the applicant was not at fault because the certificate indicating absence of forest was given by Khasi Hills Autonomous District Council. In fact the letter dated 11.5.2007 further goes to state that the activities of C the applicant will provide employment to a large number of local tribals and rural people and consequently the application for forest clearance made by the applicant without prejudice to their rights and contentions dated 3.5.2007 be considered by MoEF. [para 25] [1017-F-H; D 1018-A-D]

3.3. Besides, on 22.4.1998, a notification was issued by the State Pollution Control Board constituting an Environmental Public Hearing Panel to evaluate and assess the documents submitted by M/s. LMMPL. On E 3.6.1998, a public hearing did take place. The Headman of Nongtrai was also present. The village Durbar had agreed to the proposed project, for the reason that the limestone was abundantly available in the area but the same remained unutilized by local villagers themselves F due to lack of infrastructure. For economic development of the local population, the village Durbar had decided to lease the area to the project proponent. [para 25] [1018-D-H; 1019-A]

3.4. Public participation provides a valuable input in G the process of identification of forest. The natives and indigenous people are fully aware and they have knowledge as to what constitutes conservation of forests and development. They equally know the concept of forest degradation. They are equally aware of systematic H scientific exploitation of limestone mining without

causing of "environment degradation". However, they do not have the requisite wherewithal to exploit limestone mining in a scientific manner. These natives and indigenous people know how to keep the balance between economic and environment sustainability. In the instant case, this fact is brought out by the Minutes of the meeting held on 3.6.1998. In fact the written submissions filed by the Nongtrai Village Durbar (respondent No. 5) in I.A. No. 1868 of 2007 have specifically averred that the Nongtrai village has about 1300 hectares of community land out of which 900 hectares are limestone bearing land. The manner and method of allocation, use and occupation of the community lands are decided by the Village Durbar. The Village Durbar has granted lease of 100 hectares of community land which is limestone bearing land. [para 25] [1019-C-H; 1020-A-D]

3.5. The word "development" is a relative term. One cannot assume that the tribals are not aware of principles of conservation of forest. Limestone mining has been going on for centuries in the area and it is an activity which is intertwined with the culture and the unique land holding and tenure system of the Nongtrai Village. [para 31] [1029-D-E]

3.6. Further, a detail written submission has been filed on 13.5.2011 by the Nongtrai Village Durbar fully supporting the impugned project. Thus, this is a unique case from North East. This Court is fully satisfied that the natives and the indigenous people of Nongtrai Village are fully conscious of their rights and obligations towards clean environment and economic development. There is ample material on record which bears testimony to the fact of their awareness of ecological concerns which has been taken into account by MoEF. [para 25] [1020-D-F]

3.7. The word "environment" has different facets. Section 2(f) of the United Khasi – Jaintia Hills

A **Autonomous District (Management and Control of Forests) Act, 1958 defines the expression "forest". It is the trees of a particular girth and breast height and not every tree should be counted while computing whether a particular area is a forest area or not. In fact in the year**
B **2007, a survey of the unbroken area was conducted by the Forest Department of the State of Meghalaya wherein an inventory of the existing trees was prepared based on their nature and girth. The said record confirms that the unbroken area has less than 25 trees per acre having**
C **girth of more than 120 cms. It is in view of the existence of the 1958 Act, which is a local legislation, that the native people as also the State officials like the DFO understood the area in the light of the said Act. It is important to note once again that this understanding of the natives and**
D **tribals about the Local Act is an important input in the decision making process of granting environmental clearance. It is deeply engrained in the local customary law and usage. It is so understood by the Expert Committee headed by the then Principal Chief Conservator of Forests on the basis of which the State**
E **granted the mining lease saying that there was no forest. This certificate was granted by the State in terms of the order of this Court dated 12.12.1996. This understanding also existed in the mind of KHADC when it gave certificates on 28.4.1997, 10.7.1997 and 27.8.1997. In fact**
F **this has been the understanding of the Council as is apparent even from its letter dated 18.1.2011 (page 126 of the affidavit dated 9.3.2011 filed by the State of Meghalaya). This view prevailed with the MoEF between 1997 and 2007. [para 25] [1020-G-H; 1021-C-H; 1022-A]**

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3.8. On facts of the case, it cannot be held that the decision to grant ex post facto clearances stood vitiated on account of non-application of mind or on account of suppression of material facts by the applicant as alleged
H **by SAC. [para 25] [1022-A-B]**

4.1. Similarly, it cannot be held that ex post facto clearances have been granted by MoEF in ignorance of the existence of forests due to mis-declaration. Firstly, the ex post facto clearance is based on the revised EIA. In the circumstances, EIA Notification of 2006 would not apply. Secondly, IA preferred by SAC being I.A. No. 2225-2227/08 was preferred only in March, 2008. Thus, during the relevant period of almost a decade, SAC did not object to the said project. I.A. No. 3063 of 2011 preferred by CEC, which has acted only after receiving inputs from respondent No. 5, prima facie throws doubt on the credibility of objections raised by SAC. [para 26] [1022-C-G]

4.2. On the ex post facto clearance, suffice it to state that after Chief Conservator of Forests (C) submitted his report on 1.6.2006, MoEF directed the project proponent to apply for necessary clearances on the basis that there existed a forest in terms of the order of this Court dated 12.12.1996 and the ex post facto clearance has now been granted on that basis permitting diversion of forest by granting Stage-I forest clearance subject to compliance of certain conditions imposed by MoEF and by this Court. [para 26] [1022-G-H; 1023-A-B]

4.3. On the question of non-application of mind by the MoEF, at various stages despite compliances by the project proponent and despite issuance of certificates by various authorities, MoEF sought further clarifications/ information by raising necessary requisitions. A number of queries have been raised from time to time by the MoEF as indicated from the facts. There were four terms of references given to the HPC. According to the report, all conditions imposed with regard to environmental clearance had been substantially complied with by the applicant. The most important aspect is the HPC Report regarding the topography of the area. It states that

A though the area can be treated as forest, still it is a hilly uneven undulating area largely covered by "Karstified" limestone. The Report further states that the area can be reforested as a part of the reclamation plan. It further states that the indigenous and native people are satisfied B with the credentials of the applicant as the company is providing health care facilities, drinking water facilities, employment for local youth, construction of village roads, employment for school teachers, scholarship programme for children, etc. It also indicates that the issue of mining C was thoroughly discussed with the Village Durbar by the members of the HPC who visited the site and that the community was in agreement to allow the applicant to continue mining. [para 26] [1023-A-B; 1024-A-F]

4.4. Keeping in view the steps taken by MoEF, this D Court is satisfied that the parameters of intergenerational equity are satisfied and no reasonable person can say that the impugned decision to grant Stage-I forest clearance and revised environmental clearance stood vitiated on account of non-application of mind by MoEF. E On the contrary, the facts indicate that the MoEF has been diligent; that, MoEF has taken requisite care and caution to protect the environment; and, in the circumstances, this Court upholds the stage-I forest clearance and the revised environmental clearance granted by MoEF. [para F 26] [1024-H; 1025-A-B]

4.5. The order dated 12.4.2010 recites agreed conditions between the parties, imposed by this Court in addition to the conditions laid down by MoEF. These G conditions are in terms of judgment of this Court in *T.N. Godavarman Thirumulpad* with regard to *commercial exploitability* which even according to SAC was not considered by MoEF at the time of granting revised environmental clearance on 19.4.2010 or at the time of granting forest clearance on 22.4.2010. This order H

indicates the benefit which will accrue to the natives and residents of the Nongtrai Village. The site covers 100 hectare required for limestone mining. The Village Durbar seeks to exploit it on scientific lines. The minutes of the meeting of the Village Durbar and the submissions filed by the Durbar indicate the exercise of the rights by the tribals and the natives of Nongtrai Village seeking economic development within the parameters of the 1980 Act and the 1986 Act. [para 27-28] [1025-C-E; 1027-G-H]

4.6. However, it is made clear that none of the observations made in this judgment in the context of the nature of the land (the extent of the lands owned by the community and by private persons) shall be taken into account by the competent court in which title dispute is pending. [para 29] [1028-A-B]

4.7. On the facts of the case, the MoEF exercised due diligence in the matter of forest diversion. The instant order is confined to the facts of this case. Accordingly, there is no reason to interfere with the decision of MoEF granting site clearance dated 18.6.1999, EIA clearance dated 9.8.2001 read with revised environmental clearance dated 19.4.2010 and Stage-I forest clearance dated 22.4.2010. [para 31-32] [1029-E-F; G-H]

Part II

Guidelines to be followed in future cases

5.1. The words "environment" and "sustainable development" have various facets. At times in respect of a few of these facets data is not available. Care for environment is an ongoing process Identification of an area as forest area is solely based on the Declaration to be filed by the User Agency (project proponent). The project proponent under the existing dispensation is required to undertake EIA by an expert body/ institution.

A **The MoEF/ State Government acts on the report (Rapid EIA) undertaken by the Institutions who though accredited submit answers according to the Terms of Reference propounded by the project proponent. At times the court is faced with conflicting reports. Similarly,**
B **the government is also faced with a *fait accompli* kind situation which in the ultimate analysis leads to grant of ex facto clearance. Therefore, guidelines are required to be given so that *fait accompli* situations do not recur:**

C **(i) Time has come for this Court to declare and it is hereby declare that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the grant of permissions u/s 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and**
D **improvement under the Environment (Protection) Act, 1986. The principles/ guidelines mentioned in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation)**
E **Act, 1980. This direction is required to be given because there is no machinery even today for implementation of the National Forest Policy, 1988 read with the Forest (Conservation) Act, 1980.**

F **Section 3 of the Environment (Protection) Act, 1986 confers a power coupled with duty and, thus, it is incumbent on the Central Government to appoint an Appropriate Authority, preferably in the form of Regulator, at the State and at the Centre level for**
G **ensuring implementation of the National Forest Policy, 1988. The Court is of the view that under s. 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to**
H **impose penalties on polluters.**

A regulatory mechanism should be put in place and till the time such mechanism is put in place, the MoEF should prepare a Panel of Accredited Institutions from which alone the project proponent should obtain the Rapid EIA and that too on the Terms of Reference to be formulated by the MoEF.

(ii) In all future cases, the User Agency (project proponents) shall comply with the Office Memorandum dated 26.4.2011 issued by the MoEF which requires that all mining projects involving forests and for such non-mining projects which involve more than 40 hectares of forests, the project proponent shall submit the documents which have been enumerated in the said Memorandum.

(iii) If the project proponent makes a claim regarding status of the land being non-forest and if there is any doubt the site shall be inspected by the State Forest Department along with the Regional Office of MoEF to ascertain the status of forests, based on which the certificate in this regard be issued. In all such cases, it would be desirable for the representative of State Forest Department to assist the Expert Appraisal Committee.

(iv) At present, there are six regional offices in the country. This may be expanded to at least ten. At each regional office there may be a Standing Site Inspection Committee which will take up the work of ascertaining the position of the land (namely, whether it is forest land or not). In each Committee there may be one non-official member who is an expert in forestry. If it is found that forest land is involved, then forest clearance will have to be applied for first.

(v) Increase in the number of Regional Offices of the

A Ministry from six presently located at Shillong, Bhubaneswar, Lucknow, Chandigarh, Bhopal and Bangalore to at least ten by opening at least four new Regional Offices at the locations to be decided in consultation with the State/UT Governments to
B facilitate more frequent inspections and in-depth scrutiny and appraisal of the proposals.

(vi) Constitution of Regional Empowered Committee, under the Chairmanship of the Chief Conservator of Forests (Central) concerned and Conservator of
C Forests (Central) and three non-official members to be selected from the eminent experts in forestry and allied disciplines as its members, at each of the Regional Offices of the MoEF, to facilitate detailed/in-depth scrutiny of the proposals involving diversion
D of forest area more than 5 hectares and up to 40 hectares and all proposals relating to mining and encroachments up to 40 hectares.

(vii) Creation and regular updating of a GIS based
E decision support database, tentatively containing *inter-alia* the district-wise details of the location and boundary of: (i) each plot of land that may be defined as forest for the purpose of the Forest (Conservation) Act, 1980; (ii) the core, buffer and eco-sensitive zone
F of the protected areas constituted as per the provisions of the Wildlife (Protection) Act, 1972; (iii) the important migratory corridors for wildlife; and (iv) the forest land diverted for non-forest purpose in the past in the district. The Survey of India toposheets in digital format, the forest cover maps prepared by
G the Forest Survey of India in preparation of the successive State of Forest Reports and the conditions stipulated in the approvals accorded under the Forest (Conservations) Act, 1980 for each case of diversion of forest land in the district will also
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be part of the proposed decision support database. A

(viii) Orders to implement these may, after getting necessary approvals, be issued expeditiously.

(ix) The Office Memorandum dated 26.4.2011 is in continuation of an earlier Office Memorandum dated 31.03.2011. B

(x) Besides, Office Memorandum dated 26.04.2011 on Corporate Environmental Responsibility has also been issued by the MoEF. This O.M. lays down the need for PSUs and other Corporate entities to evolve a Corporate Environment Policy of their own to ensure greater compliance with the environmental and forestry clearance granted to them. C

(xi) All minutes of proceedings before the Forest Advisory Committee in respect of the Forest (Conservation) Act, 1980 as well as the minutes of proceedings of the Expert Appraisal Committee in respect of the Environment (Protection) Act, 1986 should be regularly uploaded on the Ministry's website even before the final approval/decision of the Ministry for Environment and Forests is obtained. This has been done to ensure public accountability. This also includes environmental clearances given under the EIA Notification of 2006 issued under the Environment (Protection) Act, 1986. Henceforth, in addition to the above, all forest clearances given under the Forest (Conservation) Act, 1980 may now be uploaded on the Ministry's website. D E F

(xii) Completion of the exercise undertaken by each State/UT Govternment in compliance of this Court's order dated 12.12.1996 wherein *inter-alia* each State/ UT Government was directed to constitute an Expert Committee to identify the areas which are "forests" G H

A irrespective of whether they are so notified, recognized or classified under any law, and irrespective of the land of such "forest" and the areas which were earlier "forests" but stand degraded, denuded and cleared, culminating in
B preparation of Geo-referenced district forest-maps containing the details of the location and boundary of each plot of land that may be defined as "forest" for the purpose of the Forest (Conservation) Act, 1980.

C (xiii) Incorporating appropriate safeguards in the Environment Clearance process to eliminate chance of the grant of Environment Clearance to projects involving diversion of forest land by considering such forest land as non-forest, a flow chart depicting,
D the tentative nature and manner of incorporating the proposed safeguards, to be finalized after consultation with the State/ UT Governments.

(xiv) The public consultation or public hearing as it
E is commonly known, is a mandatory requirement of the environment clearance process and provides an effective forum for any person aggrieved by any aspect of any project to register and seek redressal of his/her grievances.

F (xv) The MoEF will prepare a comprehensive policy for inspection, verification and monitoring and the overall procedure relating to the grant of forest clearances and identification of forests in consultation with the States (given that forests fall
G under entry 17A of the Concurrent List). [Para 32] [1030-B-H; 1031-A; 1036-A-C]

5.2. These guidelines are to be followed by the Central Government, State Government and the various
H authorities under the Forest (Conservation) Act, 1980 and

the Environment (Protection) Act, 1986, and implemented in all future cases of environmental and forest clearances till a regulatory mechanism is put in place. These guidelines have been issued in the light of this Court's experience in the last couple of years. On the implementation of these Guidelines, MoEF will file its compliance report within six months. [para 33] [1036-D-F]

Case Law Reference:

2000 (4) Suppl. SCR 94	**referred to**	**para 19**
2005 (3) Suppl. SCR 552	**referred to**	**para 27**
(2011) 1 All ER 476	**referred to**	**para 30**

CIVIL ORIGINAL JURISDICTION : I.A. Nos. 1868, 2091, 2225-2227, 2380, 2568 & 2937

IN

Writ Petition (Civil) No. 202 of 1995 etc.

Under Article 32 of the Constitution of India.

WITH

Transfer Petition (C) No. 277 of 2010.

Goolam E. Vahanvati, AG, Parag P. Tripathi, ASG, Harish N. Salve, U.U. Lalit, Shyam Divan, F.S. Nariman, Dr. A.M. Singhvi, Jayant Bhushan, Krishnan Venugoplan, Siddhartha Chowdhury, A.D.N. Rao, P.K. Manohar, Somiran Sharma, Nishanth Patil, Haris Beeran, Devdatt Kamat, S.N. Terdal, Subhash Sharma, Sanjeev K. Kapoor, Rajat Jariwal Kumar Mihir (for Khaitan & Co.), Anuj Bhandari, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, H.S. Thangkhiew, Manish Kumar Bishnoi, P. Nongbri for the appearing parties.

The Judgment of the Court was delivered by

A **S. H. KAPADIA, CJI.**

Facts

1. Lafarge Surma Cement Ltd. ('LSCL' for short) is a company incorporated under the laws of Bangladesh. It has set B up a cross-border cement manufacturing project at Chhatak in Bangladesh, which inter-alia has a captive limestone mine of 100Ha located at Phlangkaruh, Nongtrai, East Khasi Hills District in the State of Meghalaya. The mine is leased out in favour of Lafarge Umium Mining Pvt. Ltd. ('LUMPL' for short), C which is an incorporated company under the Indian Companies Act, 1956 and which is a wholly owned subsidiary of LSCL. The entire produce of the said mine is used for production of cement at the manufacturing plant at Chhatak, Bangladesh under the agreement/arrangement between Government of D India and Government of Bangladesh. There is no other source of limestone for LSCL except for the captive limestone mine situated at Nongtrai, East Khasi Hills District in the State of Meghalaya. The limestone as mined by LUMPL is conveyed from the mine situated at Nongtrai after crushing in a crusher E plant. The limestone mined is conveyed by a conveyor belt to LSCL plant in Bangladesh.

2. The National Forest Policy, 1988 stood enunciated pursuant to Resolution No. 13/52-F, dated 12th May 1952 of GOI to be followed in the management of State Forests in India. F The said Policy stood enunciated because over the years forests in India had suffered serious depletion due to relentless pressures arising from ever increasing demand for fuel wood, fodder and timber; inadequacy of protection measures; diversion of forest lands to non-forest uses without ensuring G compensatory afforestation and essential environmental safeguards; and the tendency to look upon forests as revenue earning resource. Thus, there was a need to review the situation and to evolve, for the future, a strategy of forest conservation including preservation, maintenance, sustainable utilisation,

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restoration and enhancement of the natural environment. It is this need which led to the enunciation of National Forest Policy dated 7th December, 1988. The principal aim of the Policy was to ensure environmental stability and maintenance of ecological balance. The derivation of direct economic benefit was to be subordinate to the principal aim of the Policy (See para 2.2). Under essentials of forest management it is stipulated that existing forests and forest lands should be fully protected and their productivity improved. It is further stipulated that forest cover should be increased rapidly on hill slopes, in catchment areas and ocean shores. It is further stipulated that diversion of good and productive agricultural lands to forestry should be discouraged in view of the need for increased food production (See para 3.2). Under the Policy a strategy was prescribed vide para 4. The goal is to have a minimum of one-third of the total land area under forest or tree cover. In the hills and in mountains the aim is to maintain two-third of the area under forest or tree cover in order to prevent erosion and land degradation and to ensure the stability of the fragile eco-system. Under para 4.2.3, village and community lands, which is the common feature in north-east regions, not required for other productive uses, should be taken up for development of tree crop and fodder resources and the revenue generated through such programmes should belong to the panchayats where lands are vested in them and in other cases such revenues should be shared with local communities to provide an incentive to them and accordingly land laws should be so modified wherever necessary so as to facilitate and motivate individuals and institutions to undertake tree farming. Vide para 4.3.1, the Policy lays down that schemes and projects which interfere with forests that cover steep slopes, catchment of rivers, lakes and reservoirs, geologically unstable terrain and such other ecologically sensitive areas should be severely restricted. Tropical rain/moist forests, particularly in areas like Arunachal Pradesh, Kerala, Andaman & Nicobar Islands should be totally safeguarded. No forest should be permitted to be worked without the government having approved the management plan in a prescribed form and in

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keeping with the National Forest Policy (See para 4.3.2). Under para 4.3.4.2 the rights and concessions from forests should primarily be for the bonafide use of the communities living within and around forest areas, specially the tribals. The Policy recognizes the fact that the life of tribals and other poor people living within and near forests revolves around forests and therefore the Policy stipulates vide para 4.3.4.3 that the rights and concessions enjoyed by such persons should be fully protected and that their domestic requirements of fuel wood, fodder, minor forest produce and construction timber should be the first charge on the forest produce. Para 4.4 deals with diversion of forest lands for non-forest purposes. Under the said para it is stipulated that forest land or land with tree cover should not be treated merely as a resource readily available to be utilised for various projects, but as a national asset which requires to be properly safeguarded for providing sustained benefits to the community. Diversion of forest land for non-forest purpose therefore should be subject to most careful examination by experts from the stand point of social and environmental costs and benefits. Construction of dams and reservoirs, mining and industrial development should be consistent with the need for conservation of trees and forests. Projects which involve such diversion should at least provide in their investment budget, funds for regeneration/compensatory afforestation. Beneficiaries who are allowed mining and quarrying in forest lands and in lands covered by trees should be required to re-vegetate the area in accordance with forestry practices and, therefore, by para 4.4.2 it is stipulated that no mining lease shall be granted without a proper mine management plan. Under para 4.5 it is stipulated that forest management should take special care for wildlife conservation and consequently forest management plans should include prescriptions for that purpose. Under para 4.6 of the Policy it is stipulated that a primary task of all agencies responsible for forest management shall be to associate the tribals and communities living in such areas in the protection, regeneration and re-development of forests as wells as to provide gainful

employment to people living in and around the forest. A

3. On 27.1.1994, in exercise of the powers conferred by Section 3(1) read with clause (v) of sub-Section (2) of Section 3 of the Environment (Protection) Act, 1986 (for short "the 1986 Act") read with Rule 5(3)(d) of Environment (Protection) Rules, 1986 the Central Government issued Environmental Impact Assessment Notification whereby it directs that on and from the date of publication of the said Notification in the official gazette expansion or modernization of any activity or a new project listed in Schedule-I shall not be undertaken in India unless it has been accorded environmental clearance by the Central Government in accordance with the procedure specified in the Notification. Under clause (2)(I) any person who desires to undertake any new project listed in Schedule-I shall submit an application to MoEF, New Delhi in the proforma specified in Schedule-II to be accompanied by a project report which shall include EIA report/environment management plan prepared in accordance with the guidelines issued by MoEF. Under clause 2(II) in case of mining as a site specific project the project authority (project proponent) will intimate the location of the project site to the MoEF while initiating any investigation and survey. The MoEF will convey its decision regarding suitability of the proposed site within a specified period. Thus, site clearance will be granted for a sanctioned capacity and shall be valid for five years for commencing construction, operation or mining. The EIA Report submitted with the application by the project proponent shall be evaluated and assessed by the Impact Assessment Agency, and if deemed necessary, it may consult a Committee of Experts having a composition as specified in Schedule-III. The Impact Assessment Agency (IAA) is MoEF. The Committee of Experts shall have full right of entry and inspection of the site. The IAA shall prepare a set of recommendations based on technical assessment of documents and data, furnished by the project authorities (project proponent), supplemented by data collected during visits to sites which would include interaction with the affected B C D E F G H

A population and environmental groups, if necessary. The summary of the reports, the recommendations and the conditions, subject to which environmental clearance is given, shall be made available subject to public interest to the concerned parties or environmental groups on request. B Comments of the public may be solicited within the specified period by IAA in public hearings arranged for that purpose. The pubic shall be provided access, subject to public interest, to the summary of the EIA report/environment management plan. The clearance granted shall be valid for five years for C commencement of the construction or operation of the plant. The monitoring of the implementation of the recommendations and conditions of IAA is also provided for in the said notification vide clause IV.

4. The said notification dated 27.1.1994 stood slightly D amended by notification dated 10.4.1997. By the said notification detailed procedure for public hearing has been prescribed. It also prescribes composition of public hearing panels.

E 5. On 1.9.1997 LMMPL made an application for granting environmental clearance for limestone mining project at Nongtrai, East Khasi Hills District, Meghalaya. The application was made under EIA Notification, 1994. It was made in the form prescribed by the Notification, 1994. 20 copies of Rapid EIA F Report (NEHU Report) were also annexed therewith. However, the said proposal dated 1.9.1997 was returned by MoEF vide letter dated 24.10.1997. The reason being that on 10.4.1997, as stated hereinabove, the MoEF had amended the EIA Notification of 1994 making public hearing mandatory for the development projects listed in Schedule-I of the Notification. By G reason of the said Notification dated 10.4.1997 the then project proponent (M/s. LMMPL) was asked to seek Site Clearance as well as Project Clearance separately. The Site Clearance proposal was called for through the State level agency dealing with the mines. Accordingly, by application dated 23.9.1998 M/

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s. LMMPL applied for Site Clearance for Limestone Mining Project at Nongtrai village, East Khasi Hills District, Meghalaya. This application was made in the prescribed form. The application indicates that there exists an approach/access road to the site that is described as Shillong-Mawsynram-Nongtrai or Shillong-Cherrapunjee-Shella-Nongtrai. The application further states that all villages represent tribal population. The application further indicates that there exists many private limestone quarries in the area. It is further stated in the application that the topography of the area is hilly. Against the column 'Forest Land Involved in the Project' the answer given by the project proponent was "Nil". According to the application the site is not a habitat/corridor for endangered/rare/endemic species. The source of this information was the NEHU Report. According to the said Report, mining of limestone in Khasi Hills was a source of revenue right from 1858. The limestone deposit in Meghalaya is estimated to be 2165 million tonnes. Exploitation of Nongtrai limestone dates back to 1885. Even today, a number of private parties quarry limestone in this area. An area of 100 hectares stood acquired by LMMPL on lease basis for mining. For that an agreement was signed with Village Durbar. The limestone bearing area around Nongtrai and Shella falls under the Karst topography. This area falls on the southern fringe of the Meghalaya plateau. [See Land Use/ Land Cover Map (March 1997) submitted by Mr. F.S. Nariman, Source: IRS-1C LISS-3 MX DATA, Path & Row: 111-054, Date: March 1997] Karst topography is a landscape formed by the dissolution of a layer(s) of soluble bedrock, usually carbonate rock such as limestone. Karst topography is characterized by limestone caverns carved by groundwater. Karst landscapes are formed by the removal of bedrock (composed in most cases of limestone, gypsum or salt). [See Article from Encyclopedia Britannica by William B. White] Alongwith the application, a certificate dated 27.8.1997 was annexed. It was issued by Khasi Hills Autonomous District Council, Shillong which council is the constitutional authority under Sixth Schedule of the Constitution. By the said certificate

A the council specifically stated that it had no objection for mining operation in the area at Nongtrai village since the area does not fall within a forest land. This application for site clearance was allowed by MoEF vide letter dated 18.6.1999 addressed to the Project Proponent. Site clearance was, thus, granted B under the 1994 Notification as amended on 4.5.1994 and 10.4.1997 subject to strict compliance of terms and conditions mentioned therein. One of the conditions was that the Project Proponent shall obtain environmental clearance for the proposed limestone mine as per the procedure laid down in C the 1994 Notification before taking up developmental work at the site. The said clearance was not to be construed as grant of mining permission. No developmental activity relating to the project was to start prior to environmental clearance. Accordingly, on 17.4.2000, LMMPL made an application for D environmental clearance to MoEF in the prescribed form to excavate 2.0 million tonnes per annum of limestone and to transport the same to Chhatak in Bangladesh through belt conveyor (7.2 km long within Indian territory). The mining lease area was indicated to be 100 hectare. The description of land was shown as "barren". In the application, it was further stated E that there is no notified forest land within 25 kms. from the proposed mine. Along with the application vide Annexure A, copy of No Objection Certificate (NOC) for mining operations at the proposed site dated 27.8.1997 stood annexed. That certificate was issued by Khasi Hills Autonomous District F Council, Shillong, which, as stated above, inter alia states that the Council has no objection for mining operations at Nongtrai Village since the area of 100 hectare does not fall within forest land. Similarly, vide letter dated 6.7.1997 issued by Village Durbar, NOC was granted for withdrawal of water for the G project. Vide Annexure G to the application, consent to establish the project stood issued by Meghalaya Pollution Control Board. By Annexure H to the application, minutes of Environmental Public Hearing of the project has been annexed. These minutes indicates the presence of Addl. Deputy H Commissioner, East Khasi Hills District, various government

officials including nominees of Forest Conservators and Member Secretary of the Pollution Control Board. According to the Headman of Nongtrai Village, limestone is abundantly available in the area; the same has not been utilized by local villagers due to lack of infrastructure; for economic development, the Village Durbar had decided to lease the area; the environmental implications of the project stood discussed; complaint received from Meghalaya Adventures Association was read out which complaint mainly dealt with destruction of caves which stood rebutted by the Headman and, thus, the meeting stood concluded. All this indicates even public participation and grant of NOCs by various competent authorities. Vide Annexure J to the application for environmental clearance, we find approval being granted under Section 5(1) of the Mines and Minerals (Regulation and Development) Act, 1957. Along with the application for environmental clearance M/s. LMMPL also forwarded to MoEF Rapid EIA of Limestone Mine prepared by Environmental Resources Management India Pvt. Ltd. This report describes in detail the topography of the mining site. According to the said report the leased area lies on the western side of Umium river valley. It is approachable from Shillong via Mawsynram and Nongtrai villages by motorable road. It is also accessible from Shillong by road via Cherrapunji. According to the report the site is at the Phalngkaruh which originates from the foot hills of the proposed mine site. According to the said report the site is on uneven terrain with a rugged topography. There are heaps of fractured rocks all over the place. It is a rocky region. The site rejects any possibility of natural growth of forest. It is an area of low botanical and floral diversity. It is an area covered with rocks. The area can be termed as a wasteland.

6. On receipt of the application for environmental clearance, certain queries were raised by MoEF with regard to the scope of the site clearance (the original site clearance was for 0.8 million tonnes whereas subsequently that capacity was revised to 2 million tonnes); that, as per this Court's order

A dated 12.12.1996, "forests" has to be understood in terms of the dictionary meaning and, accordingly, a certificate was asked for in that regard from local DFO; the effect due to disposal of waste water through soak pit and whether the existing road width was sufficient to carry on heavy equipments B for mining purposes. These were some of the queries/ objections on the basis of which clarification was sought vide letter dated 1.5.2000 by MoEF with regard to environmental clearance under the 1994 notification. As requested by MoEF, the project proponent vide letter dated 11.5.2000 requested the C local DFO to issue necessary certificate as called for by MoEF in terms of the order of this Court dated 12.12.1996. Accordingly, on 13.6.2000, the DFO forwarded the certificate to the project proponent in respect of Limestone Mining Project at Nongtrai, East Khasi Hills District, Meghalaya by which it was D certified that the mining site was not a forest area as per this Court's Order dated 12.12.1996 and nor did it fall under any of the notified reserved or protected forests. Moreover, the certificate once again reiterated that the site area stood covered with Karst topography which supported only a sporadic growth of a few tree shrubs. Despite such certificate of DFO, E MoEF in continuation of their letter dated 1.5.2000 called for additional information inter alia including list of flora and fauna in compliance of Wildlife (Protection) Act, 1972, list of species under the 1972 Act, consent from the State Pollution Control Board for 3000 TPD of limestone, information on ground water F potential, information regarding water requirement, etc. Clarifications sought by MoEF vide letters dated 1.5.2000 and 16.6.2000 for environmental clearance were answered by LMMPL vide letter dated 17.8.2000. As per the said reply, the environmental public hearing notice was published in three G newspapers; that, earlier the project proposal was for 0.8 million tonnes per annum but later on based on the increased cement plant production capacity in Bangladesh, it stood increased to 2.0 MTPA; that, earlier the lease period was proposed to be 35 years which stood reduced to 30 years; that, H the mine site was on Karst topography which neither MoEF nor

the Shella Action Committee ("SAC" for short) denies; that, the equipment to the mine site would be brought through Guwahati – Shillong – Mawsynram route which contains an established route whose width was 7.5 m wide; that, there was no proposal to cut any trees for the purpose; that, no sanctuary/ national park is located within 25 kms. radius from the proposed mine location; that, the mine site is situated in the southern slopes of the Central Plateau of Meghalaya; that, the core area comprising of the mining site consisted of uneven terrain with a rugged Karst topography (see page 484 of Volume III); the minutes of the environmental public hearing dated 3.6.1998 were also annexed; site clearance dated 18.6.1999 granted by MoEF was also annexed; that, a report regarding impact of limestone mining on Nongtrai, Meghalaya on Siltation Process prepared by Center for Study of Man and Environment dated April, 2000 also stood annexed to the clarifications given by LMMPL. We need to comment on that report. Firstly, it indicates that the mining site is located on the southern fringe of the Meghalaya Plateau adjoining the plains of Bangladesh having a rich endowment of high grade limestone. Secondly, it highlights that the site is approachable from Shillong (109 km.) by motorable road via Mawsynram and Nongtrai. Thirdly, it states that on account of dissolution of the limestone, Karst topography has resulted which topography is characterized by caverns and caves which are so prominent that even in 1:50,000 toposheet, they could be plotted. In other words, the karst features are intimately tied up with hydrological situation. Certain recommendations have been made in the report with regard to possible impact of limestone mining on the Phalangkaruh river system. Despite clarification, MoEF once again examined the matter through Expert Committee which held its meeting on 19th and 20th October, 2000 in New Delhi under the aegis of MoEF. In the meeting, the project proponent made a presentation on their proposal for production of *lime*stone at the rate of 30,000 tonnes per annum for five years. Certain queries were raised by the Expert Committee on the basis of which once again further clarification was sought by

A MoEF from LMMPL vide letter dated 6.11.2000. According to the query, the area in question supports diversity of plants and animals. It also represents the remnants of the rapidly vanishing humid rainforest. That, the area is a home of endemic insectivorous plants, butterflies; All this, according to MoEF, B would require a detailed survey of plants and animals to be carried out with the help of BSI and ZSI offices located in Shillong. Accordingly, the project proponent submitted report on Ecological Status Survey prepared by Centre for Environment and Development; report on Afforestation C Reclamation Plan, report on Physiography and Hydrogeology of Fugro Milieu Consult B.V. and report on Catchment Area Treatment Plan, vide letter dated 9.2.2001 addressed to MoEF. One more aspect may be noted. These reports were placed before the Expert Committee once again on 7.3.2001. Even D Wild Life Division also gave its report on 1.6.2001. After placement of all these reports, at the end of the day, EIA Clearance was given by MoEF on 9.8.2001 which again contained further conditions which were to operate once the developmental work started. According to the environmental clearance dated 9.8.2001, the total lease area of the mine is E 100 hectares; that no diversion of forest land was involved; that the targeted annual production capacity of the mine had to be 2.0 million tonnes and, lastly, certain general conditions were stipulated with regard to steps to be taken during the developmental work. On EIA Clearance being granted by F MoEF, LMMPL became desirous of transferring and assigning the lease in favour of LUMPL having its registered office at Shillong on which the State Government granted permission to transfer the mining lease vide order dated 29.8.2001. Accordingly, a transfer deed stood executed on 28.2.2002 in G the prescribed form under Rule 37-A of Mineral Concession Rules, 1960. Accordingly, on 30.7.2002, environmental clearance which was earlier granted to LMMPL stood transferred to LUMPL by MoEF.

H 7. However, vide letter dated 1.6.2006, from Chief

Conservator of Forests (C), Shri Khazan Singh, addressed to MoEF it was pointed out that he had visited Limestone Mining Project of M/s. Lafarge when it was found that project had completed developmental works and opening of mine benches had also been accomplished for 7Ha of the mining lease land. According to the said letter the mining lease area around the developed mine benches stood surrounded by thick natural vegetation cover with sizeable number of tall trees. The said vegetation included trees being cleared for developing the mining benches. That the wood obtained from felling of trees was collected by the lessor who were from Nongtrai Village. According to the said letter, for such clearance no permission was taken under Forest (Conservation) Act, 1980 (for short the '1980 Act'). Further, even the Rapid EIA report submitted by the project proponent described the land as wasteland though the visit of the Chief Conservator found it to be otherwise. Consequently, by the said letter the Chief Conservator of Forests (C) informed the MoEF that the project proponent may be directed to obtain forest clearance under the 1980 Act and not to proceed with the mining activities till such clearance. A copy of the said letter was also sent to the project proponent. By letter dated 11.8.2006, the project proponent replied to the Chief Conservator of Forests (C) stating that it had proceeded with the developmental work on the basis of the certificate given by DFO dated 13.6.2000 under which it was certified that the project area was not a forest area and it did not fall in any of the notified reserved or protected forests. It was further clarified that in the core area there were only a few trees, shrubs growing in some soil trapped in the crevices and only those shrubs and trees which are growing in the area demarcated on the excavation plan have been cut. According to the said letter the 1980 Act was not applicable as there was no diversion of forest land for non-forestry purposes. Accordingly, a letter was addressed by MoEF on 15.11.2006 to M/s. LMMPL. The complaint made by the Chief Conservator of Forests (C) was conveyed to the project proponent. In terms of the said complaint, MoEF directed M/s. LMMPL to obtain forest

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A clearance under the 1980 Act before taking steps to clear vegetation including trees for developing mining benches. On 14.9.2006, MoEF issued EIA Notification 2006 whereunder concerns of local affected persons were required to be taken into account through public consultation. By letter dated B 29.1.2007, M/s. Lafarge took the stand that there is some natural growing vegetation; that only those shrubs which are growing in the excavation plan have been cleared and since there was no diversion of forest land for non-forestry purposes the 1980 Act was not applicable. Vide letter dated 9.4.2007 C addressed by the Chief Conservator of Forests (C) to the Secretary, Department of Forest and Environment, Government of Meghalaya as well as to the Khasi Hills Autonomous District Council, it was pointed out that the mining project was undertaken in the virgin and natural forest; that the forest is D standing all around the periphery of the broken area; that the mine was operating on forest land without clearance under the 1980 Act; that the area is a natural/virgin forest; that the land belonged to village Durbar of Nongtrai and in the circumstances forest clearance was required to be obtained under the E provisions of 1980 Act in terms of the order of the Supreme Court dated 12.12.1996. According to the said letter, there was a clear violation of the 1980 Act. Accordingly, the Chief Conservator of Forests(C) Shri B.N. Jha requested the Government of Meghalaya to stop fresh clearance of vegetation, breaking of land, extension of mining area, removal F of felled trees and stoppage of non-forestry activities with immediate effect. A copy of the said letter was also forwarded to MoEF. By letter dated 17.4.2007 addressed by MoEF to Government of Meghalaya a report was asked for indicating justification for continuance of mining by the project proponent G within a week failing which MoEF had no option but to direct mine closure. Thereafter response was given by M/s. Lafarge vide letter dated 25.4.2007. However, MoEF, vide letter dated 30.4.2007, directed complete closure of all on going non-forestry activities by M/s. Lafarge in compliance of the H directions of the Supreme Court dated 12.12.1996. Suffice it

to state without going into further correspondence that M/s. Lafarge submitted its application for forest clearance under the 1980 Act vide application dated 3.5.2007. The application makes it clear that permission is sought for forest clearance without prejudice to the rights and contentions of the project proponent. After reciting the above facts, M/s. Lafarge submitted that the project was a cross-border project; that it had put in ten years of efforts for obtaining approvals; that had the reservation on the legal status of the land and the use of the mine site as forest land been made clear by Chief Conservator of Forests (C) and had such reservation been conveyed to M/s. Lafarge earlier or even at the time of consideration of the proposal for environmental clearance, they (project proponent) would have sought approval under the 1980 Act before implementing the mining project. It was pointed out that the mining lease area was 100 Ha. At the time of making the application for forest clearance the broken up area was 21.44 Ha. In the said application M/s. Lafarge undertook to bear the cost of raising and maintenance of compensatory afforestation. They also undertook to fulfill all other conditions leviable under the law. By letter dated 11.5.2007 addressed by the Principal Chief Conservator of Forests, Meghalaya to the Government of Meghalaya, it was pointed out that the project proponent had broken up area of about 21.44Ha; that the topography in the leased mine around the broken up areas was Karst topography consisting of limestone surface having natural fissures and crevices; that a sizeable quantity of limestone was lying in and around the broken up area; that the non-broken up area in the leased mine was forest land falling within the purview of the 1980 Act. By the said letter, the Principal Chief Conservator of Forests submitted that the project proponent be allowed to remove the already broken limestone from the site and that the project proponent may be directed to apply for forest clearance under the 1980 Act for the non-broken up part of the leased area. It is at this stage that M/s. Lafarge moved this Court by way of I.A. No. 1868 of 2007 inter alia seeking orders directing MoEF to expeditiously process its application under Section

A 2 of the 1980 Act within a time bound programme preferably within 60 days. By letter dated 3.7.2007 addressed by M/s. Lafarge to the MoEF (North-East Region), the regional office of the MoEF, was informed that the project proponent had already applied for forest clearance to the MoEF, New Delhi.

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8. On 6.9.2007 CEC submitted its report to this Court saying that the project proponent should have taken permission under the 1980 Act before starting operations in the area. According to CEC this was a typical case where ex-post facto approval under the 1980 Act is sought after the mine has been C allowed to operate illegally. Since fait accompli situation arose according to CEC there was no option but to recommend the case for grant of permission for the use of forest land for mining lease, conveyor belt system and associated activities subject to certain conditions mentioned therein. By interim order dated D 5.2.2010 M/s. Lafarge was directed to stop all mining activities. On 5.4.2010 a report was submitted by Shri B.N. Jha, Regional Chief Conservator of Forests (C) [also known as High Powered Committee (HPC)]. The report was submitted pursuant to the site inspection carried out by a High Level Committee which E also had interaction with local population and institutions in the first week of April, 2010. Briefly, it may be stated that the report indicates assessment of the impact of the mining done by the project proponent up to April 2010 on forest, wildlife and surroundings. The report indicates details of the area already F broken up. On the impact aspect the report states that the total clearing involves felling of 9345 trees out of which 1200 trees have already been felled. That, although the area supports rich flora, the same can be re-forested as a part of reclamation plan. According to the report, the said impact can be minimized G after a thorough study of Bio-Diversity Management Plan as well as Catchment Area Treatment Plan is prepared and executed in a time bound manner. At the same time the report states that the project is positive and beneficial to the residents of Nongtrai village due to huge amount of cash going to village H Durbar and reaching the individual household improving the

financial health of the population of two villages, i.e., Nongtrai and Shella. According to the report, interaction took place between the High Powered Committee constituted by MoEF and the locals. That villagers of Shella are not having any problems from M/s. Lafarge and that the people are very satisfied with the mining company which has provided health care facilities, drinking water facilities, employment, schools etc. According to the report, M/s. Lafarge has been contributing for the benefits of the village as well as for all the villagers by way of payment of rent for the use of the community land as well as towards the price of limestone exported to Bangladesh. The figures of such payments are also indicated in the report. Further, the report states that mining is not having any adverse effect on the human life. When the matter came before the Supreme Court on 12.4.2010, the learned Attorney General stated that MoEF will take a final decision under the 1980 Act for the revised environmental clearance for diversion of 116 Ha of forest land subject to certain conditions. Accordingly, on 19.4.2010 the MoEF granted environmental clearance with certain additional conditions. The environmental clearance dated 19.4.2010 was followed by forest clearance dated 22.4.2010 (ex-post facto clearance) granted by MoEF. This letter refers to letter of the State Government dated 19.7.2007 forwarding its proposal for diversion of 116.589 Ha of forest land for Lime Stone Mining in favour of M/s. Lafarge wherein prior approval of Central Government was sought. The said proposal of the State Government was examined by FAC constituted by Central Government under Section 3 of the 1980 Act. Thus, forest clearance was granted by MoEF vide letter dated 22.4.2010 which again stipulated further conditions to be complied with by the project proponent. Accordingly on 26.4.2010 learned AGI submitted before this Court that M/s. Lafarge may be permitted to resume the mining operations subject to compliance of conditions enumerated in the order passed by MoEF on 22.4.2010. However, this Court ordered that before it grants permission to resume the mining operations it was imperative that plans should be drawn up and

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relevant reports be placed before this Court based on a comprehensive engineering and biological study including assessment of flora and fauna. A study report was submitted by NEHU on June, 2010 in which it has been stated that the forests in the said area can be categorized into tropical moist-deciduous forest, tropical semi-evergreen forest, savanna, subtropical broadleaved forest, forest gardens, orchards etc. Regarding the core area, the report states that the broken up area (already mined) was 38.089 Ha; that the said area was devoid of any vegetation and could be characterized by limestone floor and benches. However, the vegetation in the rest of the core area (i.e. proposed mining area) had tropical-moist deciduous type of vegetation with variable canopy cover and mostly sparse. It further states that the density of plants is very low due to rocky terrain and low soil content. It further states that only a few trees described in that paragraph are present in the undisturbed core zone. On compliance of various conditions imposed by MoEF including payment of compensatory afforestation, penal compensatory afforestation and NPV with interest as well as the reports submitted by various authorities were placed before the Expert Appraisal Committee on 29.6.2010 and 21.7.2010 pursuant to the directions of the Supreme Court vide order dated 26.4.2010. According to the minutes of Expert Appraisal Committee, the conditions and environmental safeguards stipulated by MoEF while according environmental clearance on 9.8.2001 and 19.4.2010 were comprehensive enough to mitigate any adverse impacts of the project and to protect the environment if implemented effectively. The minutes of the meeting of the Expert Appraisal Committee dated 21.7.2010 also recites that various reports were considered by the Committee. It also recites the fact that the Government of Meghalaya had addressed a letter to MoEF on 12.7.2010 conveying their recommendations for the grant of formal approval under Section 2 of the 1980 Act for diversion of 116.589 Ha of forest land for Lime Stone Mining. On 21.10.2010 M/s. Lafarge submitted a compliance chart of 31 conditions.

Submissions

9. According to the learned Amicus Curiae, it is obvious from all the documents that have come on record including those filed by M/s. Lafarge that permissions under EIA Notification, 1994 (as amended) under Section 3 of the 1986 Act have been obtained without a candid disclosure of the facts. That, even if it is held that in cases of bona fide mis-interpretation of statutory provisions and Rules the project stood commenced without obtaining prior permission as mandated under Section 2 of the 1980 Act, save and except in cases of absolute candor and where the want of such permission is solely and entirely on account of bona fide doubt as to the nature and character of the land and /or statutory regime applicable to such projects, no permission should be granted specially to private projects established only for profit where the project presents a 'fait accompli'. The learned Amicus submitted that over the years we find commencement of projects without obtaining prior permission as mandated under Section 2 of the 1980 Act and, when detected, the project proponent(s) falls back on the plea of 'fait accompli'. According to the learned Amicus, time has, therefore, come for this Court not to regularize such projects which are commenced without obtaining prior permission under the 1980 Act except in cases of absolute candor and where the want of permission is solely and entirely based on account of bona fide doubt as to the nature and character of the land and/ or the statutory regime applicable to such projects. According to the learned Amicus, barring the above exceptions, this Court should direct removal of the project and restoration of the environment wherever it is possible or to take over the project to ensure that all gains from such projects are allowed to be used only for those whose rights have been violated. In support of his above submissions, learned Amicus placed reliance on the report of Chief Conservator of Forests (C) dated 1.6.2006 addressed to the MoEF in which it was stated that the mining lease area around the developed benches has been found surrounded by *thick*

A natural vegetation cover with sizeable number of tall trees; that, the said vegetation including the trees was being cleared for developing the mine benches; that, the wood obtained from felling of trees was being collected by Nongtrai Village Durbar; and that, the said report of the Chief Conservator of Forests B (C) dated 1.6.2006 contradicts the Rapid EIA report submitted by the project proponent which describes the land in question as waste land. The learned Amicus also relied upon the second report dated 9.4.2007 again by the Chief Conservator of Forests (C) based on his site visit on 7.4.2007 in which report C it has been stated that the mining lease lies in the midst of virgin and natural forest. According to the said report, the said mine in question is operating on forest land without clearance under the 1980 Act. According to the said report, calling the area / site by any other name than a forest would be travesty which D could only be assigned to an ulterior motive of obtaining exemption or avoiding taking prior approval of Government of India under the 1980 Act. The learned Amicus also placed reliance on the report dated 11.5.2007 of the Principal Chief Conservator of Forests. In the said report dated 11.5.2007, the E Principal Chief Conservator of Forests also agreed with the view of the Chief Conservator of Forests (C) stating that the project proponent should have taken permission under the 1980 Act to start the operation in the area. According to the learned Amicus, though the mine commenced commercial production w.e.f. October, 2006, the said commencement was F based on approvals granted by statutory authorities on the assumption that the mining lease area is a non-forest land. In this connection, learned Amicus pointed out that the entire case of the project proponent is based on only one certificate issued by DFO, Khasi Hills Division dated 13.6.2000 in which it has G been certified that the mining site for limestone mining project at Nongtrai, East Khasi Hills District, Meghalaya is not a forest area in terms of the order of this Court dated 12.12.1996 and that it does not fall under any notified reserved or protected forests. In the said certificate, it has been further stated that the H project site is on Karst topography which supports only a

sporadic growth of a few trees shrubs and creepers. Besides the said certificate dated 13.6.2000, the project proponent also seeks to place reliance on letters dated 28.4.1997 and 27.8.1997 addressed by Khasi Hills Autonomous District Council which took the view that the area is a non-forest land. According to the learned Amicus, it is not open to the project proponent to rely upon the certificate of DFO dated 13.6.2000 as the said certificate was given without any intimation to the higher authorities and that an inquiry has been instituted to determine the circumstances in which the certificate was issued by DFO. Learned Amicus further pointed out that the prospecting licence held by the project proponent was allowed to be converted into a mining licence in 1997 which was after the order of the Supreme Court dated 12.12.1996. That apart, there is a special law in the State of Meghalaya, i.e. The United Khasi-Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1985 under which forest has been defined to mean an area in which there are twenty five trees per acre. Thus, according to the learned Amicus by all these definitions the area in question is a forest. Thus, according to the learned Amicus even if the project proponent ultimately succeeded in getting forest clearance under Section 2 of the 1980 Act on 22.4.2010 since the said project stood established originally in the forest area in a brazen violation of the 1980 Act such a project cannot be allowed to be regularized by grant of permission ex-post facto dated 22.4.2010.

10. Shri Shyam Divan, learned senior counsel appearing on behalf of Shella Action Committee (SAC) while adopting the submissions of the learned Amicus Curiae with regard to the project being illegal, submitted that having regard to para 4.3.1 of the National Forest Policy, 1988, tropical rain/moist forest are required to be totally safeguarded. According to SAC the forest in the region is a tropical moist forest and no forest clearance ought to have been granted because of the ecological significance recognized by the 1988 Policy. According to SAC this fact was known to M/s. Lafarge *at all*

material times as can be seen from the Rapid EIA Report prepared by NEHU which specifically states that the vegetation at the study site is a mixed moist deciduous forest. Reliance is also placed by the learned counsel on the assessment of floral diversity prepared by NEHU in June, 2010 which indicates that the forest in the study area can be categorized into tropical moist-deciduous forest, tropical semi evergreen forest, savanna, sub-tropical broad leaves forest, forest garden, orchards and riparian forest. According to the said assessment of 2010, the vegetation in the core area is tropical moist-deciduous types whereas the vegetation in the proper zone can be categorized into tropical and sub-tropical types. Thus, according to the learned counsel having regard to the undisputed position emerging from the record the subject area is covered by a tropical moist forest deserving highest degree of ecological protection and therefore this Court should set aside the environmental clearance dated 9.8.2001 given under Section 3 of the 1986 Act by MoEF. In this connection it may be mentioned that SAC has also moved this Court by way of I.A. No. 2937 of 2010 seeking revocation of the environmental clearance dated 9.8.2001. They have also challenged the revised environmental clearance dated 19.04.2010 granted by MoEF as also Stage-I forest clearance dated 22.04.2010 issued by MoEF.

11. According to the learned counsel, M/s. Lafarge was duty bound to make an honest disclosure of all facts when seeking environmental and forest clearances as it is an express requirement under Clause 4 of the EIA notification 1994. That, where a false information, false data, engineered reports are submitted or factual data is concealed, the application is liable to be rejected, and where granted, it is liable to be revoked. According to SAC, M/s. Lafarge had given an express undertaking in its application for environmental clearance dated 17.4.2000 that if any part of the information submitted was found to be false or misleading the project clearance could be revoked at M/s Lafarge's risk and cost.

According to SAC, the region where the mining is taking place and with regard to which permissions were obtained is governed by a specific local Act and Rules framed thereunder, namely, United Khasi Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958 which Act was enacted by the District Council of the United Khasi Jaintia Hills Autonomous District in exercise of its powers under the Sixth Schedule to the Constitution of India. According to the learned counsel, the 1958 Act classifies forests and regulates forest resource management and use and applying the definition of "forest" under Section 2(f), the region where the mining is taking place is a forest as the said area has not less than 25 trees per acre. Thus, according to the learned counsel for SAC, it ought to be assumed that the officials of M/s. Lafarge had full knowledge of the local law as well as the forest cover and the lay out of the land. From every perspective, M/s. Lafarge could not have commenced the project without a detailed survey of the physical topography of the land and the forest cover. Thus, M/s. Lafarge had knowledge of the forest cover in the region and yet it falsely withheld this information from the concerned authorities including the MoEF. In this connection, learned counsel placed reliance on the NEHU Report of 1997, letter dated 1.6.2006 from the Chief Conservator of Forests (C) to the MoEF, letter dated 9.4.2007 from the Chief Conservator of Forests (C) to the Government of Meghalaya and assessment of floral diversity prepared by NEHU in June, 2010. According to the learned counsel, despite knowledge of the definition of "forest" and the provisions of the 1958 Act, the government officials issued letters containing incorrect information in relation to the forest cover. These letters are the letter dated 28.4.1997 from Khasi Hills Autonomous District Council, letter from the Deputy Commissioner, East Khasi Hills District dated 10.7.1997 enclosing a spot inquiry report which stated that there was no forest on the land proposed to be leased out, letter dated 27.8.1997 from Khasi Hills Autonomous District Council granting NOC on the basis that there was no forest and certificate dated 13.6.2000 issued by DFO, Khasi Hills Division

A stating that there was no forest on the land proposed to be leased out. According to the learned counsel, the environmental clearance dated 9.8.2001 issued by MoEF was premised on "No diversion of forest land or displacement of people is involved". According to the learned counsel, the said premise B is per se incorrect as there is a tropical moist – deciduous forest in the area being mined. According to the learned counsel, the environmental clearance dated 9.8.2001 was clearly granted on the basis of false representations made by M/s. Lafarge regarding absence of forests; engineered reports C projecting the site as "a near wasteland"; and the concealment of factual data available with M/s. Lafarge including the 1997 NEHU Report which showed the subject land as forest land. Thus, according to the learned counsel, the MoEF ought to revoke the environmental clearance dated 9.8.2001 having D regard to Para 4 of the EIA Notification 1994 and inasmuch as the MoEF has failed and neglected to revoke the clearance dated 9.8.2001, this Court may quash the said clearance. According to the learned counsel, the environmental clearance dated 9.8.2001 is the parent clearance and, consequently, the E revised environmental clearance dated 19.10.2010 (the correct date is 19.4.2010) must automatically fall if the parent clearance is quashed. In any event, the learned counsel submitted that the revised clearance is liable to be set aside since the mandatory procedure of conducting a public consultation had not taken place. According to the learned counsel, a public consultation F is mandatory in terms of para 7 of the EIA Notification dated 14.9.2006. Such consultation has not taken place. The public hearing held on 3.6.1998 was without a disclosure of the forest and, hence, there has been no public consultation in accordance with para 7 of the EIA Notification dated 14.9.2006. G Thus, according to the learned counsel, the revised environmental clearance dated 19.4.2010 is liable to be quashed on the ground of non-compliance of the mandatory provisions of the EIA Notification of 2006. According to the learned counsel, consequently, the stage-I forest clearance H dated 22.4.2010 is also liable to be rejected. It may be noted

that the stage-I forest clearance dated 22.4.2010 has been granted by FAC of MoEF. The learned counsel submits that under National Forest Policy, 1988 tropical rain/ moist forest is required to be totally safeguarded. That, it is a no-go area. According to the learned counsel, since the region where mining is taking place falls within tropical rain/ moist forest, FAC ought not to have given the clearance on 22.4.2010. For the afore-stated reasons, it is the case of SAC that both on account of the nature of the land in question and the conduct of M/s. Lafarge, this Court should dismiss the IA No. 1868 of 2007 filed by M/s. Lafarge and that the IA No. 2937 of 2010 filed by SAC seeking revocation of the parent environmental clearance dated 9.8.2001 and revised environmental clearance dated 19.4.2010 and forest clearance dated 22.4.2010 be allowed.

12. On the nature of the land in question, learned Attorney General submitted that in the EIA Report (NEHU Report), annexed along with the application dated 1.9.1997 for grant of environmental clearance, a description of the vegetation area at the proposed mining site which is distributed in three distinct layers indicated that the third and the lower layer consisted of shrubs and herbs and their poor growth was due to lack of soil. It was also mentioned that the majority of valuable timber trees had already been extracted from the mining site in the past in Meghalaya by the tribals who lived on timber. In para 4.9 of the Report the site was described to be mostly covered with pole sized trees, shrubs and herbs. This EIA Report did not make reference to the Certificate dated 28.4.1997 of the Khasi Hills Autonomous District Council, the Spot Inspection Report dated 10.7.1997 nor the Certificate dated 27.8.1997 issued by the Council all of which referred to absence of forest. According to the learned Attorney General at each stage MoEF had raised queries and requisitions and after a thorough probe MoEF gave ultimately Environment Clearance on 19.4.2010 and 22.4.2010 being the Forest Clearance. In this regard it was pointed out by MoEF vide letter dated 24.10.1997 that the EIA *Notification* 1994 was amended on 10.4.1997 making public hearing

A mandatory for the development projects listed in Schedule-I of the Notification. Consequently, the proposal required two stage clearance, namely, site as well as project clearance. This is the reason why the project proponent made Site Clearance application on 23.9.1998. Before that the project proponent B approached the Meghalaya State Pollution Control Board for consent to establish limestone mining project. Similarly, a public hearing notice was given on 27.4.1998. The public hearing was conducted on 3.6.1998. This was followed by Site Clearance Application dated 23.9.1998. All these steps were C taken by M/s. LMMPL, the predecessor of M/s. Lafarge. Even before granting of the Site Clearance on 18.6.1999, a letter dated 8.4.1999 was received from M/s. LMMPL sending a certificate dated 20.3.1999 from DFO, Khasi Hills Division, Shillong indicating absence of forest. Thus, at the stage of Site Clearance MoEF had two certificates before it, one dated D 27.8.1997 issued by the Executive Committee, Khasi Hills Autonomous District Council and the other being the certificate dated 20.3.1999 issued by DFO, both indicating absence of forest. To the same effect is the main application for Environmental Clearance dated 17.4.2000. One more fact E needs to be mentioned. Along with the application for Environmental Clearance dated 17.4.2000, an EIA Report prepared by Environmental Resources Management India Pvt. Ltd. giving a detailed description of the topography of the area was forwarded to MoEF. It was called as Karst Topography. In F that Report it was categorically stated that the project area did not fall in the designated forest land; that the terrain at the site was described as Karst Topography which did not allow normal plant growth. Despite clarification, MoEF wrote a letter dated 1.5.2000 to the project proponent seeking further clarification G as to whether there existed forest in terms of the Supreme Court order dated 12.12.1996 and if so a certificate to that extent should be obtained from the local DFO. In reply, M/s. LMMPL forwarded a certificate of DFO dated 13.6.2000 which stated that the proposed mining site for limestone mining project at H Phalangkaruh, Nongtrai, East Khasi Hills District, Meghalaya

leased out by M/s. LMMPL is not a forest area as per Supreme Court judgment and it does not fall under any of the notified reserves or protected forests. The area is covered with Karst topography and supports only a sporadic growth of a few trees, shrubs and creepers. The proposal of M/s. LMMPL was once again discussed at the meeting of the Expert Committee (Mining) held on 19-20.10.2000. This Committee sought further information and clarification, one of the clarifications sought was a detailed survey of the plant and animals to be carried out with the help of BSI and ZSI officers situated in Shillong. It also sought a video film of the site and other areas. Accordingly, on 9.2.2001 M/s. LMMPL gave the requisite response as desired by MoEF as well as additional information was also provided in respect of a comprehensive survey and Flora and Fauna Report dated January, 2001 of Dr. A.K. Ghosh (Former Director ZSI). The said Report of January, 2001 extensively dealt with tropical semi-evergreen forest at different elevations. This Report of Dr. Ghosh (Centre for Environment and Development) was placed before the Expert Committee on 7.3.2001. The minutes of the meeting indicate that a video film of the site was also shown. The Report indicates the Karst features, extensive flora and fauna survey carried out by the Centre for Environment and Development in conjunction with the Botanical Survey of India and Zoological Survey of India. After elaborate discussion, the Expert Committee recommended Environmental Clearance of the project once again subject to certain conditions. Even after such recommendation, the MoEF once again wrote to the Chief Conservator of Forest, Meghalaya. This was on 19.4.2001 regarding Environmental Clearance. The Chief Conservator of Forest (Wildlife Division) vide letter dated 1.6.2001 gave his comments as per the annexures which was on the basis of Field Verification Report submitted by DFO, Khasi Hills Wildlife Division, Shillong. According to the Chief Conservator of Forest (Wildlife Division) the project area is sloppy, ending in the nearby plains of Bangladesh and covered wholly by degraded forests and grassland vegetation. Further, he stated that there is a motorable road used for traffic and the

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A forest is farther away up the slope. It was concluded that there was no likelihood of any wildlife presence in the area. Thus, according to the learned Attorney General it is incorrect to say that the EIA clearance dated 9.8.2001 was granted without proper consideration. There has been a detailed consideration B at every stage. That, at the time of the submission of the application for Site Clearance dated 23.9.1998 there existed an NOC of the Pollution Control Board, a certificate dated 27.8.1997 issued by East Khasi Hills Autonomous Council and thus it cannot be said that the EIA clearance indicated non- C application of mind or that it was liable to be set aside on the ground that the EIA Division of the MoEF did not properly consider the matter. In the circumstances, according to the learned Attorney General, it cannot be said that the Environmental Clearance dated 9.8.2001 came to be issued D by MoEF arbitrarily, capriciously or whimsically. At that stage of Environmental Clearance dated 9.8.2001 existence of the forest land was not established. If it had been so established then the project proponent had to obtair forest clearance under the 1980 Act also.

E 13. At the outset, Shri F.S. Nariman, learned senior counsel appearing on behalf of M/s. Lafarge adopted the submissions made on behalf of MoEF by the learned Attorney General. As regards the nature of the land, the learned counsel invited our attention to the approved mining plan which was submitted by F LMMPL to the Regional Controller of Mines, IBM, Calcutta for limestone extraction which plan was duly approved in February, 1998. In this approved mining plan, the project area was described as having Karst topography with the presence of deep caverns, caves and cracks which permit surface water G to percolate downwards and circulate underground only to reappear as hills side springs at certain outlets. According to the mining plan, the terrain over the entire area is rocky with very little soil and devoid of hard overburden rocks. The vegetation of the area is seen to be mixed deciduous type. H There is no agricultural activity in the area as thin soil cover is

unable to sustain crops. That, even according to the NEHU Report of 1997, the site selected for mining has commercially viable limestone deposit. According to the said report, the land was left unused covered with degraded forests and this was the reason why the Durbar preferred to lease out the site to LMMPL for mining. Other factors responsible for selecting the proposed site were availability of water resource, away from human habitation, closer to the cement plant at Chhatak, easy accessibility by road and minimum damage to the rich biodiversity (see page 19 of the NEHU Report). The learned counsel submitted that Section 2 of the 1980 Act stipulates "prior approval". Thus, prior determination of what constituted forest land is required to be done. This lacuna in the 1980 Act was supplied by the order of this Court dated 12.12.1996 which inter alia provided that every State Government shall first constitute an Expert Committee within one month and based on its recommendations the State Government will identify the land as forest land on the criteria mentioned in the said Order. The learned counsel also invited our attention to Rule 4 of the Forest (Conservation) Rules, 1981 in which it is stipulated that every State Government seeking prior approval under Section 2 of the 1980 Act shall send its proposal to the Central Government in the form appended to the Rules. Thus, according to the learned counsel, under the 1980 Act read with the Rules, the requirement of submission of the proposal for forest diversion under the 1980 Act is exclusively the obligation of the State Government. This was also spelt out in the guidelines issued on 25.10.1992. Later on the Government of India amended the said guidelines in respect of the diversion of forest lands for non-forest purpose under the 1980 Act by letter dated 25.11.1994 and in para 2.4 the concept of "User Agency" was introduced but that concept was made applicable only to cases of renewal of mining leases. However, on 10.1.2003, Rule 4 of the 1981 Rules stood reframed (as Rule 6 of the 2003 Rules) which inter alia provided that every "User Agency" who wants to use any forest land for non-forest purpose shall make its proposal in the specified form appended to the Rules to the

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A concerned Nodal Officer along with the requisite information before undertaking any non-forest activity on the forest land; after receiving the proposal and if the State Government is satisfied that the proposal required prior approval under Section 2, it had to send the said proposal to the Central B Government in the appropriate form within 90 days of the receipt of the proposal from the "User Agency". The threshold limit was kept at 40 hectares. Where the proposal involved forest land of more than 40 hectares, it was to be sent by the State Government to the Government of India with the copy to C the Regional Nodal Officer. According to the learned counsel, insofar as M/s. Lafarge was concerned, its predecessor LMMPL was already given environmental clearance on 9.8.2001 and while granting the clearance there was an express finding in the environmental clearance that "*no diversion of forest land was involved*". Thus, it was never D stipulated at any time as a condition to the grant of environmental clearance dated 9.8.2001 that permission under the 1980 Act should be obtained. The learned counsel further pointed out that pursuant to the Order of this Court dated 12.12.1996 an Expert Committee was formed by the State of E Meghalaya vide notification dated 8.1.1997 with the Principal Chief Conservator of Forests as its Chairman. On 10.2.1997, the State of Meghalaya, on the subject of "Order of the Supreme Court dated 12.12.1996" wrote to the Khasi Hills Autonomous District Council that the land in question was reckoned by the F State as non-forest land. The Council was asked to inform/ clarify whether the area in question under the mining lease fell on forest land as per the records of the District Council. By letter dated 28.4.1997, the Council informed the State Government that the area in question did not fall on forest lands. Moreover, G pursuant to the Order of this Court dated 12.12.1996, the Chairperson of the Expert Committee appointed by the State of Meghalaya also filed the report of the Expert Committee in which it was expressly stated that the mining lease granted by the State Government did not fall on the forest land. Thus, it was H under the above circumstances, having regard to the order of

this Court dated 12.12.1996, that the State Government was not required to and it did not submit any proposal to the Central Government under Section 2 of the 1980 Act read with Rule 4 of the 1981 Rules as it treated the site in question as a non-forest land. This position has not been disputed by MoEF. Thus, according to the learned counsel, there was no obligation on the project proponent or on the State of Meghalaya to move MoEF under Section 2 of the 1980 Act.

14. According to the learned counsel, what has happened in the present case is that almost after 9 years there was a change of view on the part of MoEF, i.e., between 1997 and 2007. Under this change of view of MoEF, the report of the Chairperson of the Expert Committee of the State of Meghalaya which report stood annexed to the affidavit dated 3.5.1997 in this Court to the effect that the mining lease did not fall on forest land was given a go-by and an entirely new stand was taken only on and from 2006-07. One more aspect has been highlighted by the learned counsel for M/s. Lafarge. On 1.6.2006, the Chief Conservator of Forests (C), Shri Khazan Singh stated that he had visited the limestone mining project of M/s. Lafarge on 24.5.2006 when he found that the mining lease area is surrounded by thick natural vegetation cover with sizeable number of tall trees. According to the Chief Conservator of Forests (C), the Rapid EIA Report (ERM India Pvt. Ltd.) submitted by the project proponent describes the land as waste land which was not a fact. Thus, according to the Chief Conservator of Forests (C), the project proponent should be directed to obtain clearance under the 1980 Act and not to expand mining activities till such clearance is obtained. After the said letter dated 1.6.2006, the then Principal Chief Conservator of Forests now stated vide letter dated 11.5.2007 that he too agreed with the opinion of the Chief Conservator of Forests (C), Shri Khazan Singh. However, according to the learned counsel, even the Principal Chief Conservator of Forests stated in his letter dated 11.5.2007 that though M/s. Lafarge had failed to take forest clearance, they were not at

A fault because of the certificate of the Council that the site fell in a non-forest area. The letter dated 11.5.2007 further goes on to state that the activities of the company will provide employment to large number of local tribals and rural people and that since the company had applied for forest clearance B on 3.5.2007 forest clearance may be considered. Thus, according to the learned counsel, there was no collusion between M/s. Lafarge and the DFO as alleged to get the certificate dated 13.6.2000.

C 15. On the question of alleged suppression by M/s. Lafarge from MoEF of the NEHU Report 1997, learned counsel submitted that an application was prepared and submitted by M/s. LMMPL for Environmental Clearance to MoEF vide letter dated 1.9.1997; along with the said letter there were several enclosures. One of the enclosures was the NEHU D Report, the other was NOC from Khasi Hills Autonomous Council for mining operation in the project area. This letter dated 1.9.1997 was duly acknowledged by MoEF vide its letter dated 24.10.1997. As stated above, in view of the amendment to the Notification of 1994, the project proponent was advised to make E a new proposal in two different parts, namely, site clearance and project clearance. Pursuant to the said advice the project proponent preferred Site Clearance Application on 23.9.1998 made to MoEF in which once again the project proponent enclosed maps which were verbatim reproduction of the relevant F pages (including maps) in the NEHU Report. MoEF granted Site Clearance on 18.6.1999. Further even the Mining Plan submitted by the project proponent contained a Chapter on Environment Management Plan (EMP) which is a verbatim copy of Chapter 6 of NEHU Report. The said plan was G approved by Bureau of Mines. Moreover, in the Sociological and Ecological Impact Assessment Report dated 16.2.1998 prepared by ERM it has been expressly stated that Environmental Impact Assessment was carried out in 1997 and it was submitted to MoEF in September, 1997. To the same H effect one finds reference in the Executive Summary of the EIA

of proposed Limestone Mining of 9.4.1998 by ERM. According to the learned counsel the above documents indicate that there was no suppression by the project proponent from MoEF of NEHU Report of 1997 as alleged. One of the points which SAC has argued before us was absence of public hearing as required under EIA Notification of 1994. On this aspect Shri Nariman, learned counsel appearing on behalf of M/s. Lafarge invited our attention to the requisite correspondence. On 22.4.1998 a Notification was issued by Meghalaya State Pollution Control Board of constituting an Environmental Public Hearing Panel to evaluate and assess the documents submitted by the project proponent and to verify the comments, views and suggestions made by the public on the proposed project. This Notification was issued in terms of the EIA Notification of 1994, as amended on 10.4.1997. On 27.4.1998 a public notice was also issued by MPCB informing the general public about the limestone project of M/s. LMMPL. On 5.5.1998 MPCB informed two local newspapers in writing asking them to publish the Khasi translation of the public notice. On 6.5.1998 MPCB wrote to Shella Confederacy asking its Headman to display two sets of executive summary each in Khasi and English. On 13.5.1998 the State PCB wrote to the Director of Information asking him to publish public notice in Shillong Times. On 25.5.1998 the State PCB wrote to the Secretary, Shella village informing him of date and time of public hearing. 31 members attended the public hearing on 3.6.1998. As stated above, the entire proceedings have been recorded in the minutes of the meeting. On 4.9.1998 the Deputy Director, Govt. of India, MoEF forwarded a letter to the State PCB enclosing proceedings of the public hearing conducted for proposed limestone mining project of M/s. LMMPL, Nongtrai. Thus, according to the learned counsel there is no merit in the submission advanced on behalf of SAC that public hearing as per EIA Notification of 1997 did not take place.

16. Shri Nariman, learned counsel appearing on behalf of M/s. Lafarge further submitted that on facts and circumstances

A of the present case it is clear that both the project proponent and the MoEF were at all relevant times under the bona fide impression that the project site was not forest land; in fact the consistent view of all authorities, including MoEF, was that the project site (mining lease area) was not located on "forest land". B In this connection our attention was invited to the application dated 23.9.1998 made by M/s. LMMPL to MoEF for Site Clearance, the NOC from KHADC dated 27.8.1997 stating that the project area does not fall within a forest land, grant of Site Clearance on 18.6.1999 by MoEF, application for C Environmental Clearance dated 17.4.2000, grant of Environmental Clearance on 9.8.2001. All these documents and series of letters exchanged during the relevant time, according to the learned counsel, indicate that both the project proponent and MoEF were at all relevant times under the bona fide D impression that the project site (mining lease area) was not located on forest land.

17. Learned counsel further submitted that after stop mining order dated 30.4.2007 and the direction of CCF(C) of even date to obtain Forest Clearance under Section 2 of the 1980 E Act, an application was filed by M/s. Lafarge on 3.5.2010 to the State Government under Rule 6 of the Forest Conservation Rules, 2003, as amended in 2004. Accordingly, on 11.5.2007 the Principal Chief Conservator of Forest, Meghalaya wrote to the Government of Meghalaya agreeing with the views of the F CCF (C) to the effect that M/s. Lafarge should obtain permission under the 1980 Act. At the same time, as stated above, the PCCF made it clear that no fault lay on the door step of M/s. Lafarge for not seeking Forest Clearance earlier. Accordingly, on 19.6.2007 a formal proposal was made by G State Government on 19.6.2007 to MoEF for diversion of 116.589 Ha of forest land for limestone and other ancillary activities in favour of M/s. Lafarge in Khasi Hills Division under Section 2 of the 1980 Act. Thus, all necessary steps were taken, as indicated hereinabove, by M/s. Lafarge which H ultimately culminated in the Environmental Clearance by MoEF

dated 19.4.2010 and Forest Clearance dated 22.4.2010. In the circumstances, learned counsel submitted that I.A. 1868/2007 preferred by M/s. Lafarge be allowed.

Issues

18(i) Nature of land;

(ii) Whether ex post facto environmental and forest clearances dated 19.4.2010 and 22.4.2010 respectively stood vitiated by alleged suppression by M/s. Lafarge regarding the nature of the land. In this connection it was contended by learned Amicus and by the learned counsel appearing on behalf of SAC that the EIA clearance under Section 3 of the 1986 Act dated 9.8.2001 (being a parent clearance) was obtained by M/s. Lafarge on the basis of "absence of forest" with full knowledge that the project site was located on forest land.

Findings

(a) Legal Position

19. Universal human dependence on the use of environmental resources for the most basic needs renders it impossible to refrain from altering environment. As a result, environmental conflicts are ineradicable and environmental protection is always a matter of degree, inescapably requiring choices as to the appropriate level of environmental protection and the risks which are to be regulated. This aspect is recognized by the concept of "sustainable development". It is equally well-settled by the decision of this Court in the case of Narmada Bachao Andolan v. Union of India and Others [(2000) 10 SCC 664] that environment has different facets and care of the environment is an on-going process. These concepts rule out the formulation of across-the-board principle as it would depend on the facts of each case whether diversion in a given case should be permitted or not, barring "No Go" areas (whose

identification would again depend on undertaking of due diligence exercise). In such cases, the Margin of Appreciation Doctrine would apply.

20. Making these choices necessitates decisions, not only about how risks should be regulated, how much protection is enough, and whether ends served by environmental protection could be pursued more effectively by diverting resources to other uses. Since the nature and degree of environmental risk posed by different activities varies, the implementation of environmental rights and duties require proper decision making based on informed reasons about the ends which may ultimately be pursued, as much as about the means for attaining them. Setting the standards of environmental protection involves mediating conflicting visions of what is of value in human life.

(b) Nature of the land

21. In the NEHU Report of June, 1997 (Rapid EIA of Proposed Limestone Mining Project at Nongtrai, Meghalaya), a brief history of limestone mining in Khasi Hills of Meghalaya is spelt out. It indicates that mining of limestone in Khasi Hills dates back to July 10, 1763 when an agreement was signed between East India Company and the *Nawab* of Bengal for preparation of *chunam*. Regular trade of limestone from Khasi Hills of Bengal started on and from 1858. Substantial revenue was earned by the British Government from these limestone quarries as rentals, which was Rs. 23,000/- in 1858 and which subsequently stood increased to Rs. 67,000/- in 1878. The first historical account of exploitation of Nongtrai limestone dates back to 1885 when Don Rai of Shella obtained permits from the *Wahadars* (Head of Confederacy) of Shella to quarry limestone in Nongtrai village. There are historical records about continuance of limestone trade between Khasi Hills and Bengal up to 1947. The business declined after partition. Limestone mining and trade slipped into the hands of unorganized sector. According to the NEHU Report of 1997, today a number of private parties quarry limestone using unscientific methods and

export it to counterparts in Bangladesh, often illegally. These private parties sell the product at a very low price. This aspect is also being examined by CEC which has now filed its report in I.A. No. 3063 of 2011. One more aspect needs to be highlighted. According to the State of Forest Report, 2001, the North Eastern Hill State of Meghalaya is predominantly tribal with 86% population being tribal. According to the NEHU Report of 1997, approximately 60 settlements consisting of 50-200 inhabitants each with a total estimate population of 16500 persons exist within 10 km radius of the proposed mining site. Under an agreement dated 29.9.1993 (lease agreement), the village Durbar represented by a Special Committee headed by the Headman as lessor granted lease of the limestone quarry in Nongtrai to M/s. LMMC (the predecessor-in-interest of M/s. LMMPL). Thus, an area of 100 hectares stood acquired on lease basis for mining whose lessor was the village Durbar of Nongtrai. Coming to the topography of the area, one finds that the limestone bearing area around Nongtrai and Shella villages falls under Karst topography. This area falls on the southern fringe of the Meghalaya plateau. Karst topography is characterized by a limestone caverns/ caves. The factum of limestone bearing area around Nongtrai and Shella falling under Karst topography is also borne out by the certificate dated 27.8.1997 issued by KHADC, Shillong. This Council is a constitutional authority under Sixth Schedule of the Constitution. As stated above, the limestone bearing area around Nongtrai and Shella falls on the southern fringe of Meghalaya plateau. The site is approachable from Shillong via Mawsynram and Nongtrai villages by a motorable road. The site is also accessible from Shillong by road via Cherrapunji. This road is wide enough for crushers and heavy machines to be brought from Shillong. The site is on the uneven terrain with a rugged topography. (See Rapid EIA Report submitted by ERM India Pvt. Ltd. dated 6.4.2000). According to the said report, the Karst topography of the area supports sporadic growth of a few tree shrubs. According to the NEHU Report of 1997, the site selected for mining has commercially viable

A limestone deposit. The site was selected after thorough consultation with the concerned village Durbar who is the custodian of the land. The land was left unused covered with degraded forests and this was the reason for the Durbar to lease out the said land to the project proponent for mining. The B village Durbar also felt that in the area unscientific limestone quarrying was going on resulting in loss of revenue both to the State as well as the inhabitants of the village particularly because the said mining was undertaken by unorganized sectors and, thus, it was decided to enter into the lease with C the project proponent so that mining could be done on scientific basis. The site was also selected because of easy accessibility by road and less vegetation clearance stood involved. According to the NEHU Report, the site is located in the area on the outskirts of the forest. (See page 19 of the said Report)

D **(c) Validity of ex post facto clearance**

22. An important argument has been advanced on behalf of SAC that the site clearance dated 18.6.1999 and EIA clearance dated 9.8.2001 were based on misrepresentation by E M/s. Lafarge. They proceeded on the basis that there was no forest. That, both the said clearances stood vitiated by suppression of material fact of existence of forest by M/s. Lafarge and as a sequel the subsequent revised environmental clearance dated 19.4.2010 and forest clearance (Stage – I) F dated 22.4.2010 stood vitiated. In this connection, it was submitted that having regard to Para 4.3.1 of the National Forest Policy, 1988 tropical rain/ moist forest is required to be totally safeguarded; that, the project is located in a tropical moist forest and no forest clearance ought to have been G granted by MoEF because of the special ecological significance recognized by the 1988 policy. According to SAC, the fact that tropical moist forest existed in the area and continues to exist was known to M/s. Lafarge at all material times as can be seen from the NEHU Report of 1997 in which it has been categorically stated that the vegetation at the study H

site is a mixed moist deciduous forest composed of deciduous and evergreen tree elements; that, in the same Report it has been further stated that the vegetation of the area is a tropical semi-evergreen forest composed of deciduous and evergreen elements which is further corroborated by the assessment of Floral Diversity prepared by NEHU dated June, 2010 in which it has been stated that the forest in the study area is tropical moist deciduous forest, tropical semi-evergreen forest, savanna, sub-tropical broad leaves forest, forest garden, orchards and riparian forest; that, the vegetation in the unbroken area is tropical moist deciduous type with variable canopy cover mostly sparse. Thus, according to SAC and CEC, the undisputed position emerging from the record that the subject area is covered by a tropical moist forest deserving highest degree of ecological protection ought to have been taken into account by MoEF which was not done at the time of initial clearances dated 18.6.1999 and 9.8.2001. Shri Divan, learned senior counsel appearing for SAC submitted before us that the case in hand essentially deals with the decision making process in relation to the grant of environmental clearance and to test whether the decision making process stood up to judicial review. According to the learned counsel, the following basic points regarding the legal framework must be kept in view: - From the environmental perspective, in relation to a mining project, there are three main sets of permissions that are required to be obtained:

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(i) The first set of permissions is at the State level. This set of permissions primarily has to do with pollution. In each State or a group of States, a Pollution Control Board issues consent/ permit. These consents or permits are granted from a pollution perspective. The scope of enquiry is limited to pollution impacts. Obtaining such consents and permits are essential but they are not a substitute for compliance with other environmental laws.

A (ii) The second set of permissions, according to the learned counsel, is with regard to environmental clearance. The scope of environmental clearance is wider than a pollution control clearance. The authority granting environmental clearance will look
B at broader impacts beyond pollution and will examine the effect of the project on the community, forests, wild life, ground water, etc. which are beyond the scope of Pollution Control Board examination. The exercise of granting environmental clearance
C with regard to a limestone mining project of the present magnitude requires MoEF clearance.

(iii) A clearance for diversion of forest under the 1980 Act which is granted by MoEF on the recommendation of the FAC should logically
D precede the grant of environmental clearance as the environmental clearance is broader in scope and deals with all aspects, one of which may be forest diversion.

E 23. Applying the said legal framework to the facts of the present case, the learned counsel appearing for SAC submitted that the MoEF, as the authority which decides on diversion of forests and which grants environmental clearances, is duty bound to examine the diversion application in the context
F of the 1988 Policy, particularly, where tropical moist forests are sought to be cleared by the project proponent. According to the learned counsel, where MoEF grants environmental clearance in ignorance of the existence of a forest due to mis-declaration, it is duty bound to take severest possible action against the
G party that made the false declaration for profit. According to the learned counsel, since impact assessment and EIA clearances are processes based on self declarations by the project proponent (s), the decision making by MoEF depends upon honest and cogent material supplied by the project proponent and since the said process is premised on a full and fair
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disclosure of relevant facts by the project proponent, in cases where material facts are not disclosed, the MoEF should withdraw both the site as well as the environmental clearances. According to the learned counsel, the most important input in this regard must be received by MoEF in the course of its decision making from the public which is an essential check for a failure to disclose correct facts or to have regard to environmental issues that may have escaped the attention of the project proponent. According to the learned counsel, the requirement of public hearing is, thus, mandatory both under the 1994 Notification and the 2006 Notification. That, the requirement for payment of NPV does not automatically mean that environmental clearance is to be granted.

24. We are in full agreement with the legal framework suggested by the learned counsel for SAC. There is no dispute on that point. The question is confined to the application of the legal framework to the facts of the present case. Can it be said on the above facts that a mis-declaration was wilfully made by M/s. Lafarge or its predecessor (project proponent) while seeking site and environmental clearances? Was there non-application of mind by MoEF in granting such clearances? Was the decision of MoEF based solely on the declarations made by the project proponent(s)?

25. At the outset, one needs to take note of Section 2 of the 1980 Act which stipulates prior approval. That Section refers to restriction on the dereservation of forests or use of forest land for non-forest purpose. It begins with non-obstante clause. It states that "Notwithstanding anything contained in any other law for the time being in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing that any forest land or any portion thereof may be used for any non-forest purpose". This is how the concept of prior approval by the Central Government comes into picture. Thus, prior determination of what constitutes "forest land" is required to be done. By an

A order dated 12.12.1996 by a Division Bench of this Court in Writ Petition (C) No. 202 of 1995 with another in case of *T.N. Godavarman Thirumulpad v. Union of India,* this Court directed each State Government to constitute within a specific period an Expert Committee to identify areas which are forests
B irrespective of whether they are so notified, recognized or classified under any law and also identify areas which were earlier forests but stand degraded, denuded or cleared. The Committee was to be headed by the Principal Chief Conservator of Forests. This order dated 12.12.1996, thus,
C clarified that every State Government seeking prior approval under Section 2 of the 1980 Act shall first examine the question relating to existence of forests before sending its proposal to the Central Government in terms of the form prescribed under the Forest (Conservation) Rules, 1981 (see Rule 4). Thus, the
D requirement of submitting the proposal for forest diversion under the 1980 Act is exclusively the obligation of the State Government. This position was spelt out initially in the guidelines dated 25.10.1992. However, later on, the Government of India amended the guidelines in respect of
E diversion vide letter dated 25.11.1994 and by the said letter the concept of "User Agency" stood introduced. On 10.1.2003, Rule 4 of the 1981 Rules stood reframed which inter alia provided that every "User Agency" who wants to use any forest land for non-forest purpose shall make its proposal in the specified form appended to the Rules to the concerned Nodal
F Officer along with the requisite information before undertaking any non-forest activity on the forest land and after receiving the said proposal and if the State Government is satisfied that the proposal required prior approval under Section 2, the State Government had to send the said proposal to the Central
G Government in the appropriate form within the specified period of 90 days from the receipt of the proposal from the "User Agency". At this stage, it may be noted that the earlier project proponent in the present case was M/s. LMMPL. That project proponent had obtained EIA clearance given by MoEF dated
H 9.8.2001 which clearance stood transferred to M/s. Lafarge only

on 30.7.2002. While granting environmental clearance dated 9.8.2001 there was an express finding to the effect that "no diversion of forest land was involved". In terms of the order of this Court dated 12.12.1996, an Expert Committee was in fact formed by the State of Meghalaya vide notification dated 8.1.1997 with the Principal Chief Conservator of Forests as its Chairman. On 10.2.1997, the State of Meghalaya had addressed a specific letter to the Khasi Hills Autonomous District Council, which as stated above is a Constitutional Authority, stating that the land in question was reckoned as non-forest land and the Council was asked to clarify whether the area in question under the mining lease fell in the forest as per the records of the Council. The Council by its letter dated 28.4.1997 had informed the State Government that the area in question did not fall in the forest. Apart from the said letter, the Chairperson of the Expert Committee appointed by the State of Meghalaya being the Principal Chief Conservator of Forests also submitted his report in which it was expressly stated that the mining lease granted by the State Government did not fall in the forest. Since the mining lease granted by the State did not fall in the forest, the State Government did not submit any proposal to the Central Government under Section 2 of the 1980 Act as it treated the site in question as falling on the outskirts of the forests. It is almost after nine years that there was a change of view on the part of MoEF under which the report of the Expert Committee headed by the Principal Chief Conservator of Forests was given a go-by. Between 1997 and 2007, the view which prevailed was that the project site stood located on the outskirts of the forests. In this connection, it needs to be stated that on 1.6.2006 for the first time the Chief Conservator of Forests (C), Shri Khazan Singh came out with the change of view which was ultimately accepted in 2007 by MoEF. According to the Chief Conservator of Forests (C), he had visited the limestone mining project of M/s. Lafarge on 24.5.2006 when he found that the mining lease area stood surrounded by thick natural vegetation covered with sizeable number of tall trees and in the circumstances he recommended

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A that the project proponent should be directed to obtain clearance under the 1980 Act and not to carry on the mining activities till such clearance is obtained. The most important fact is that subsequent to the letter dated 1.6.2006, addressed by the Chief Conservator of Forests (C), Shri Khazan Singh, the
B Principal Chief Conservator of Forests agreed with the opinion of the Chief Conservator of Forests (C). This was by letter dated 11.5.2007. However, even according to the Principal Chief Conservator of Forests, who was the Chairperson of the Expert Committee appointed by the State Government, M/s.
C Lafarge was not at fault because the certificate indicating absence of forests was given by Khasi Hills Autonomous District Council. In fact the letter dated 11.5.2007 further goes to state that the activities of M/s. Lafarge will provide employment to a large number of local tribals and rural people
D and consequently the application for forest clearance made by M/s. Lafarge without prejudice to their rights and contentions dated 3.5.2007 be considered by MoEF. Apart from the above circumstances, on 22.4.1998, a notification was issued by the State Pollution Control Board constituting an Environmental Public Hearing Panel to evaluate and assess the documents
E submitted by M/s. LMMPL. A public notice was also issued in local newspapers on 25.5.1998. The State Pollution Control Board also sent a letter to the Secretary, Shella Village informing him of the date and time of public hearing and accordingly on 3.6.1998, a public hearing did take place.
F According to the minutes of the meeting, 31 citizens of Shella Nongtrai, Pyrkan attended the hearing. In the hearing, the purpose, objective, composition and procedure of environmental public hearing was discussed. The Headman of Nongtrai was also present. He gave reasons as to why the
G village Durbar had agreed to the proposed project. The main reason being that the limestone was abundantly available in the area but the same remained unutilized by local villagers themselves due to lack of infrastructure. That, for economic development of the local population, the village Durbar had
H decided to lease the area required for the project to M/s.

Lafarge. In the meeting, the economic benefits of the local people from the project proponent were also discussed. The environmental implications were also discussed. The mitigating measures to be adopted by the project proponent were also discussed to maintain the ecology and environmental balance of the area. The objections of certain persons were also noted and discussed. The Durbar came to the conclusion that there was no destruction of any caves. The complainant was not even present during the hearing. Thus, a public hearing did take place on 3.6.1998. One more aspect at this stage needs to be mentioned. Public participation provides a valuable input in the process of identification of forest. Today, amongst the tribals of the North East, there is a growing awareness of the close relationship between poverty and environmental pollution. According to Environmental Law and Policy in India by Shyam Divan and Armin Rosencranz, "many native and indigenous people are fully aware of what constitutes preservation and conservation of biodiversity. Many native and indigenous people have many a times opposed government policies that permit exploitation on traditional lands because such exploitation threatens to undermine the economic and spiritual fabric of their culture, and often results in forced migration and resettlement, the struggle to protect the environment is often a part of the struggle to protect the culture of the native and indigenous people" (see page 591). In our view, the natives and indigenous people are fully aware and they have knowledge as to what constitutes conservation of forests and development. They equally know the concept of forest degradation. They are equally aware of systematic scientific exploitation of limestone mining without causing of "environment degradation". However, they do not have the requisite wherewithal to exploit limestone mining in a scientific manner. These natives and indigenous people know how to keep the balance between economic and environment sustainability. In the present case, the above is brought out by the Minutes of the meeting held on 3.6.1998. In fact the written submissions filed by the Nongtrai Village Durbar (respondent No. 5) in I.A. No. 1868 of 2007 preferred by M/s.

A Lafarge have specifically averred that the total area of the land that falls within the jurisdiction of Nongtrai Village is about 2200 hectares; that, the said lands fall in two categories, namely, individual ownership lands, and community lands. The management and control of community lands is completely B within the jurisdiction of the community. Such community lands in highlands of Khasi Hills are termed as *Ri Raid* whereas community lands in low-lying areas are termed as *Ri Seng*. Nongtrai village has about 1300 hectares of community land out of which 900 hectares are limestone bearing land. The C manner and method of allocation, use and occupation of the community lands are decided by the Village Durbar. The Village Durbar has granted lease of 100 hectares of community land out of 900 hectares which as stated above is limestone bearing land. It is important to note that apart from the minutes of the meeting held on 3.6.1998 which was attended by the D Headman of the Nongtrai Village, a detail written submission has been filed on 13.5.2011 by the Nongtrai Village Durbar fully supporting the impugned project. Thus, this is a unique case from North East. We are fully satisfied that the natives and the indigenous people of Nongtrai Village are fully conscious of E their rights and obligations towards clean environment and economic development. There is ample material on record which bears testimony to the fact of their awareness of ecological concerns which has been taken into account by MoEF. In the circumstances, it cannot be said that the F impugned project should be discarded and that the decision of MoEF granting ex post facto clearances stands vitiated for non-application of mind as alleged by SAC. At this stage one more argument advanced on behalf of SAC needs to be addressed. According to SAC, in this case a decisive factor G which clearly shows that there is "forest" on the core area is the statutory definition of forest contained in the United Khasi – Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958. Section 2(f) defines the expression "forest" and the tree count emerging from the High Powered H Committee (HPC) Report which establishes that the area

answers the statutory definition. According to SAC, in terms of the said definition of forest, if there exists more than 25 trees per acre then it is a forest. This argument has no merit. According to Shri Krishnan Venugopal, learned senior counsel appearing on behalf of the Village Durbar of Nongtrai Village (respondent No. 5), SAC has not stated the full facts in this regard. We find merit in this contention. Section 5 of the 1958 Act inter alia provides that no timber or forest produce shall be removed for the purpose of sale, trade and business without prior permission. Section 7 of the said Act deals with restrictions on felling of trees and further provides that no tree below 1.37 metre in girth at the breast level shall be felled. Thus, it is the trees of a particular girth and breast height and not every tree should be counted while computing whether a particular area is a forest area or not. In fact in the year 2007, a survey of the unbroken area was conducted by the Forest Department of the State of Meghalaya wherein an inventory of the existing trees was prepared based on their nature and girth. The said record confirms that the unbroken area has less than 25 trees per acre having girth of more than 120 cms per acre. It is in view of the existence of the 1958 Act, which is a local legislation, that the native people as also the State officials like the DFO understood the area in the light of the said Act. It is important to note once again that this understanding of the natives and tribals about the Local Act is an important input in the decision making process of granting environmental clearance. It is deeply engrained in the local customary law and usage. It is so understood by the Expert Committee headed by the then Principal Chief Conservator of Forests on the basis of which the State granted the mining lease saying that there was no forest. This certificate was granted by the State in terms of the order of this Court dated 12.12.1996. This understanding also existed in the mind of KHADC when it gave certificates on 28.4.1997, 10.7.1997 and 27.8.1997. In fact this has been the understanding of the Council as is apparent even from its letter dated 18.1.2011 (see page 126 of the affidavit dated 9.3.2011 filed by the State of Meghalaya). As stated above, this

A view prevailed with the MoEF between 1997 and 2007. The word "environment" has different facets [see para 127 of the judgment of this Court in Narmada Bachao Andolan (supra)]. On the above facts, it is not possible for us to hold that the decision to grant ex post facto clearances stood vitiated on
B account of non-application of mind or on account of suppression of material facts by M/s. Lafarge as alleged by SAC.

26. Similarly, it is not possible for us to hold on the above
C facts that ex post facto clearances have been granted by MoEF in ignorance of the existence of forests due to mis-declaration. Two points are required to be highlighted at the outset. Firstly, the ex post facto clearance is based on the revised EIA. In the circumstances, EIA Notification of 2006 would not apply. Secondly, IA preferred by SAC being I.A. No. 2225-2227/08
D was preferred only in March, 2008. Thus, during the relevant period of almost a decade, SAC did not object to the said project. In fact an IA is now pending in this Court being IA No. 3063 of 2011 preferred by CEC which indicates that there are 28 active mines out of which 8 are located along the Shella-
E Cherrapunjee Road which are operating without obtaining approval and in violation of the 1980 Act. Further, the said I.A. alleges that 6 registered quarry owners are under the Shella Wahadarship, East Khasi Hills and that there are 12 individuals involved in mining limestone in the Shella Area during 2008-
F 09. All these aspects require in-depth examination. The locus of SAC is not being doubted. However, the I.A. No. 3063 of 2011 preferred by CEC which has acted only after receiving inputs from the respondent No. 5 prima facie throws doubt on the credibility of objections raised by SAC. However, we do not
G wish to express any conclusive finding on this aspect at this stage. On the ex post facto clearance, suffice it to state that after Shri Khazan Singh, Chief Conservator of Forests (C) submitted his report on 1.6.2006, MoEF directed the project proponent to apply for necessary clearances on the basis that
H there existed a forest in terms of the order of this Court dated

12.12.1996 and the ex post facto clearance has now been granted on that basis permitting diversion of forest by granting Stage-I forest clearance subject to compliance of certain conditions imposed by MoEF and by this Court. On the question of non-application of mind by the MoEF, we find that at various stages despite compliances by the project proponent and despite issuance of certificates by various authorities, MoEF sought further clarifications/ information by raising necessary requisitions. To give a few instances in terms of the 1994 EIA Notification, the then project proponent made an application to MoEF for grant of environmental clearance. With that application, the then project proponent submitted the NEHU Report of 1997. However, in the mean time there was an amendment to the EIA Notification of 1994. That amendment took place on 10.4.1997 by which two stage clearances were required to be obtained, namely, site clearance and project clearance. Therefore, immediately MoEF returned the application to the project proponent asking it to submit applications for site clearance as well as for project clearance. Similarly, although the then project proponent had made site clearance application which fulfilled the 1994 Notification (as amended), the MoEF gave site clearance on 18.6.1999 with additional conditions. Similarly, despite the project proponent making application for environmental clearance on 17.4.2000 enclosing Rapid EIA prepared by ERM India Pvt. Ltd. referring to absence of forest, the MoEF asked project proponent to obtain certificate of DFO in terms of the definition of the word "forest" as laid down in the order of this Court dated 12.12.1996. Similarly, despite the certificate given by DFO on 13.6.2000 stating that the proposed mining site is not a forest area, the MoEF sought further details in terms of the connotation of the word "forest" as laid down in the order of this Court dated 12.12.1996. Similarly, from time to time the Expert Committee of MoEF asked for details with regard to flora and fauna, list of species in that area, types of forests existing in that area, etc. Similarly, after receipt of letter from Shri Khazan Singh, the then Chief Conservator of Forests (C) on 1.6.2006,

A the MoEF called upon the project proponent to submit an application for forest clearance on the basis that the site was located in the forest. A number of queries have been raised from time to time by the MoEF as indicated from the facts enumerated hereinabove. Even a report from the High Powered
B Committee (HPC) was called for by MoEF which was submitted on 5.4.2010. There were four terms of references given to the HPC. According to the report, all conditions imposed with regard to environmental clearance had been substantially complied with by M/s. Lafarge. The report also refers to the
C steps taken by M/s. Lafarge with regard to reforestation. The most important aspect of the HPC Report is regarding the topography of the area. It states that though the area can be treated as forest, still it is a hilly uneven undulating area largely covered by "Karstified" limestone. The Report further states that the area can be reforested as a part of the reclamation plan. It
D further states that the indigenous and native people are satisfied with the credentials of M/s. Lafarge as the company is providing health care facilities, drinking water facilities, employment for local youth, construction of village roads, employment for school teachers, scholarship programme for
E children, etc. It also indicates that the issue of mining was thoroughly discussed with the Village Durbar by the members of the HPC who visited the site and that the community was in agreement to allow M/s. Lafarge to continue mining. The report further notes that most of the members of the SAC were not
F the residents of the locality (Shella Village) and were living in Shillong while occasionally visiting Shella. The report further states that 200 persons participated in a long interaction with the members of HPC. The report further states that in fact the villagers became very upset in the apprehension of M/s.
G Lafarge not being allowed to mine on their community land. As stated above, even according to the letter dated 11.5.2007, the Principal Chief Conservator of Forests states that though the site falls in the forest as pointed out by Shri Khazan Singh, the Chief Conservator of Forests (C) vide letter dated 1.6.2006,
H still it is not the fault of M/s. Lafarge. Thus, under the above

circumstances, we are satisfied that the parameters of intergenerational equity are satisfied and no reasonable person can say that the impugned decision to grant Stage – I forest clearance and revised environmental clearance stood vitiated on account of non-application of mind by MoEF. On the contrary, the facts indicate that the MoEF has been diligent. That, MoEF has taken requisite care and caution to protect the environment and in the circumstances, we uphold the stage-I forest clearance and the revised environmental clearance granted by MoEF.

27. Before concluding, we would like to refer to our order dated 12.4.2010 which recites agreed conditions between the parties which conditions are imposed by this Court in addition to the conditions laid down by MoEF. These agreed conditions incorporated in our order dated 12.4.2010 are in terms of our judgment in *T.N. Godavarman Thirumulpad v. Union of India* [(2006) 1 SCC 1] with regard to *commercial exploitability* which even according to SAC was not considered by MoEF at the time of granting revised environmental clearance on 19.4.2010 or at the time of granting forest clearance on 22.4.2010. We reproduce our order dated 12.4.2010, which reads as under:

> "Heard both sides. Learned Attorney General for India stated that the Ministry of Environment & Forests will take a decision under the Forest Conservation Act and shall consider granting permission subject to the following conditions :
>
> 1. The applicant shall deposit a sum of Rs.55 crores towards five times of the normal NPV (as recommended by the CEC) with interest @ 9% per annum from 1st April, 2007, till the date of payment. Such payment shall be made in totality in one instalment within 4 weeks from the date of the order.
>
> 2. An SPV shall be set up under the Chairmanship

of the Chief Secretary, Meghalaya with the Principal Chief Conservator of Forests, Meghalaya, Tribal Secretary, Meghalaya, Regional Chief Conservator of Forests, MoEF at Shillong and one reputed NGO (to be nominated by the MoEF) as Members. The SPV will be set up within 4 weeks.

3. The User Agency will deposit with the SPV a sum of Rs.90/- per tonne of the limestone mined from the date on which mining commenced within 4 weeks of the SPV being constituted.

4. The SPV shall follow the principles and procedure presently applied for utilization of CAMPA money. The account will be audited by the Accountant General, Meghalaya. The money will be kept in interest bearing account with a Nationalized Bank. The Accountant General and the SPV shall file an Annual Report before this Hon'ble Court detailing all the work done by it in relation to the welfare projects mandated upon it including the development of health, education, economy, irrigation and agriculture in the project area of 50 kms. solely for the local community and welfare of Tribals.

5. The User Agency will comply with all the conditions imposed on it earlier as well as further recommendations made by the Committee constituted by the MoEF under the order dated 30th march, 2010, including, in particular, the following :

(a) It shall prepare a detailed Catchment Area Treatment Plan.

(b) It shall explore the use of surface miner technology.

(c) It shall monitor ambient area quality as per

New National Ambient Air Quality Standards. A

(d) It shall take steps to construct a Sewage Treatment Plant and Effluent Treatment Plant.

(e) It shall discontinue any agreement for procuring limestone on the basis of disorganized and unscientific and ecologically unsustainable mining in the area. B

(f) It shall prepare a comprehensive forest rehabilitation and conservation plan covering the project as well as the surrounding area. C

(g) It shall prepare a comprehensive Biodiversity Management Plan to mitigate the possible impacts of mining on the surrounding forest and wildlife. D

(h) It shall maintain a strip of at least 100 meter of forest area on the boundary of mining area as a green belt.

E

6. The MoEF shall take a final decision under the Forest Conservation Act, 1980 for the revised environmental clearance for diversion of 116 hectares of forest land, taking into consideration all the conditions stipulated hereinabove and it may impose such further conditions as it may deem proper. F

List on 26.04.2010 at 2.00 p.m."

28. This order indicates the benefit which will accrue to the natives and residents of the Nongtrai Village. The site covers 100 hectare required for limestone mining. The Village Durbar G seeks to exploit it on scientific lines. The minutes of the meeting of the Village Durbar and the submissions filed by the Durbar indicate the exercise of the rights by the tribals and the natives of Nongtrai Village seeking economic development within the parameters of the 1980 Act and the 1986 Act. H

29. At the request of the learned counsel for SAC, we wish to state that none of the observations made hereinabove in the context of the nature of the land (the extent of the lands owned by the community and by private persons) shall be taken into account by the competent court in which title dispute is pending today.

(d) Summary

30. Time has come for us to apply the constitutional "doctrine of proportionality" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices. In the circumstances, barring exceptions, decisions relating to utilization of natural resources have to be tested on the anvil of the well-recognized principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision? Thus, the court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play. Our above view is further strengthened by the decision of the Court of Appeal in the case of R v. Chester City Council reported

in (2011) 1 All ER 476 (paras 14 to 16).

31. Accordingly, this matter stands disposed of keeping in mind various facets of the word "environment", the inputs provided by the Village Durbar of Nongtrai (including their understanding of the word "forest" and the balance between environment and economic sustainability), their participation in the decision-making process, the topography and connectivity of the site to Shillong, the letter dated 11.5.2007 of the Principal Chief Conservator of Forests and the report of Shri B.N. Jha dated 5.4.2010 (HPC) (each one of which refers to economic welfare of the tribals of Village Nongtrai), the polluter pays principle and the intergenerational equity (including the history of limestone mining in the area from 1858 and the prevalent social and customary rights of the natives and tribals). The word "development" is a relative term. One cannot assume that the tribals are not aware of principles of conservation of forest. In the present case, we are satisfied that limestone mining has been going on for centuries in the area and that it is an activity which is intertwined with the culture and the unique land holding and tenure system of the Nongtrai Village. On the facts of this case, we are satisfied with due diligence exercise undertaken by MoEF in the matter of forest diversion. Thus, our order herein is confined to the facts of this case.

Conclusion

32. Accordingly, we see no reason to interfere with the decision of MoEF granting site clearance dated 18.6.1999, EIA clearance dated 9.8.2001 read with revised environmental clearance dated 19.4.2010 and Stage-I forest clearance dated 22.4.2010. Accordingly, I.A. No. 1868 of 2007 preferred by M/s. Lafarge stands allowed with no order as to costs. Consequently, I.A. No. 2937 of 2010 preferred by SAC is

A dismissed. The interim order passed by this Court on 5.2.2010 shall also stand vacated. All other I.As. shall stand disposed of.

Part II

B **Guidelines to be followed in future cases**

(i) As stated in our order hereinabove, the words "environment" and "sustainable development" have various facets. At times in respect of a few of these C facets data is not available. Care for environment is an ongoing process. Time has come for this Court to declare and we hereby declare that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the D grant of permissions under Section 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and improvement under the Environment (Protection) Act, 1986. The principles/ guidelines mentioned in the National E Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation) Act, 1980. This direction is required to be given because there is no machinery even today established for implementation of the said National F Forest Policy, 1988 read with the Forest (Conservation) Act, 1980. Section 3 of the Environment (Protection) Act, 1986 confers a power coupled with duty and, thus, it is incumbent on the Central Government, as hereinafter G indicated, to appoint an Appropriate Authority, preferably in the form of Regulator, at the State and at the Centre level for ensuring implementation of the National Forest Policy, 1988. The difference between a regulator and a court must be kept in H mind. The court / tribunal is basically an authority

which reacts to a given situation brought to its notice whereas a regulator is a pro-active body with the power conferred upon it to frame statutory Rules and Regulations. The Regulatory mechanism warrants open discussion, public participation, circulation of the Draft Paper inviting suggestions. The basic objectives of the National Forest Policy, 1988 include positive and pro-active steps to be taken. These include maintenance of environmental stability through preservation, restoration of ecological balance that has been adversely disturbed by serious depletion of forest, conservation of natural heritage of the country by preserving the remaining natural forests with the vast variety of flora and fauna, checking soil erosion and denudation in the catchment areas, checking the extension of sand-dunes, increasing the forest/ tree cover in the country and encouraging efficient utilization of forest produce and maximizing substitution of wood. **Thus, we are of the view that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.** There is one more reason for having a regulatory mechanism in place. Identification of an area as forest area is solely based on the Declaration to be filed by the User Agency (project proponent). The project proponent under the existing dispensation is required to undertake EIA by an expert body/ institution. In many cases, the court is not made aware of the terms of reference. In several cases, the court is not made aware of the study area undertaken by the expert body. Consequently, the MoEF/ State Government acts on the report (Rapid EIA) undertaken by the

A Institutions who though accredited submit answers according to the Terms of Reference propounded by the project proponent. We do not wish to cast any doubt on the credibility of these Institutions. However, at times the court is faced with conflicting
B reports. Similarly, the government is also faced with a *fait accompli* kind situation which in the ultimate analysis leads to grant of ex facto clearance. To obviate these difficulties, we are of the view that a regulatory mechanism should be put in place and
C till the time such mechanism is put in place, the MoEF should prepare a Panel of Accredited Institutions from which alone the project proponent should obtain the Rapid EIA and that too on the Terms of Reference to be formulated by the MoEF.

D (ii) In all future cases, the User Agency (project proponents) shall comply with the Office Memorandum dated 26.4.2011 issued by the MoEF which requires that all mining projects involving forests and for such non-mining projects
E which involve more than 40 hectares of forests, the project proponent shall submit the documents which have been enumerated in the said Memorandum.

(iii) If the project proponent makes a claim regarding
F status of the land being non-forest and if there is any doubt the site shall be inspected by the State Forest Department along with the Regional Office of MoEF to ascertain the status of forests, based on which the certificate in this regard be issued. In
G all such cases, it would be desirable for the representative of State Forest Department to assist the Expert Appraisal Committee.

(iv) At present, there are six regional offices in the country. This may be expanded to at least ten. At
H each regional office there may be a Standing Site

Inspection Committee which will take up the work of ascertaining the position of the land (namely whether it is forest land or not). In each Committee there may be one non-official member who is an expert in forestry. If it is found that forest land is involved, then forest clearance will have to be applied for first.

(v) Increase in the number of Regional Offices of the Ministry from six presently located at Shillong, Bhubaneswar, Lucknow, Chandigarh, Bhopal and Bangalore to at least ten by opening at least four new Regional Offices at the locations to be decided in consultation with the State/UT Governments to facilitate more frequent inspections and in-depth scrutiny and appraisal of the proposals.

(vi) Constitution of Regional Empowered Committee, under the Chairmanship of the concerned Chief Conservator of Forests (Central) and having Conservator of Forests (Central) and three non-official members to be selected from the eminent experts in forestry and allied disciplines as its members, at each of the Regional Offices of the MoEF, to facilitate detailed/in-depth scrutiny of the proposals involving diversion of forest area more than 5 hectares and up to 40 hectares and all proposals relating to mining and encroachments up to 40 hectares.

(vii) Creation and regular updating of a GIS based decision support database, tentatively containing *inter-alia* the district-wise details of the location and boundary of (i) each plot of land that may be defined as forest for the purpose of the Forest (Conservation) Act, 1980; (ii) the core, buffer and eco-sensitive zone of the protected areas constituted as per the provisions of the Wildlife

(Protection) Act, 1972; (iii) the important migratory corridors for wildlife; and (iv) the forest land diverted for non-forest purpose in the past in the district. The Survey of India toposheets in digital format, the forest cover maps prepared by the Forest Survey of India in preparation of the successive State of Forest Reports and the conditions stipulated in the approvals accorded under the Forest (Conservations) Act, 1980 for each case of diversion of forest land in the district will also be part of the proposed decision support database.

(viii) Orders to implement these may, after getting necessary approvals, be issued expeditiously.

(ix) The Office Memorandum dated 26.4.2011 is in continuation of an earlier Office Memorandum dated 31.03.2011. This earlier O.M. clearly delineates the order of priority required to be followed while seeking Environmental Clearance under the Environment Impact Assessment Notification 2006. It provides that in cases where environmental clearance is required for a project on forest land, the forest clearance shall be obtained before the grant of the environment clearance.

(x) In addition to the above, an Office Memorandum dated 26.04.2011 on Corporate Environmental Responsibility has also been issued by the MoEF. This O.M. lays down the need for PSUs and other Corporate entities to evolve a Corporate Environment Policy of their own to ensure greater compliance with the environmental and forestry clearance granted to them.

(xi) All minutes of proceedings before the Forest Advisory Committee in respect of the Forest (Conservation) Act, 1980 as well as the minutes of

proceedings of the Expert Appraisal Committee in respect of the Environment (Protection) Act, 1986 are regularly uploaded on the Ministry's website even before the final approval/decision of the Ministry for Environment and Forests is obtained. This has been done to ensure public accountability. This also includes environmental clearances given under the EIA Notification of 2006 issued under the Environment (Protection) Act, 1986. Henceforth, in addition to the above, all forest clearances given under the Forest (Conservation) Act, 1980 may now be uploaded on the Ministry's website.

(xii) Completion of the exercise undertaken by each State/UT Govt. in compliance of this Court's order dated 12.12.1996 wherein *inter-alia* each State/UT Government was directed to constitute an Expert Committee to identify the areas which are "forests" irrespective of whether they are so notified, recognized or classified under any law, and irrespective of the land of such "forest" and the areas which were earlier "forests" but stand degraded, denuded and cleared, culminating in preparation of Geo-referenced district forest-maps containing the details of the location and boundary of each plot of land that may be defined as "forest" for the purpose of the Forest (Conservation) Act, 1980.

(xiii) Incorporating appropriate safeguards in the Environment Clearance process to eliminate chance of the grant of Environment Clearance to projects involving diversion of forest land by considering such forest land as non-forest, a flow chart depicting, the tentative nature and manner of incorporating the proposed safeguards, to be finalized after consultation with the State/ UT Governments.

A (xiv) The public consultation or public hearing as it is commonly known, is a mandatory requirement of the environment clearance process and provides an effective forum for any person aggrieved by any aspect of any project to register and seek redressal B of his/her grievances;

(xv) The MoEF will prepare a comprehensive policy for inspection, verification and monitoring and the overall procedure relating to the grant of forest clearances and identification of forests in C consultation with the States (given that forests fall under entry 17A of the Concurrent List).

33. Part II of our order gives guidelines to be followed by the Central Government, State Government and the various D authorities under the Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986. These guidelines are to be implemented in all future cases. These guidelines are required to be given so that *fait accompli* situations do not recur. We have issued these guidelines in the light of our experience in E the last couple of years. These guidelines will operate in all future cases of environmental and forest clearances till a regulatory mechanism is put in place. On the implementation of these Guidelines, MoEF will file its compliance report within six months.

F R.P. Interalocutary applications disposed of.