IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWPIL No. 8 of 2009
along with
CWP No.6802 & 6803 of 2010.

Judgment reserved on: 27.5.2011.

Date of decision : 12.8.2011

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1. CWPIL No.8 of 2009:

Court on its own Motion …Petitioner

Versus.

State of H.P. and others ….Respondents

2.CWP No.6802 of 2010

Lafarge India Pvt. Ltd. ….Petitioner

Versus.

Union of India and others ….Respondents

3.CWP No.6803 of 2010

Lafarge India Pvt. Ltd. ….Petitioner

Versus

Union of India and others ….Respondents

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge .

The Hon'ble Mr. Justice Sanjay Karol,, Judge.

Whether approved for Reporting ? yes

For the Petitioner (s): Ms.Madhu Sharma, Advocate for the petitioner in CWPIL No.8 of 2009.

M/s.Raju Ramchandra and Mr.R.L. Sood, Sr.Advocates, with N.K. Sood, Ajay Mohan Goel, Akshay Patil, Nitin Mishra, Vipin Negi and Aman Sood, Advocates for M/s.Lafarge India Pvt. Ltd.

For the Respondent(s): Mr.Vivek Singh Thakur, Addl.A.G. and Mr.Rajesh Mandhotra, Dy.A.G. for respondents State.

Mr.Sandeep Sharma, ASGI and Mr.Ravinder Thakur, CGSC, for respondent Union of India.

Mr.S.S. Mittal, Senior Advocate with Mr.Anil Chauhan, counsel for respondent Pollution Control Board.

Mr.G.D. Verma, Sr.Advocate with Mr.G.S. Thakur, counsel for respondents 2&3 in CWP No.6802 of 2010.

M/s.Ritwick Dutta, Rahul Chaudhary and Anand Sharma, counsel for respondent No.2 in CWP No.6803 of 2010.

Per Deepak Gupta, J.

1. The aforesaid three petitions are being disposed of by one judgment since common questions of law and fact are involved in these cases.

2. Briefly stated, the facts of the case are that the petitioner in CWP Nos.6802 & 6803 of 2010 M/s.Lafarge India Pvt. Ltd. (hereinafter referred to as the Company) entered into a memorandum of understanding with the State of Himachal Pradesh for setting up a cement project in Tehsil Karsog, District Mandi, H.P. Consequent to this memorandum the Company applied for grant of environment clearance for its proposed project. The Union of India finalized the terms of reference and sent the same to the Company. Thereafter, a public notice was issued and the same was published in requisite number of newspapers as required under law. Objections were invited from the inhabitants of

the affected areas. Public hearing was held on 4th December, 2008 and thereafter the Expert Appraisal Committee (EAC) which was to take a decision in the matter constituted a Sub committee to visit the spot. The said Sub Committee visited some of the areas on 1st and 2nd May, 2009. It admittedly did not visit the mining area but viewed it from some distance. Thereafter, the EAC recommended that the project be approved and on the basis of the report of the EAC, Union of India passed an order on 8th June, 2009 granting environmental clearance which clearance was granted subject to as many as 55 conditions.

3. Against the order dated 8th June, 2009, two appeals were filed before the National Environmental Appellate Authority (hereinafter referred to as the Appellate Authority). It is not disputed that there was no Judicial Member presiding over the authority and one sole member of the authority visited the site and thereafter set-aside the order of the EAC. This

order has been challenged by the petitioner Company on various grounds.

4. A letter addressed to the Hon'ble Chief Justice of this Court against the setting up of the cement plant in question was treated as a writ petition (CWPIL No.8 of 2009) and since this relates to the same plant it has also been heard with the petitions of the petitioner Company.

5. The main dispute relates to the environment clearance dated 8.6.2009 granted in favour of the petitioner Company by the Union of India. Some of the local residents of the area challenged this clearance by filing appeals before the appellate Authority mainly on the following grounds:

a) that the Additional Magistrate chairing the public hearing acted in an arbitrary manner and that no opportunity was given to the persons opposing the setting up of the plant.

b) That the environmental impact assessment did not take into consideration the effect of setting up of

the cement plant on the fertile agricultural land and the other areas which would be affected. It was also urged that the forest rights of the villagers and the right to get herbs would be affected.

c) Complaints were also raised with regard to air and noise pollution and the fact that the project would generate a large amount of hazardous waste. It was also prayed that no such permission should have been granted without first getting the forest clearance.

6. The sole member of the Appellate Authority visited the mining and plant site and came to the conclusion that the overwhelming opposition of the local villagers merits reconsideration by the State Government and according to the Single Member the dispossession, impoverishment and trauma attached to the people had not been captured by the EIA nor appreciated by the EAC or the

State Government. The Single member opined that the mining would affect the environment of the area. He also found that Majathal Wildlife Sanctuary is just 5 k.m. away from the plant site and taking all these factors into consideration the member came to the conclusion that the EAC and the Ministry have not correctly assessed the impact of the Project and quashed the same. He gave certain other directions also with which this Court is not concerned.

7. One of the main reasons which weighed with the Appellate Authority for setting aside the recommendations of the EAC was that the EAC had constituted a Sub Committee to visit the site but this Sub Committee only visited the plant site and did not visit the mining site. This decision of the Appellate Authority has been challenged by the Company by filing the aforesaid two writ petitions.

8. On behalf of the petitioner Company it is contended that the environmental clearance was granted after following the process laid down in the EIA notification dated 14th

September, 2006 and there was no violation of the prescribed procedure. It is further submitted that the public hearing was conducted in accordance with the requirements of the aforesaid notification. In this public hearing views were expressed both for and against the setting up of the Project. Further, according to the petitioner company, the EIA prepared by the petitioner Company was in strict compliance of the terms of reference. It is contended that it was not the legal requirement of law that the EAC by itself or through the Sub Committee should have visited the spot to assess the impact of the Project. It is admitted that the Sub Committee only visited the plant site but did not visit the actual mining site. It is contended that the Sub Committee viewed the mining site from three vantage points and also through Google imaging etc. It is further contended that the sub committee in its report had clearly indicated that it could not visit the mining site but despite this fact the EAC accepted the report of the sub Committee and therefore it is submitted that the

EAC by accepting the report of the Sub Committee condoned any lapse on behalf of the Sub Committee. It is urged that the single Member of the Appellate Authority could not have functioned as the Appellate Authority and passed the impugned order. It is further submitted that the member became Judge, Prosecutor and witness and he could not have himself gone to the spot to receive further evidence. Sh.Raju Ramchandra, learned senior counsel appearing on behalf of the petitioner Company also contended that a single Member could not sit over the report of the Expert Committee. According to him, the Member was swayed more by public sentiments than by legal provisions. He further submitted that the Appellate authority could not go into this aspect of the matter. It is argued by him that the concept of sustainable development is an integral part of our environmental jurisprudence.

9. Sh.Ritwick Dutta, learned counsel appearing on behalf of private respondents submitted that when the public hearing was held no public

representatives were present and only those supporting the management were present. According to him the Majathal Wildlife Sanctuary is less than 10 k.ms away and therefore the Project could not have been granted environmental clearance. Sh.Dutta submits that the petitioner Company is guilty of suppressing material facts and in its EIA as well as in other documents it wrongly stated that Majathal Wildlife Sanctuary was less than 10 k.ms away. He also submitted that there should be sequential clearances and first forest clearance must be obtained and then only environmental clearance can be granted.

10. Sh.G.D. Verma, learned senior counsel for some of the private respondents submitted that the environmental clearance could not have been granted in the fashion it has been done. According to him, the Company should first fulfil the conditions and thereafter only the question of granting environmental clearance to it would arise. He submits that the Company may or may not comply with the conditions laid down by

EAC and therefore the permission should be set-aside.

11. Ms.Madhu Sharma, Advocate, amicus curie in the Public Interest Litigation submitted that the plant in question if permitted to be erected will cause environmental havoc in the area. It will affect the flora and fauna of the area. She has otherwise supported the submissions of Mr.Ritwick Dutta.

12. The first question which arises for decision is whether a single Member could have decided the case or not because this goes to the very root of the matter. In fact this question is academic in nature because now there is no National Environment Appellate Authority as the National Environment Authority Act has itself been repealed. However, this question has to be decided as far as the present case is concerned.

13. The National Environmental Appellate Authority was created under the National Environment Appellate Authority Act, 1997. Section 4 deals

with the composition of the Authority and reads as follows:

> "**4. Composition of Authority.**
>
> The Authority shall consist of a Chairperson, a Vice-Chairperson and such other Members not exceeding three, as the Central Government may deem fit."

14. Under Section 5 of the Act, only a person who has been a Judge of the Supreme Court or the Chief Justice of a High Court was qualified to be appointed as Chairperson of the Appellate Authority. As far as Vice-Chairperson is concerned the minimum eligibility was that the person should have held the post of Secretary to the Government of India for a period of at least two years and should have administrative, legal, managerial experience or expertise. Only a person having professional knowledge or practical experience in the areas pertaining to conservation, environmental management, law or planning and development could be appointed as a Member.

15. Section 6 provides that in the event of the occurrence of any vacancy in the office of the Chairperson, the Vice Chairperson may act as a Chairperson till a new Chairperson is appointed.

16. Section 10 of the Act reads as follows:

> **"10. Vacancy in Authority not to invalidate acts or proceedings.**
>
> No act or proceedings of the Authority shall be questioned or shall be invalid merely on the ground of existence of any vacancy or defect in the establishment of the Authority."

17. Under Section 11, an appeal against the order granting environmental clearance lay to the Appellate Authority. The procedure and powers of the Authority are laid down in Section 12 of the Act. Section 13 provides that the Chairperson shall exercise financial and administrative powers and has the authority to delegate such powers to the Vice-Chairperson or any other officer.

18. On behalf of the Petitioner Company, it is submitted that the sole member could not have acted as the Appellate Authority and a perusal of Section 12 of the Act clearly indicates that the decision had to be taken by at least two or more members. It is contended that Section 10 should be read only in respect of acts which are administrative in nature or proceedings relating to intermediately or interlocutory orders. It is contended that Section 12 clearly lays down

that it is the authority alone which can decide the matter and not a single member.

19. On the other hand, on behalf of the public representatives it is contended that Section 10 clearly validates all acts including judicial acts and it is contended that the order cannot be held invalid only on account of the fact that the posts of Chairperson and Vice-Chairperson were vacant.

20. Reliance is also placed on Rule 12 (4) of the National Environment Appellate Authority (Appeal)Rules, 1997 which reads as follows:

> **"12.Orders of the Authority and time-frame for disposal of appeal:-**
>
> (1)to (3) xxxxxxxx
>
> (4)No order of the Authority shall be questioned on the ground merely of the existence of any vacancy or defect in the constitution of the Authority or any defect in the appointment of a person acting as the member of the Authority."

21. In **Diwan Chand Verma vs. State of H.P. and another, 2004(2) Cur.L.J. (HP) 248,** relating to the Human Rights Act, no Chairman was appointed but one of the Members was notified to act as Chairman in terms of Section 25 of the Protection of Human Rights Act. The person so appointed was a retired Judge of this Court. His appointment was the subject matter of

challenge in a petition filed in this Court. Section 25 of that Act is similar to Section 6 of the National Environment Appellate Authority Act. It would also be pertinent to mention that Section 9 of the Human Rights Act is identical to Section 10 of the present Act. Dealing with an identical issue a Division Bench of this Court held as follows:

> "14. We can summarily deal with Section 9 at this very stage and by simply observing that the existence of any vacancy or defect in the constitution of the Commission, as is mentioned therein, is relatable only to a stage which may arise after the constitution of the Commission, and not prior to its constitution. Only after the Commission has been validly constituted, at a stage subsequent to its valid constitution, if a vacancy has arisen or there creeps in some defect in its constitution, Section 9 saves the proceedings of the Commission from any vice of legal infirmity owning to any such vacancy or any defect in the constitution of the Commission. Section 9, therefore, had no applicability to the issues involved in this case (as the Commission had not been admittedly constituted, even on the own showing of the respondents, till the date the opinion was rendered) and it was, therefore, totally wrong on the part of the Law Department in invoking Section 9 of the act in so far as the facts of the present case were concerned.
>
> 15. That brings us to the core issue involved in this case which revolves around a plain reading of Section 25 of the Act read with primarily Section 21 of the Act. First and for most, a very clear stipulation in Section 21 of the Act is suggestive of the fact that a State Government has to consist of mandatorily a Chairperson (who has been a Chief Justice of a High Court) and Members, whose categories, are mentioned in Clauses (b), (c) and (d) of sub-section (2) of Section 21. The expression "the State Commission shall consist of" (emphasis supplied) being mandatory in nature, conveys clear Legislative intent in unmistakable terms that the Commission would not come into being nor shall it be deemed to be in existence unless and until its Chairperson, in addition to the Members, has been validly appointed.

The only person, who is eligible to be appointed as a Chairperson of the Commission, is one who has been a Chief Justice of a High Court. Factually it is undisputed that respondent No.2 has not been a Chief Justice of the High Court. If Notifications dated 5th August, 2003 and 17th September, 2003 are read together, insofar as the appointment of the four persons mentioned in the Notification dated 17th September, 2003 as Members of the Commission are concerned, perhaps no defect can be found in the issuance of these two Notifications per se nor can any defect be found in the matter of appointment of the four persons as the Members of the Commission. To that extent, therefore, only to the limited extent of examining the correctness and validity of the aforesaid two Notifications and appointment of the four person as the Members of the Commission, the Notification dated 17th September, 2003 may have to be read in isolation in the sense that even though it does appoint four persons as Members of the Commission, by itself neither this Notification nor the earlier Notification dated 5th August, 2003 bring about the existence of the Commission as such because the existence of the Commission cannot be brought about except with the appointment of the Chairperson. The composition of the Commission is complete only after the Chairperson is appointed. The four persons appointed as Members of the Commission vide Notification dated 17th September, 2003 actually cannot constitute or be deemed to constitute the part of the Commission because even after their appointment as Members of the Commission, Commission cannot be considered to have come into being, awaiting as it does the appointment of the Chairperson. Only after the Chairperson is appointed, would the Commission be deemed to have come into existence and, therefore, on and from the moment the Chairperson is appointed, the four members earlier appointed would constitute as a part of the Commission because only from the stage onwards can be Commission be said to have been validly constituted and to come into existence. To that extent, therefore, we have no hesitation in holding that despite the issuance of the Notifications dated 5th August, 2003 and 17th September, 2003 the State Commission could not be and cannot be considered to have been validly constituted because the Chairperson was not appointed and the appointment of the Chairperson, a person who has been a Chief Justice of the High Court, being a mandatory requirement under law, a sine qua non to the coming into existence of the Commission the appointment of the four persons, mentioned in the Notification dated 17th September, 2003, was a ritual, an exercise, or at best an event which

> remained incomplete, directly linked as it was with the appointment of the Chairperson."

22. Reliance is also placed on a judgment of this Court in **Virender Kumar vs. P.S. Rana and another, 2007 (2) Cur.L.J. (HP) 106,** wherein a Division Bench of this Court held that the State Information Commission constituted under the Right to Information Act, 2005 must be a multi member body.

23. A bare reading of the National Environment Appellate Authority Act leaves no manner of doubt that the National Environment Appellate Authority was to be a multi member body consisting of a Chairperson, Vice Chairperson and not more than three members. Therefore, for the body to be complete at any given time there should have been a Chairperson, Vice Chairperson and a member. It is important to note that under Section 6 of the Act it is only the Vice Chairperson who was given the power to act as the Chairperson and to discharge the functions in certain circumstances. There is no such provision permitting a member to act as a Chairperson. I am of the considered view that there could be no Appellate Authority without a

Chairperson and since only the Vice-Chairperson could act as a Chairperson there can be no proper body when there is neither a Chairperson nor a Vice Chairperson.

24. Reliance has been placed on Section 10 and Rule 12(4) that no order or proceedings of the Authority can be questioned on the ground of existence of any vacancy or defect in the constitution of the Authority. Defect of constitution can be on various grounds. For example a person who was not qualified to be a Vice-Chairperson may have been appointed as such. If an authority comprising such a Vice Chairperson passed an order such order would be valid on account of Section 10. No doubt, Section 10 also lays down that merely on the ground of existence of any vacancy no act or proceedings can be invalid. However, it must be noted that Section 10 falls under Chapter-II relating to the establishment of Authority and will not, in our considered opinion, apply to the judicial decisions of the Authority which fall within Chapter III.

25. Rule 12(4) however clearly lays down that no order of the authority shall be questioned on the ground of existence of vacancy or defect in the constitution of the Authority. This Rule clearly envisages that even a judicial order passed in appeal cannot be challenged on this ground.

26. It is well settled law that Rules cannot supplant the provisions of the Act itself. No doubt, Rule 12 (4) indicates that no judicial order of the Authority can be questioned on the ground of existence of vacancies or defect in the constitution of the authority but this in my considered opinion runs contrary to the provisions of the main Act. The main Act specifically provides that the Authority shall consist of a Chairperson, Vice Chairperson and at lest one other Member. Section 6 provides that a Vice Chairperson may act as a Chairperson in certain circumstances. However, there is no provision where a Member can act as a Chairperson or a Vice Chairperson. Section 12 provides that it is the Authority which shall hear the appeal. Rule 12(4) validates the orders

despite there being existence of any vacancy or defect in the constitution of the Authority. There is, in my considered opinion, a difference between a defect in the constitution of the authority and in an authority not being constituted at all. A single Member by no stretch of imagination can be said to constitute the Authority. A vacancy of a Chairperson or a Vice Chairperson i.e. of one of them may be overlooked but when both posts are vacant the member by himself cannot constitute the Authority.

27. While taking this view, I am taking into consideration the fact that the National Environment Appellate Authority was to act as a judicial authority. It had very important functions to perform and therefore the legislature in its wisdom felt that the person to be appointed as a Chairperson must have been a Judge of the Supreme Court or a Chief Justice of a High Court. The Vice Chairperson and the Members could be 'lay' persons though with the qualifications prescribed referred to

hereinabove. The jurisdiction of the authority was very wide and Section 15 debarred any civil court from entertaining any matter which the authority is empowered to entertain under this Act.

28. Section 16 provides that the proceedings before the Authority would be deemed to be judicial proceedings. Section 19 contains a penal clause whereby a person who fails to comply with the orders made by the authority would be liable to be punished for an imprisonment which may extent to seven years. The Authority is clothed with very wide powers. The EAC is comprised of a number of experts and the Authority which would have the jurisdiction to set-aside the orders of the EAC was to constitute of a person who had held high judicial position, an expert in the filed of administration and Members who would be experts in fields of conservation, environment management, planning and development etc. The Authority has to function as an Appellate Authority looking not only into the environmental aspects but also

into judicial aspects. The EAC also has to keep into consideration the concept of sustainable development and has to strike a balance between industrial progress and preservation of the ecology. Therefore, the legislature in its wisdom thought it fit to make it a multi member body. The absence of either the Chairperson or the Vice Chairperson may not constitute a major defect in the authority but when both posts are vacant it would be very risky and not legally sound to invest a 'lay' Member who has no judicial or administrative experience with the powers to set-aside the orders of an expert body like the EAC. Therefore, I am of the considered view that in the aforesaid circumstances when the posts of both Chairperson and Vice Chairperson were vacant a Member alone could not have exercised the powers of the Authority.

29. It has been urged that applying the principle of necessity a single Member could have decided the matter. In my view, the principle of necessity would not apply to a Tribunal like the National

Environmental Appellate Authority since if the Appellate Authority was not properly constituted the aggrieved party could file a writ petition before the High Court under Article 226 of the Constitution of India.

30. The impugned order could be set-aside on this ground alone but we are proceeding to go into the merits of the case. In fact the discussion is no longer very relevant since the National environment Appellate Authority Act itself has now been repealed and no such Authority exists. Sh.Dutta has informed us that except for the initial period no person was ever appointed as Chairperson. We, therefore, proceed to dispose of the other questions raised and shall presume for the sake of arguments that the single Member had the authority to decide the matter.

31. Coming to the merits of the order passed by the Appellate Authority, we are constrained to observe that the order is not an order which one would expect of an authority of this nature is expected to deliver. The Authority was not

bound by the Rules of Procedure but in the matter of summoning of evidence etc. the powers of the Civil Court are vested in the Authority. The Authority did not act in a very judicial manner. In para 6 of the impugned order, the Authority noted that at the request of the appellant and the respondent the Authority inspected both the machinery and plant sites and also the adjoining villages on 25th June, 2010 and held discussion with the cross section of the people of the area and independently assessed the impact of the mining and plant on land, water and air environment to decide whether the environmental clearance is good or bad.

32. A perusal of the order dated 13.5.2010, Annexure P-7, shows that it was only the counsel for the appellants who had requested the authority for site inspection and no such request was made by the Company. This order clearly shows that counsel for the Company had submitted that he may first be given time to file detailed reply and then the authority should decide whether to visit the site or not. Therefore,

the final order does not depict the correct facts. We are of the considered opinion that when any authority is vested with the judicial or quasi judicial functions it should act in a manner which is in consonance with the procedure laid down and also in accordance with the Rules of natural justice. No doubt the Authority, if it so desire, could have visited the spot but it should have followed some proper procedure before doing so.

33. The authority visited the site on 21st and 22nd June, 2010. A public notice informing the people should have been issued that the Member was coming to the site and he could have invited all or any member of the public to put-forth their views. Otherwise, his site visit should have been restricted to making observations of his own. The impugned order shows that the Member not only visited the site but interacted with some members of the public and formed his own opinion as to whether the environmental clearance should have been granted or not. When no public notice of the

visit was issued it is obvious that only the appellants before the authority or their supporters may be present.

34. In our opinion, the Appellate Authority could have visited the site only for the purpose of making its own assessment. The Member of the Appellate Authority in fact did not act as an appellate authority but acted as if he was the person who was to decide what was good or bad. Instead of deciding the appeals on the basis of material before the EAC he started collecting evidence on the site, which he should not have done especially without giving adequate opportunity to the parties. He also made some observations which are not supported by any material on record. According to him, Majathal Wildlife Sanctuary is less than 5 k.m. away. How, he reached this conclusion is not clear. Furthermore, the Member of the authority not only collected the evidence but used his site inspection alone as a ground to quash the order of the EAC. The EAC is a Multi Member body of experts and a

Member sitting by himself without finding any fault with the functioning of the Committee or the manner in which the clearance had been granted decided that the permission was wrong. This should not have been done.

35. Since we are of the view that the matter has not been properly decided, we have no option but to set-aside the order of the Appellate Authority. However, we have to decide the other aspects of the matter also and therefore we are going into the validity of the decision of the EAC. This Court is not oblivious to the fact that we are not experts. We can only go into the correctness of the decision making process and not the correctness of the decisions itself. In the light of these principles we proceed to examine the decision of the EAC.

36. The Concluding portion of the minutes of the 93rd meeting of the Expert Appraisal committee reads as follows:

> "After detailed deliberations, the Committee noted that forest land approval is still in process. No mining lease approval from the State Govt. and Indian Bureau of Mines is obtained so far although mining plan is approved by the Indian Bureau of Mines. 'Permission' from the State Forest Department regarding impact of the proposed project on the surrounding forests viz. Taraur PF and Baksher RF is also yet to b e

> obtained. Permission for the use of water from River Satluj is pending. The project will be located at higher altitude and transportation of raw material and end product in the hilly terrain may create problem until and unless adequate steps for widening of roads is taken. Keeping the various representations in mind, the Committee decided that a Sub-Committee having Shri R.K. Garg, Vice Chairman, Prof. S. Mohan, Member, Nominee of the CPCB, Representative of the State Govt., State Forest Department, Representative from the Wildlife Institute of India, Regional Office of the Ministry at Chandigarh and Representative from the Ministry should visit the site to assess the impact due to proposed plant."

37. A bare reading of the aforesaid portion, clearly shows that keeping in view the various factors the Committee constituted a sub committee of a number of persons to visit the site and to assess the impact before the proposed plant. The sub committee visited the site and the relevant portion of its report reads as follows:

> "The actual mining site was not visited due to poor accessibility but saw the mining area from 3 different locations. A video film on the mining site and also through Google image was also seen including the corridor (6.8 km) proposed to be provided for the conveyor to transport the limestone from mining site to the cement plant.
>
> During the visit, Forest Officers from the State Department, Senior Geologist from State Department, consultants, Project Proponents Office (North), Chandigarh were present listed the participants is at Annexure-I"

38. It is thus apparent that the Sub Committee did not visit the mining site but saw it from three different locations. We also find that some of the factors taken by the said Committee are not correct. The Sub Committee took into consideration the fact that a road would be

constructed by various cement industries as indicated by the Principal Secretary but no such road has been constructed till date. The Sub Committee has also taken into consideration the fact that a railway line up to village Barmana is at an advanced stage and targeted to be completed by 2018. These are totally incorrect facts and no such railway line has been approved till date. Moreover, the Sub committee did not visit the mining area at all. How could it assess the impact of mining on the area and answer the various questions which were raised before it without visiting the site?

39. It may be true that the EAC has accepted the report of the Sub committee but it appears that while accepting the report the EAC did not even consider the fact as to what was the impact of the Members of the Sub Committee not visiting the mining area. Environmental clearance has to be granted by the EAC. If it sets up a sub Committee to visit the site it is obvious that the EAC had thought it fit to send some of the members to the site to visit the spot

and make a detailed report. The mining site is much larger than the plant site and mining will have a huge impact on the environment. It was for the Sub Committee to decide what this impact was but we are of the clear-cut view that the effect of the mining could not have been decided without visiting the mining site at all.

40. Therefore, we are of the considered opinion that the environmental clearance granted by the EAC has also to be set-aside. The matter is remanded to the Expert Appraisal Committee (EAC) who should direct the Sub Committee to visit the site and submit its report. Before visiting the site the Sub Committee should ensure that sufficient notice is given to the people of the area so that they can appear before the Members of the Sub Committee and put-forth their views. The Sub Committee may if it so desire make a Video recording of its site visit and its interaction with the people. The EAC after considering the report of the Sub Committee should decide the matter afresh.

41. Lengthy arguments have been addressed before us on the concept of sustainable development. We have purposely not gone into the other arguments raised before us since we have remanded the case to the EAC which is the expert body to go into these aspects of the matter.

42. We further direct the EAC to ensure that it gives its finding within a period of two months from the date a copy of this order is produced before it by any of the parties. Needless to say, any party aggrieved by the order of the EAC can approach the appropriate forum including the National Green Tribunal for redressal of their grievances.

43. All the petitions are disposed of in the aforesaid terms with no order as to costs.

August 12, 2011. (Deepak Gupta),J.
PV

Per Sanjay Karol, Judge.

1. I have gone through the erudite views expressed and opinion given by my learned brother. He has held that in the absence of Chairman, Vice-Chairman or any other member of the Tribunal being available, a "single member" alone was incompetent to

hear and decide the appeal filed by the Company. The impugned order dated 30th August, 2010, passed by the National Environment Appellate Authority has also been set aside after adjudicating the matter on merits. The matter now stands remanded back to the Expert Appraisal Committee (EAC) for consideration afresh.

2. In so far as adjudication of the issues on merits is concerned I am in total agreement with my learned brother. But however, on the legal question as to whether a single member was competent to decide the appeal and pass an order, I am in respectful disagreement with him. As such, I shall deal only with this aspect separately.

3. On behalf of the company, on this point the matter was essentially argued by Mr. Raju Ramchandra, Senior Advocate and Mr. Ajay Mohan Goel, Advocate. On behalf of the respondents Mr. Ritwick Dutta, Advocate, addressed us.

4. For appreciating the controversy in issue, reproduction of relevant provisions of the National Environment Appellate Authority Act, 1997 (hereinafter referred to as the Act) as also the Rules framed thereunder would be beneficial. They read as under:-

> "2. Definitions. In this Act, unless the context otherwise requires, -
> (a) .....
> (b) "Authority" means the National Environment Appellate Authority

established under sub-section (1) of section 3;

(c) "Chairperson" means the Chairperson of the Authority;

(d) "Member" means of Member of the Authority;

(e) .....

(f) "Vice-Chairperson" means the Vice-Chairperson of the Authority."

"3. Establishment of Authority..-(1) The Central Government shall, by notification in the Official Gazette, establish a body to be known as the National Environment Appellate Authority to exercise the powers conferred upon, and to perform the functions assigned to, it under this Act.

(2) The head office of the Authority shall be at Delhi."

"4. Composition of Authority.- The Authority shall consist of a Chairperson, a Vice-Chairperson and such other Members not exceeding three, as the Central Government may deem fit."

"5. Qualifications for appointment as Chairperson, Vice-Chairperson or Member.-

(1) (2).....

(3) A person shall not be qualified for appointment as a Member unless he has professional knowledge or practical experience in the areas pertaining to conservation, environmental management, law or planning and development."

"6. Vice-Chairperson to act as Chairperson or to discharge his functions in certain circumstances. -

(1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the Vice-Chairperson shall act as the Chairperson until the date on which a new Chairperson appointed in

accordance with the provisions of this Act to fill such vacancy enters upon his office.

(2) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the Vice-Chairperson or, as the case may be, such one of the Member as the Central Government may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties."

"10. Vacancy in Authority not to invalidate acts or proceedings. -No act or proceedings of the Authority shall be questioned or shall be invalid merely on the ground of existence of any vacancy or defect in the establishment of the Authority."

"12. Procedure and powers of Authority. -(1) The Authority shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908(5 of 1908), but shall be guided by the principles of natural justice and subject to the other provisions of this Act and any rules made by the Central Government, the Authority shall have power to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private."

"13. Financial and administrative powers of Chairperson.- The Chairperson shall exercise such financial and administrative powers as may be vested in him under the rules:

Provided that the Chairperson shall have authority to delegate such of his financial and administrative powers as he may think fit to the Vice-Chairperson or any other officer subject to the condition that the Vice-Chairperson or such other officer shall, while exercising such delegated powers, continue to act under the

direction, control and supervision of the Chairperson."

"16. Proceedings before the Authority to be judicial proceedings**:-** All proceedings before the Authority shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 of the Indian Penal Code(45 of 1860)."

"17. Members and staff of Authority to be public servants.-The Chairperson, the Vice-Chairperson and the Members and the officers and other employees of the Authority shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code(45 of 1860)."

5. Rule 12 of the National Environment Appellate Authority (Appeal) rules, 1997 (hereinafter referred to as the Rules) reads as under:-

"Orders of the Authority and time frame for disposal of appeal –

(1)to (3) ……..

(4) No order of the Authority shall be questioned on the ground merely of the existence of any vacancy or defect in the constitution of the Authority or any defect in the appointment of a person acting as the member of the Authority."

6. In my considered view, the provisions of the Act are unambiguously clear.

7. All proceedings before the Authority are deemed to be judicial proceedings. No Act or "proceedings" of the authority can be questioned or held to be invalid merely on the ground of existence of

any "vacancy" or defect in the establishment of the Authority. Section 22 of the Act empowers the Central Government to frame Rules with respect to "matter which is required to be, or may be, prescribed". Even sub-rule (4) of Rule 12 provides that "no order of the authority can be questioned on the ground merely of the existence of any vacancy". In my considered view, this Rule only supplements and not supplants provisions of Section 10 of the Act. "Proceedings" would embrace in its sweep the word "decision" or "order" passed by the Authority. "Proceedings" referred to in Section 10 are judicial proceedings and the nature of the orders passed, whether interim or final would be immaterial. In *Babu Lal vs. M/s Hazari Lal Kishori Lal and others,* (1982) 1 S.C.C. 525, it has been held, "The terms 'proceeding' is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted."

8. Noticeably Member to be appointed for establishment of an Authority has to be a person having "professional knowledge or practical experience

in the areas pertaining to conservation, environmental management, law or planning and development" As such, only a professional of repute, having practical experience in the specified field, can be appointed as a Member. Further except for the eligibility criteria laid down for the appointment as a Chairperson, Vice-chairperson or member, the Act does not draw out any distinction between the Members constituting the Authority. This is so evident from a bare perusal of provisions of Sections 7, 8, 17 and 18 of the Act. In fact, powers to be exercised by the Chairperson under Section 13 of the Act can be exercised by "any Officer" empowered and authorized to do so.

9. It is not in dispute that at some point in time, a validly constituted Authority had come into existence with the appointment of a Chairperson, Vice-chairperson and a Member. It is also not in dispute that at the time of passing of the impugned order, post of Chairperson and Vice-Chairperson had fallen vacant and that the Authority was actually being manned only by a Single member. As such by virtue of provisions of Section 6(2), even a Member was entitled to and could have discharged functions of a Chairperson. It is not urged before us that the Central Government had not issued any Notification

authorizing the Member to discharge the functions as a Chairperson under the provisions of the Act.

10. Further, Section 12 authorities the Authority "to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private". Significantly the Act does not provide judicial proceedings to be conducted by constitution of Benches presided over by a Chairperson or a Vice-chairperson. Hence the Authority was free to regulate its own procedure, "including" that of constitution of its Benches. It is true that the Authority is a multi-member body but then the Benches could be headed by a Single Member also. Hence in the absence of any statutory bar, even a Single Member of the Authority could have heard and finally decided the matter on merits. While taking this view, I take support from the observation made by the Apex Court in *Election Commission of India and another versus Dr. Subramaniam Swamy and another,* (1996) 4 SCC 104.

11. Reliance by the learned counsel for the company on the decisions rendered by this Court in *Diwan Chand Verma vs. State of H.P. and another*, 2004 (2) Cur.L.J. (HP) 248 and *Virender Kumar vs. P.S.Rana and another,* 2007 (2) Cur.L.J. (HP) 106, is misplaced in the factual backdrop. Noticeably in the

instant case, a validly constituted Authority had come into existence at some point in time, unlike the situation considered by the Court in the said decisions.

12. That apart and in any event, even a Single Member of the Authority could have validly decided the issue by invoking the doctrine of necessity. Perhaps, the vacancies were not being filled up in view of the new legislation.

13. It is a well settled principle of law that doctrine of necessity applies not only to judicial but also to quasi-judicial and administrative matters. [*J. Mohapatra and co. and another versus State of Orissa and another,* (1984) 4 SCC 103].

14. The Apex Court in *Charan Lal Sahu versus Union of India,* (1990) 1 SCC 613 has held that even if all the members of the Tribunal, competent to determine a matter were subject to disqualification, they might be authorized and obliged to hear the matter by virtue of operation of common law doctrine of necessity, which view stand subsequently reiterated by the Apex Court in *Tata Cellular versus Union of India,* (1994) 6 SCC 651.

15. In *Union of India versus S.P.S. Rajkumar and others,* (2007) 6 SCC 407, the Apex Court had occasion to deal with a case where the order was passed by a Judge Advocate, junior in rank to the

person competent to pass the same. Considering that no other officer was available, by applying the doctrine of necessity, order passed by the Judge Advocate was upheld to be valid.

16. In *Gokaraju Rangaraju versus State of Andhra Pradesh*, (1981) 3 SCC 132 the Apex Court had occasion to deal with a case where Sessions Judges had passed judgments in criminal appeals. Appointments of the Judges were not in accordance with law which were subsequently set aside by the Supreme Court. Hence it was urged by the appellants that the judgments rendered were void. The Apex Court, by invoking "de facto doctrine" repelled the contention by holding that "… the acts of the officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding, as if they were the acts of officers de jure"… It further held that the doctrine was founded on good sense, sound policy and practical expedience and aimed at prevention of public and private mischief and protection of public and private interest to avoid endless confusion and needless chaos. A Judge, de facto, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his

appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. While arriving at such conclusions the historical perspective of the doctrine, as laid down in England and subsequently followed in India, was traced in the following terms:-

> "5. In *Pulin Behari v. King-Emperor* [(1912) 15 Cal LJ 517, 574: 16 IC 257: 16 Cal WN 1105: 13 Cri LJ 609], Sir Asutosh Mookerjee, J. noticed that in England the de facto doctrine was recognized from the earliest times. The first of the reported cases where the doctrine received judicial recognition was the case of *Abbe de Fontaine {1431 Year Book 9 H 6 Fol 32}* decided in 1431. Sir Asutosh Mookerjee noticed that even by 1431 the de facto doctrine appeared to be quite well known and, after 1431, the doctrine was again and again reiterated by English Judges."
>
> "7. In *Scadding v. Lorant* [(1851) 3 HLC 418: 15 Jur 955: 10 ER 164 (HL)], the question arose whether a rate for the relief of the poor was rendered invalid by the circumstance that some of the vestry men who made it were vestry men de

facto and not de jure. The Lord Chancellor observed as follows:

> With regard to the competency of the vestry men, who were vestry men de facto, but not vestry men de jure, to make the rate, Your Lordships will see at once the importance of that objection, when you consider how many public officers and persons there are who were charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers and it might also lead to persons, instead of resorting to ordinary legal remedies to set right anything done by the officers, taking the law into their own hands."

"8. Some interesting observations were made by the Court of Appeal in England in *Re James (An Insolvent)* [(1977) 2 WLR 1: (1977) 1 All ER 364 (CA)]. Though the learned Judges constituting the Court of Appeal differed on the principal question that arose before them namely whether "the High Court of Rhodesia" was a British Court, there did not appear to be any difference of opinion on the question of the effect of the invalidity of the appointment of a judge on the judgments pronounced by him. Lord Denning, M.R., characteristically, said:

> He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. May be he was not validly appointed. But, still, he holds the office. It is the office that matters, not the incumbent…. … So long as the man holds the office, and exercises it duly and in accordance with law, his orders are not a nullity. If they are erroneous they may be upset on appeal. But, if not, erroneous they should be upheld.

Lord Denning then proceeded to refer to the *State of Connecticut v. Carroll* [(1871) 38 Conn 449] decided by the Supreme Court of Connecticut, *Re Addridge* [(1893) 15 NZLR 361] decided by the Court of Appeal in New Zealand and *Norton v. Shelby County* (1886) 118 US 425: 30 L Ed 178] decided by the United States Supreme Court. Observations made in the last case were extracted and they were:

> Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. … The official acts of such persons are recognized as valid on grounds of public policy,

and for the protection of those having official business to transact."

"11. In *Norton v. Shelby County,* Field, J., observed as follows:

The doctrine which gives validity to acts of officers de facto whatever defects there may be in the legality of their appointment or election is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers there title could be called in question."

17. Though in a slightly different context, where violation of the principles of natural justice was urged as a ground of bias, the Apex Court in *Dr. Subramaniam Swamy (supra)* has held that:-

"The law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the

> touchstone of judicial propriety. The doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom. In such cases the doctrine of necessity comes into play. If the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making."

It was further suggested that the Election Commission itself would have evolved a mechanism of hearing the matters by constituting separate Benches. In fact, this decision squarely covers the situation in hand. The said decision stands reiterated in *Badrinath versus Government of Tamil Nadu and others,* (2000) 8 SCC 395.

18. As such, I hold that even a Single "Member" was entitled to hear, adjudicate and finally decide the appeal on merits.

12th August, 2011. (Sanjay Karol)
(C/PK) Judge.