IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No.586 of 2010.
Alongwith
CWPIL No. 15 of 2009

Judgment reserved on: 21.3.2012

Date of Decision: 04.05.2012

CWP No. 586 of 2010

1. Him Privesh Environment Protection Society, Head Office Village and P.O. Baruna, Tehsil Nalagarh, District Solan, through its President Jagjit Singh Dukhiya, s/o Sh. Sulekh Singh, r/o VPO Baruna, Tehsil Nalagarh, District Solan, H.P.
2. Sh. Ajit Singh, s/o Sh. Mast Ram Singh, r/o VPO Karuna, Tehsil Baddi, District Solan, H.P.

…Petitioners.

Versus

1. State of Himachal Pradesh through Secretary Industries to the Government of Himachal Pradesh.
2. State of Himachal Pradesh through Secretary (Environment & ST) to the Government of Himachal Pradesh.
3. State of Himachal Pradesh through Secretary (Revenue) to the Government of Himachal Pradesh.
4. State of Himachal Pradesh through Secretary (MPP and Power) Government of Himachal Pradesh.
5. The Deputy Commissioner, District Solan, Himachal Pradesh.
6. Union of India through Secretary, Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, Lodhi Road, New Delhi-110 003.
7. Central Pollution Control Board, Parivesh Bhawan, East Arjun Nagar, Delhi-110 032 through its Secretary.
8. H.P. State Pollution Control Board, Him Parivesh, Phase-III, New Shimla, H.P. through its Secretary.
9. Central Ground Water Board, NH-IV, Bhugal Bhawan Faridabad, through its Chairman.
10. M/s Jai Parkash Associates Ltd. C-16, Sector-01, Lane-01, Phase-1, SDA Housing Colony New Shimla-171 009 through its Chairman.

11. The Himachal Pradesh State Electricity Board, through its Secretary.

.. Respondents.

Civil Writ Petition under Article 226 of the Constitution of India.

CWPIL No. 15 of 2009

Court on its own motion
In re:
Residents of Gram Panchayats Karsoli Gholawal, Kashmirpura, Kheda, Baruna, Mastanpura, Joghon, through their Presidents.

...Petitioner.

Versus

1. State of H.P. through its Principal Secretary (Industries) to the Government of Himachal Pradesh, Shimla.
2. State of H.P. through Secretary (Environment) to the Government of Himachal Pradesh, Shimla-171 002.
3. Secretary (MPP and Power) to the Government of Himachal Pradesh, Shimla.
4. Himachal Pradesh State Electricity Board, through its Secretary, Shimla-4.
5. Jaypee Industries, Himachal Cement Plant at Baga, Tehsil Arki, District Solan, H.P., through its Director Shri K.P. Sharma.

…Respondents.

Court on its own motion

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. Jyotsna Rewal Dua, Advocate, for the petitioners in CWP No. 586 of 2010.**

Mr. Karan Singh Kanwar, Amicus Curiae, in CWPIL No. 15 of 2009.

For the Respondent(s):	**Mr. Rajesh Mandhotra, Deputy Advocate General, for the respondents-State.**
	Mr. Sandeep Sharma, Assistant Solicitor General of India, with Ms. Anita Dogra, Central Government Standing Counsel, for the Union of India.
	Mr. Trilok Jamwal, Advocate, for the State Electricity Board.
	Mr. S.B. Upadhaya & Mr. R.L. Sood, Senior Advocates, with Mr. Ajay Mohan Goel, Advocate, for M/s. J.P. Industries.
	Mr. K.B. Khajuria, Advocate, for Central Pollution Control Board.
	M/s. T.S. Chauhan & Anil Chauhan, Advocates, for H.P. State Pollution Control Board.

Deepak Gupta, J.

1. The challenge in these petitions is to the setting up of a Cement Plant by Jai Parkash Associates Ltd. (hereinafter referred to as the JAL) at village Bagheri, Tehsil Nalagarh, District Solan, H.P.

2. CWPIL No.15 of 2009 was initiated by the Court on its own motion on the basis of a letter written to the Hon'ble Chief Justice of this Court by a number of representatives of seven Panchayats of the area in question. CWP No.586 of 2010 has been filed by M/s Him Privesh Environment Protection Society and another wherein the petitioners allege that the cement plant has been set up in total violation of the Environment Laws especially the Environment Impact Assessment notifications of 1994 and 2006. It is also alleged that no proper public hearing

was conducted and that the village common land has been wrongly transferred by the State of Himachal Pradesh (hereinafter referred to as the State) in favour of JAL.

3. The State pursuant to its industrial policy invited investors for making investments in the State of Himachal Pradesh to extract lime stone from the areas designated by the State and to set up cement industry within the State. One of the areas so earmarked was the Baga Bhalag lime stone deposits in Tehsil Arki of District Solan. JAL was the successful bidder for this project and entered into a memorandum of understanding (MOU) with the State on 9th July, 2004 wherein it agreed to set up a large capacity cement project based on the Baga lime stone deposits with a minimum capacity of 2 million tones per annum (MTPA) of clinker manufacturing out of which at least 50% of the installed capacity of clinker was to be converted to cement through grinding units located within the State of Himachal Pradesh.

4. It would be pertinent to mention that this MOU does not clearly state as to where the cement plant had to be set up but it envisaged that the cement manufacturing unit would be set up either in District Solan or District Bilaspur. Clause 5 of this MOU provided that the exact site from amongst those proposed by the Company for cement manufacturing unit would be

decided by the Government after approval by the Site Appraisal Committee which would finalize the site in accordance with the guidelines for setting up of such an industrial project as prescribed by the Ministry of Environment and Forests (MoEF), Government of India. It was the responsibility of the Company to provide requisite data required by the Committee. The Company was to carry out a detailed techno economic study of the Project, a Site Specific Environment Impact Assessment and prepare an Environment Management Plan from reputed agencies/consultants in the field and would include the recommendations of the Expert Committee, if any, appointed by the MoEF.

5. According to the Milestones/ Time Schedule set out in Clause 10 of this MOU, the selection of plant site and initiation of EIA/EMP studies was to be completed within one year from the date of signing of the MOU i.e. by 9th July, 2005. Further, six months was the time schedule for getting clearance from the H.P. State Environment and Pollution Control Board (PCB) and for preparation of the case from the Ministry of Environment and Forests, Government of India. The time schedule provided that the environment and forest clearance from the MoEF, acquisition of private land and approval of mining plan from Indian Bureau of Mines would be cleared within three years

from the signing of the MOU i.e. by 9th July, 2007. Physically the plant was to be ready within 5 years of the MOU being signed i.e. by 9th July, 2009. It was provided that in case the steps were not taken within the time schedule, the State had a right to cancel the MOU and forfeit the security deposits.

6. Pursuant to this MOU, M/s. Jaypee Himachal Cement Grinding & Blending Plant (A unit of JAL) submitted a proposal for setting up an industrial undertaking for the manufacturing of Pozzolana Portland Cement (PPC). Single Window Clearance for setting up this plant was granted on 16.9.2004. PCB granted consent to establish 1.75 MTPA Blending Unit on 2.11.2004. It is however the admitted case of the parties that the Plant was not only a blending plant but in fact a grinding and blending plant since for the manufacturing of PPC both blending and grinding are essential. In fact the PCB issued a corrigendum on 17.1.2007 clearly stating that the word "blending" in the initially Consent to Establish (CTE) should be read as "grinding and blending". The construction of the plant in fact started soon after 2.11.2004 and admittedly no public hearing took place nor any environment clearance from the MoEF was taken and finally the Company in February, 2009 requested the PCB to grant the consent to operate (CTO) the plant. The form in this behalf was submitted on 22.4.2009 and the Board granted

Consent to Operate the plant having manufacturing capacity of 1.75 MTPA (grinding & Blending).

Cost of the Plant & the EIA Notification of 1994:

7. The first question which arises is whether the plant required environment clearance under the Environment Impact Assessment (EIA) notification of 1994. This notification provided that any person desirous of setting up or undertaking any project in any part of India which was covered by schedule-I was required to seek environment clearance from the MoEF. Clause 3 of this notification laid down that nothing contained in the notification would apply to any of the item falling under entry Nos.1, 2, 3, 4, 5, 7, 9, 10, 13, 14, 16, 17, 19, 21, 25 and 27 of schedule-1 if the investment is less than Rs.100 crores for new projects. Item No.27 is cement and item No.19 is Thermal Power Plants. Therefore, as per the EIA notification of 1994 in case the cost of the cement plant was less than 100 crores then no environment clearance was needed.

8. JAL gave an impression that the cost of the plant was less than Rs.100 crores and therefore no environment clearance was required. The petitioner alleges that the cost of the plant was much more than Rs.100 crores and JAL with a view to circumvent the EIA notification of 1994 purposely and fraudulently claimed that the costs of the plant was only Rs.90

crores. It is pointed out that in the project report the cost of the entire project was projected to be Rs.450 crores and out of which only Rs.90 crores was the cost of the Thermal Plant and therefore admittedly about more than Rs.350 crores was the cost of the Cement Plant.

9. It would be pertinent to mention that this Court vide its order dated 30.9.2011 directed JAL to place on record the audited accounts of the Company showing what was the amount actually spent on the plant and machinery purchased for setting up the 1.75 MTPA cement plant and what was the additional plant and machinery purchased after it is supposed to have been converted to a 2.0 MTPA cement plant. At this stage itself it would be pertinent to mention that the clear-cut stand taken by JAL in this Court is that no additional machinery was purchased for enhancing the capacity of plant from 1.75 MTPA to 2.0 MTPA. According to JAL the increase in the capacity was attained by proper and better utilization of the existing facilities.

10. Pursuant to the orders of this Court, JAL filed an affidavit of Sh. K.P. Sharma, Director. In this affidavit, it was stated that no separate independent audited accounts were being maintained for the Bagheri Unit but the trial balance is sent to the main company and its auditors. According to JAL when the application was submitted to the Government of Himachal

Pradesh in the year 2004 the capital outlay of the Plant was Rs.90 crores but the cost of the project escalated for reasons beyond its control on account of increased rates of commodities like cement, steel, plant and machinery, infrastructural facilities, improved equipment for pollution control etc. etc. The affidavit is blissfully silent about the exact amount spent on the project. However, from the trial balance which is placed on record it is more than apparent that the capital outlay on the cement plant alone and other infrastructure needed for such plant is more than Rs.450 crores.

11. As per this trial balance the assets of the Company including general reserves are more than Rs.556 crores. Out of this about 113 crores is general reserves. Even if, this amount is excluded then the total assets of the Company, both movable and immovable, necessary for the project value more than Rs.450 crores. The plant and machinery values more than Rs.230 crores and the capital works in progress value more than Rs.197 crores. Therefore, only the value of the plant and machinery and capital works in progress is almost Rs.430 crores. The rest is the value of the land and other fixed assets. This trial balance shows the position as on 31.3.2010 soon after the plant had started production. JAL has very cleverly avoided to give the dates when it purchased the machinery. It cannot be believed in

today's day and age that the project cost will increase more than 5 times especially when it is the stand of the Company that it started construction immediately in 2004 and the plant was ready to function in the year 2009 as per the time schedule of the MOU. Other than making a bald assertion that there has been escalation in cost, no justification has been given as to what was the cost projected of a particular machine or particular assets in the project and what was the cost later on.

12. The most shocking aspect of the matter is that neither the Department of Industries nor the Pollution Control Board thought it fit to verify whether the cost of the Project of Rs.90 crores as submitted by the JAL was in fact correct or not. One did not have to be a scientific expert to realize that this projection on the face of it was totally false. On the one hand JAL was stating that it was investing Rs.450 crores on this project and on the other hand it was claiming that the cement plant would cost only Rs.90 crores.

13. The Industry Department in its reply has, like the proverbial ostrich, hidden its head in the sand, and has not replied to the allegations regarding costing made by JAL. The stand of the PCB is that it has no mechanism to determine the cost and it depended upon the Industry Department who did not challenge the cost projected by the JAL. All we can say is that if this is

the state of affairs, the State of Himachal Pradesh is heading for environmental ruination. Was it not the duty of the Board and the Industries Department to verify the cost of the project? If the cost of the cement plant was more than Rs. 100 crores then environmental clearance from the MoEF was required. If without any verification, the bald statement of the Project Proponent is to be accepted then it will be impossible to implement the environmental laws. The word of the Project Proponent can never be accepted as the gospel truth and the concerned Departments must have the mechanism and even more importantly must have the guts and the spirit to verify the truth.

14. In the present case, if any Government agency had gone into the depth of the matter it would not have been difficult to find out that the cost of the project was much more than Rs.90 crores. As already pointed out above, in the draft EIA report for setting up two MTPA grinding unit alongwith 30 MW Multi Fuel based Power Plant and 3x10 DG based power plant, the total cost of the project was shown to be about Rs.450 crores and in the draft EIA report of the 25 MW thermal Power Plant the cost of the Thermal Power Plant of 25 MW the approximate total investment was shown to be Rs.90.45 crores. This would

definitely indicate that the cost of the Cement Plant was much more than Rs.100 crores.

15. As far as the Project Proponent and the PCB are concerned their stand was that since the Project cost was less than Rs.100 crores no environmental clearance was required. After the order dated 30th November, 2011 referred to above, was passed, the Board clearly stated in its affidavit dated 7th December, 2011 that the Board did not verify the cost of the project but accepted the statement of the project proponent as also indicated by the Industries Department. As far as JAL is concerned, in the original reply filed by it, it chose not to give a clear-cut reply to the allegation of the petitioner that it had undervalued the project cost. The allegations in this behalf have been made in para 37 wherein it was clearly stated that the cost of the Project was more than Rs.350 crores. In the first reply filed by the JAL in reply to this para the costing factor was totally ignored. After the order dated 30.9.2011 was passed, as stated above, all that was stated was that the cost of the project escalated on account of delay in execution of the project.

16. In addition to the trial balance referred to above, the respondent JAL had also relied upon a certificate dated 22.3.2010 issued by the Chartered Accountant. As per the certificate of the

Chartered Accountant the following are the fixed assets of the Cement Plant at Bagheri:

Sr.No.	**Item of fixed Assets**	**Value (Rs.in Lac)**
1.	Land	565.47
2.	Building	3489.67
3.	Plant & Machinery (Cement Plant)	21483.58
4.	Electric Installations	2147.00
5.	Railway Siding	2960.13
6.	Transportation cost etc.	212.64
7.	Pre-operative expenses to be capitalized	10655.37
8.	Misc. fixed assets	255.71
	Total:	**41769.57**

17. This indicates that the cost of the project was more than Rs.417 crores. We are not satisfied with this certificate because this certificate is not in consonance with the trial balance. According to this certificate the plant and machinery is wroth about Rs.214.83 crores whereas the plant and machinery as per the trial balance is Rs.230.16 crores. In the certificate, there is no reference of the capital works in progress. Even when the Deputy Director of Industries certified that the plant had commenced production, the valuation was almost Rs.400 crores. JAL has tried to contend that the plant cost increased

due to rise in prices and delay in execution of the project. It would be important to note that as per the schedule set out in MOU the plant was to be completed within five years of the date when JAL entered into an agreement with the State. The Plant was actually made operative within this period of five years and one fails to understand how the Project cost could have escalated on account of delay. Any project proponent when it prepares a project report obviously looks into the future and assesses the cost by taking into consideration the inflationary trends. The cement plant itself as per the certificate of the Chartered Accountant has fixed assets of Rs.417.70 crores. JAL has very conveniently avoided to give details of the dates of the purchase of machinery and value of land etc. It is thus more than apparent that the Unit was projected to cost Rs.90 crores only with a view to avoid the rigors of the EIA notification of 1994.

18. Before this Court, JAL has categorically stated that the conversion of 1.75 MTPA Plant to 2 MTPA plant did not require any additional machinery. We may again reiterate that earlier there was some confusion whether the plant was a blending plant or a grinding plant. Now it stands admitted by all the parties that the original plant was a blending and grinding plant. From the application form for setting up of the industry,

initially the capacity was shown to be 2.7 MTPA. Even in that document the total capital investment was reflected to be Rs.90 crores. The application was made on 14th August, 2004. Even the Project profile for the plant showed the capacity to be 2.7 MTPA. The application dated 27th September, 2004 for consent to establish was received in the office of the Board on 30th September, 2004. Alongwith this application, NOC application form was filed wherein the energy consumption was stated to be 3 MW and no energy was to be generated by in-plant generation. Standby DG set was to be used only in emergency. The Board granted consent to establish the plant on 2.11.2004 and admittedly the construction started immediately thereafter.

19. It would be pertinent to mention that JAL, consequent to the signing of the MOU, submitted the project reports. It projected that two cement grinding and blending plants would be set up. One Plant was to be set up by M/s. Jaypee Himachal Cement Grinding and Blending Plant at Village Malokher (Bilaspur) and the other at village Pandiyana (Tikkri) near Bagheri, Tehsil Nalagarh. The total proposed capacity of the grinding Plant at Malokher was projected to be 2 MTPA whereas for the Bagheri Plant it was 2.7 MTPA. Surprisingly, the cost of Malokher cement plant having capacity of only 2 MTPA was projected to be 670 crores whereas the cost of Bagheri project having

capacity of 2.7 MTPA was projected to be only Rs.90 crores. This clearly indicates that the cost figures were forged by the project proponent.

20. The comparison of the EIA reports, the other documents placed on record, especially the accounts of the Company leaves no manner of doubt that the project has finally cost about Rs.500 crores. It is not disputed that this project was erected and constructed within the time schedule set out in the MOU. Any project report to be a proper report must take into consideration the normal inflationary trends. It cannot be believed that the cost of the project could have risen from 90 crores to almost Rs.500 crores. When the increase is more than five fold the burden lay upon the Company to show to the Court the documents showing what was the cost of a particular item when the project report was prepared and by what percentage the cost had risen during the period of construction. No such material has been placed on record and therefore we are of the considered view that knowing fully well that the cement plant was to cost more than Rs.400 crores, JAL with an ulterior motive purposely under valued the cost of the project in the Project Report only with a view to avoid getting clearance under the EIA notification of 1994. This circumstance by itself

would be sufficient to disentitle it from getting environmental clearance.

21. **The Cement Plant and the EIA notification of 2006:** As pointed out above, the construction of the Cement Plant commenced in the year 2004 and the Plant was complete in 2009. The consent to operate was applied for in the year 2009. JAL had not obtained any environment clearance and by now it was more than apparent that the Project cost was much more than Rs.90 crores and in fact it was in the range of Rs.450 to Rs.500 crores. The case of the petitioners is that with a view to cover up this illegality, JAL came up with a novel though highly dubious plan and proposed to get environment clearance by projecting that it was setting up a new grinding plant having capacity of 2 MTPA alongwith a 30 MW Multi Fuel based Power Plant and 3x10 MW DG based power plant. It may be stated that no environment clearance is required for a DG based power plant. As far as the Multi Fuel based Power Plant is concerned we shall deal with it in detail under the heading of Thermal Power Plant and we are confining our discussion to the cement plant.

22. Now we come to the so called expansion/optimum utilization of the plant. As noted above, the initial proposal was to establish a plant having capacity of 2.7 MTPA. Thereafter, when the

project report was submitted the plant was shown to be having capacity of 1.75 MTPA but in the year 2009 when an integrated proposal was made then the plant was shown to be a 2.0 MTPA cement Unit. There is great confusion as to whether this grinding unit was separate and distinct unit from the original plant or not. Before us, as we have repeatedly stated hereinabove, the stand of JAL is that it is the same plant and no additional machinery or investment has been made. However, we find that this is not the projection given by it and till date a number of authorities including the State Pollution Control Board and the MoEF are under the impression that it is a separate Unit only for grinding. As we have held above, it is apparent that JAL was fully aware that the JAL had undervalued the Project just to avoid getting environment clearance. Later realizing that it could land itself in trouble it furnished a new proposal for setting up the plant. The question is why did JAL give the impression that the 2 MTPA Unit was a separate grinding Unit? The reason is not far to see.

23. The EIA notification of 1994 was replaced by the EIA notification of 14th September, 2006. At this stage, we are not going into the question as to whether the plants which were under construction in 2006 and had not been completely set up are governed by the notification of 2006 or not. We are

assuming for the sake of arguments that the notification of 1994 would continue to apply. This is also the case of JAL. If that be so, we fail to understand what was the need for seeking environment clearance under the notification of 2006 when the construction of the plant had already started under the EIA notification of 1994. Here it would also be important to note that as per the EIA notification of 2006 Cement Plants fall in category 3(b). If a cement Plant has a capacity of more than 1.0 MTPA it would fall in category-A and if the capacity of the Plant is less than 1.0 MTPA then it would fall in category-B. Projects and activities included in category-A require environmental clearance from the Central Government and the MoEF whereas all projects or activities included in category B require prior environmental clearance from the State Environment Impact Assessment Authority. Since the Plant obviously was more than 1.0 MTPA it was to be treated as category A if environment clearance was being sought under 2006 EIA notification. JAL now came up with another novel though highly dubious scheme. It projected that the plant was a stand alone grinding unit with capacity of more than 2.0 MTPA. All stand alone grinding units, irrespective of their capacity, are covered in category-B. Now JAL started projecting as if the cement plant was a stand alone grinding unit. This submission

of JAL was again accepted at its face value by the Board as is apparent from its reply affidavit which reads as follows:

> "2…….While applying for consent to operate the respondent company gave a clarification by way of an undertaking (annexed as Annexure R-8/6) that the said application for Consent to Operate is of the existing cement plant and not for the Integrated proposal of Cement Grinding Unit (2.0 MTPA), Multi Fuel Captive Thermal Power Plant (30 MW), Oil Furnace based Emergency DG sets. The issue of construction work on the land not allegedly owned by the project proponent calls for the reply of the respondent No.10."

24. In fact the Board and other authorities remained under the impression that the 1.75 MTPA grinding and blending Unit was a separate plant and the proposed 2.0 MTPA grinding Unit was a separate plant. At this stage, it would be pertinent to refer to the affidavit of Sh.K.P. Sharma, Director of JAL dated 26th day of October, 2009 when he applied for Consent to Operate the 1.75 MTPA Cement Plant at Tikkri Bagheri, the relevant portion of which reads as follows:

> "(1)That the application submitted by us vide our letter No.JAL/JHCGBU/ENV/CTO/2009/748 dated 20.9.2009 in respect of consent to operate for manufacturing of 1.75 MTPA Cement (Grinding and Blending) at Tikkri – Padiyana (Bagheri circle) is for consent to operate of the existing Cement Plant.
>
> (2) <u>That the above stated application is not for the integrated proposal Cement Grinding Unit (2.0 MTPA), Multi-Fuel (Coal, Rice Husk and Municipal Solid Waste) Captive Thermal Power Plant (30 MW) and furnace oil based Emergency DG sets (3 x 10.89 MW each) submitted for Environmental clearance.</u>"
>
> *(emphasis supplied)*

25. One cannot believe that a huge Company like JAL is not aware of the difference between a stand alone grinding unit and a blending and grinding plant. The consolidated draft EIA report filed in the year 2009 is for a 2.0 MTPA Cement Grinding Unit alongwith 30 MW Multi Fuel Captive Thermal Power Plant and 3x 10.89 MW DG based power plant. It cannot be believed that JAL and the persons, who prepared the draft EIA report, were not aware of the difference between a cement plant and a stand alone grinding unit. In the draft EIA report, JAL has stated that it has a 2.54 MTPA Cement Plant at Baga village and that JAL has undertaken expansion of the Cement Plant at Baga by adding 2.75 MTPA capacity and that it already has 1.75 MTPA Cement Blending Plant at village Tikkri near Bagheri and now JAL has proposed to set up 2.0 MTPA Cement Grinding Unit there. This clearly indicates that JAL was trying to project that the Grinding Unit was separate and the Blending Unit was separate. No doubt before us it has now been stated that it is one and the same plant but in the documents being filed by JAL before the various authorities it kept on projecting that there were two separate plants; one a blending and grinding unit which did not require environmental clearance under the EIA notification of 1994 since the cost was less than Rs.100 crores and the second a stand alone grinding

unit which did not require environmental clearance under the EIA notification of 2006 on the ground that it was only a grinding unit. Why was this being done? The petitioners allege that the only reason was, that the JAL desperately needed environmental clearance to cover up its previously illegalities and we have reason to agree with the petitioners.

26. Even in the letter sent to the MoEF by JAL on 16.3.2009 JAL states as follows:

> "2.As a split location unit for the above mentioned project, we are selling up a Cement Blending Unit at village: Tikkri, Padiyana (Near Bagheri) Post Khillan, Tehsil Nalagarh, Distt. Solan (H.P.) with 2.0 MTPA capacity. The location of this unit is in the foot hills of the State of Himachal Pradesh at an elevation of 390 msl. The clearance to set up the Cement Blending Unit was granted by the State Environment Protection & Pollution Control Board, "Paryavaran Bhawan" Phase-III, New Shimla-171 009 vide ref. No. PCB(399) Jaiprakash Asso.II.Cements/2003-13643-48 dated 02.11.04. Both the installations of the Project are in advance stage of implementation.
>
> 3. <u>It is now proposed to set up a 2.0 mtpa Cement Grinding Plant at the same location of Cement Blending Unit, at village: Tikkri, Padyana (Near Bagheri), Post Khillan, Tehsil Nalagarh, Distt. Solan (H.P.).</u> It is further proposed to set up a Captive Thermal Power Plant of 30 MW capacity based on Multifuel such as Coal, Biomass such as Rice Husk and processed municipal solid waster. Further DG Sets of 3 x 10.89 MW each are being planned to meet the Emergency Power requirement in the event of shut down/break down of Grid supply and Captive Power Plant. The total power requirement of our integrated cement plant is 65 MW, which will be

> partially met by captive power plant and the balance will be drawn from HPSEB grid supply.
>
> 4. The proposed unit being Cement Grinding Unit alongwith CPP, it normally qualifies for 'B' Screening category, however the proposed unit falls on the border of H.P. and Punjab (Punjab State border is one KM), thus the application is being submitted to Ministry of Environment & Forests, GOI, New Delhi for processing under category 'A'."

27. Therefore, JAL even at this stage was projecting that the grinding Unit was a separate Unit which did not require environment clearance but for the fact that it was within 10 k.m of an inter-State boundary and thus it was submitting a letter to the MoEF treating this Project to be a category-A project. Even here JAL successfully misled the MoEF into believing that the cement grinding Unit was a totally separate stand alone grinding unit which did not require environmental clearance but for the fact that it was near the inter-State boundary. The EAC considered this Project to be a separate and new 2 MTPA grinding project. This is apparent from the minutes of the EAC dated 2nd/3rd February, 2010 wherein it is clearly sated that all stand-alone grinding Units fall under category-B as per the EIA notification of 2006 and in the instant case only because the plant is located within 10 k.ms of the inter-State boundary, general conditions have to be considered at the central level. Most importantly, the Committee observed that since JAL had initiated the construction work of the cement plant at site after

obtaining proper NOC from the State Government, the Committee was of the view that the case poses no violation. The EAC probably would not have taken this view if it knew that there was no new project and that the cost of the project was more than Rs. 400 crores.

28. The environment clearance was also granted to JAL by virtually assuming that this 2.00 MTPA Unit was a stand alone grinding unit with multi fuel based captive thermal plant. The environment clearance was granted for setting up a cement grinding unit having a capacity of 2.00 MTPA and integrated multi-fuel based captive thermal power plant having a capacity of 10 MW. It is most important to note that MoEF has categorized the project in category B-2 requiring no EIA/EMP and public hearing /consultation and thereafter laid down the conditions, which the project proponent was required to comply with. When we went through the record we were shocked to note that a high powered body like the Environment Assessment Committee had considered this plant to be a B-2 category plant when even as per the JAL this was just the old plant and no new plant was being set-up. Therefore, we had directed the MoEF to file a specific affidavit and the reply of the MoEF is that the cement grinding unit did not attract the provisions of EIA notification of 1994 irrespective of the cost of

the project. It's further stand is that stand alone cement grinding units are listed at Sr.No.3(b) of the schedule of EIA notification of 2006 wherein they are categorized under category-B. From the reply of the MoEF it is more than apparent that it treated this grinding unit to be a stand alone grinding unit only and this what was projected to it by JAL.

29. At the time of hearing of the arguments we had confronted Sh.Sandeep Sharma, learned Assistant Solicitor General with the various documents on record and in fact the admitted stand of JAL that no fresh Unit was being set up and even no new machinery was installed in this old Unit but only by making optimal use of the facilities, the capacity of the old cement blending and grinding plant was proposed to be enhanced from 1.7 MTPA to 2.0 MTPA**.** At this stage, the learned Assistant Solicitor General drew our attention to the letter dated 11th May, 2009 sent by JAL to the Hon'ble Minister of Environment and Forests, which reads as follows:

> "JAL/MOEF/HP-CGU/2009
> 11th May, 2009
>
> Hon'ble Minister for Environment & Forests
> Ministry of Environment & Forests
> Government of India,
> Paryavaran Bhavan, C.G.O. Complex,
> Lodhi Road,
> **New Delhi-110 003.**
>
> Sub: **Environmental Clearance for setting up of 2.0 MTPA Cement Grinding Unit with Multi-Fuel based 30 MW Captive Power Plant and 3x10.89 MW DG Based Power Plant (Emergency Power) at Village: Tikri**

Padiyana Near Bagheri, Post Khillan, Tehsil Nalagarh, Distt., Solan (H.P.)

File No. J-11011/123/2009-IA-II(I)

Dear Sir,

This is to draw your kind attention to the subject proposed project and presentation for finalization of TOR, held on 14th April, 2009. We understand that while prescribing the TOR, your good office has stipulated Public hearing for the project.

We wish to submit, to expedite the implementation of the proposed small unit, the Public hearing may be exempted. The factor's in support to our request are submitted here below:

1. Cement Grinding Units fall under Schedule 'B' of the Environment Act and notification dated 14th Sept., 2006, not necessarily needing Public hearing.

2. Cement Grinding Unit is provided state of the art Pollution Control equipment and is non-hazardous in nature.

3. The fly ash from the proposed Captive Power Plant will be entirely used in cement manufacture and there is no possibility in polluting the air or surface.

4. A Cement Blending Unit, as approved by State Pollution Control Board, for which the necessary steps for compliance were taken, is under installation at the same location. With addition of Cement Grinding Unit and CPP, we do not expect any significant changes in the environmental conditions of the area.

5. No additional land is being acquired for the project.

It is further submitted that we shall submit the EIA report to the Ministry of Environment & Forests, which will report comprehensive impact on environment due to addition of proposed unit. However, we earnestly request you to exempt the project from public hearing. This will save a good time for implementation of the project.

In order to implement project on time, you are kindly requested to re-consider the proposed case before coming Expert Appraisal Committee (EAC-Industrial Project) fixed for 12-14th May, 2009.

Submitted for kind consideration please.

Thanking you,

Yours truly,
For JAIPRAKASH ASSOCIATES LIMITED
[V.S. BAJAJ]
AUTHORISED SIGNATORY"

30. A bare perusal of this letter shows that even as late as 11th May, 2009, JAL was projecting that the Unit being set up by it was only a Cement Grinding Unit which fell under Schedule-B and therefore public hearing was not necessary. Para 4 of the aforesaid letter also clearly indicates that the Cement Blending Unit was shown to be a separate unit for which, according to JAL necessary steps and permission had already been taken.

31. We again must reiterate that the MoEF should not have accepted the word of the Company at its face value without verifying the same. All that we can say is that all the Government Bodies which are supposed to act like watch dogs to ensure that the environment and ecology is protected, miserably failed to perform their duties. Most disheartening is the fact that after these writ petitions were filed and were pending in this Court, realizing that it was caught in the web of it's own deceit, JAL again approached the MoEF and prayed that the plant capacity has been expanded and the senior scientist of the MoEF gave the following clarification:

> "3. In view of the above, it is clarified that the environmental clearance accorded to M/s. Jaiprakash Associates Limited vide this Ministry's letter of even no. dated 27th February, 2010 for Cement Grinding Unit (2.0 MTPA), Integrated multi-fuel based Captive

> Thermal Power Plant (10 MW) and DG set for 1x10.89 MW) in District Solan, Himachal Pradesh is an expansion of existing 1.75 MTPA grinding unit.
>
> 4.This issues with the approval of the competent authority."

32. We are pained to note that a senior Scientist of the MoEF gave this clarification on July 6, 2010 knowing fully well that the matter was pending in Court. Why did the senior Scientist not ask for an explanation from JAL why it had given wrong information earlier? This clearly shows that even the functionaries of the MoEF were totally remiss and did not discharge their duties in a proper or legal manner. The above discussion clearly shows that though now JAL admits before this Court that the capacity of the old 1.75 MTPA Plant has been enhanced to 2 MTPA only by optimizing its use, while getting environmental clearance, it was projected that the plant being set up is a separate 2 MTPA stand alone grinding plant which required no environmental clearance. This was obviously done with a view to avoid public hearing. Again JAL was guilty of making false statements while getting environmental clearance. We are of the considered view that JAL purposely misled the MoEF into believing that it was erecting a stand alone grinding unit only for the purpose of getting environmental clearance knowing that a stand alone grinding unit is treated to be a B category project. When the very basis on which the permission was sought is false and

fraudulent the clearance granted to set up the project must be held to be illegal.

Thermal Plant:

33. Initially, the proposal of JAL was to set up a PPC manufacturing Unit and it was projected that the energy requirement was only 3.0 MW. However, on 20th December, 2005 JAL sent an application to the Director of Industries seeking permission to set up a 25 MW Captive Multi Fuel Power Plant at Bagheri, District Solan. In Clause 6 of this letter, it is stated that the Bagheri Unit only requires 3.5 MW electric energy and the balance power generated would be made available for wheeling to the main cement plant at Baga. This proposal was considered by the Director of Industries and JAL was informed that the competent authority to consider the proposal to set up a Thermal Power Plant is the Department of MPP and Power or the H.P. State Electricity Board. At this stage, it would be pertinent to mention that under the EIA notification of 1994, like in the case of Cement Plants, environmental clearance from the Central Government was required only if the cost of the Thermal Plant was more than Rs.100 crores. In the proposal sent to set up the 25 MW Captive Multi-fuel based Power Plant, the project proponent did not give the estimated project cost at all. Thereafter, JAL sent a

fresh proposal to the Principal Secretary (MPP and Power) on March 10, 2006. Again the cost of the project was not shown and it appears that it was presumed that the cost of the project was less than Rs.100 crores. The Board granted consent to establish the plant on 27.9.2006 without even ascertaining the cost of the project and without examining whether the plant required Environmental Clearance or not. Immediately, JAL started construction of this plant without seeking any environmental clearance whatsoever. At this stage it would be pertinent to mention that in the meanwhile, on 14.9.2006, the new EIA notification of 2006 had come into force and as per this EIA notification a Thermal Power Plant of less than 50 MW fell in category-B and required environmental clearance from the State EIAA. No such environment clearance was taken by JAL but it started construction of the Thermal Plant only on the basis of the consent to establish granted by the Board which did not even examine the applicability of the notification dated 14.9.2006 which had come into force by then. The officials of the State PCB should have been aware of the latest EIA notification of 14.9.2006 and cannot feign ignorance of such notification.

34. Even assuming that on 27.9.2006 the officials of the PCB were blissfully ignorant about this important notification issued by

the Central Government they should have realized their mistake soon thereafter. However, it took the Board almost 5 months to awaken from their deep slumber. On 15.2.2007 the PCB wrote a letter to JAL informing it that it was required to obtain environment clearance and public hearing was mandatory. The Board despite being aware, at least at this stage, of the notification of 2006 did not choose to withdraw its earlier letter granting consent to establish the plant. JAL continued with the construction despite being aware of the EIA notification dated 14.9.2006 and Thermal Power Plant was erected. JAL then submitted its draft EIA report for setting up of the Thermal Plant on the basis of a rapid assessment sometime in the year 2007 and here the total capital investment was projected to be Rs.90.45 crores.

35. Most surprisingly, the draft EIA report is purported to have been prepared on the basis of a study stated to have been conducted over a radial distance of 10 k.m. alongwith proposed plant site during Summer, 2004 covering the months April to June, 2004. This study in our considered view is a totally sham study. At this stage we may reiterate that the MOU was entered into between JAL and the State on 9th July, 2004 when even the plant site had not been selected. There was no proposal to even set up a Captive Power Plant at that stage. For the first time the

proposal to set up a captive power plant was mooted in December, 2005. Therefore, we fail to understand how any studies were carried out during the period April to June, 2004. Both the Pollution Control Board and other Environmental authorities again did not look into this aspect of the matter and accepted this statement of JAL to be correct.

36. For any proper environment impact assessment study to be considered genuine the studies should be made after informing the concerned PCB, the MoEF if the proposal requires central clearance and people of the area. Studies carried out behind the back of the persons who are likely to be affected by the establishment of a plant are meaningless. In this case, how could studies have been carried out much before the JAL had even proposed to set up a cement plant in the area and much before there was any proposal to set up a Thermal Plant. How was a study carried out without any Terms of Reference? Therefore, the draft EIA report in our considered view is a totally sham document, not worth the paper it is written on.

37. Be that as it may, a public hearing was conducted on the basis of this EIA notification on 27th June, 2007. It is more than apparent from the minutes of the public hearing dated 2.7.2007 that the entire public opposed the setting up of the Thermal Plant. On 16th July, 2007, the Government of Himachal

Pradesh took a decision to withdraw all NOCs to set up Thermal Power Projects in the State of H.P. and also took a decision not to entertain such proposal in future. It would be relevant to refer to the Government decision as reflected in the letter of the Additional Secretary-cum-Director, Environment and Scientific Technology addressed to the Member Secretary of the H.P. State Pollution Control Board which reads as follows:

> "Sir,
>
> In continuation to this Letter No.Dir(Env)/ PA/3/2007 dated 16.7.2007, I am directed to inform that the Govt. of H.P. has decided that all the permissions & NOC's granted for setting up of Thermal Power Plants may be withdrawn forthwith. It has also been decided that no such proposals may be entertained in future."

38. It is, however, obvious that the Thermal Plant was set up without any permission or environment clearance. A public hearing was held on the basis of an EIA report based on a so called study held 3 years earlier and the public opposed the setting up of the plant. The Government withdrew the NOC and at this stage the PCB woke up and withdrew the consent to establish the thermal plant on 17.7.2007. In fact once the Board had issued a letter on 15.2.2007 and had taken notice of the EIA notification of 2006 it should have at that stage itself withdrawn the Consent to Establish. Thereafter, on 7.9.2007 the MoEF also decided to keep the proposal in abeyance but JAL did not

stop the construction of the Thermal Plant even after 17.7.2007. This is obvious from the fact that on 20/3/2009 a letter had to be sent to JAL to immediately stop construction activities of the Thermal Power Plant and not to restart the construction activities till requisite permission was obtained. JAL behaved as if it is above the law.

39. Though previously the Government vide its decision dated 16.7.2007 had decided not to entertain any such proposal for setting up thermal plants in future, on 10.11.2008 the Government withdrew the earlier decision and now took a decision to permit setting up of Thermal Power Plants for captive consumption. The relevant portion of letter dated 10th November, 2008 reads as follows:

> "1.That setting up of "Thermal Power Plants (including Coal based) will be permitted in the State of H.P. subject to the condition that Thermal Power Plants based on Biomass will be given priority.
>
> 2.That the Thermal Power Plants will be permitted only for "captive" consumption by Industrial Units located within H.P.
>
> 3.That in case surplus power from these "Captive" Thermal Power Plants is available for sale, then HPSEB shall have first right of purchase of such surplus power.
>
> 4.That the Government will levy "Environment Tax/Fee" on the power so produced through captive Thermal Power Plants for which Department of Environment and Science & Technology will fix the rates separately."

40. We had asked the State to produce the record to show in what circumstances the earlier decision was taken not to entertain such proposals for setting up Thermal Plants in future and why within a short period of only one year the Government changed this policy decision on 10.11.2008. On perusal of the record we find that some complaints were received against Sh. S.P. Vasudeva the then Member Secretary of the Pollution Control Board wherein it was alleged that he had granted consent to establish Thermal Power Plants without following the policy and norms laid down by the State. The Department of Environment, Science and Technology was directed to examine this aspect of the matter. It prepared a detailed note for the perusal of the Hon'ble Minister of Environment, Science and Technology in which it was pointed out that in the last two years four Thermal Power Projects including that of J.P. Associates at Bagheri, had been granted consent to establish. The note shows that the consent to establish was accorded without any proper scrutiny of the extent of air pollution these Thermal Plants would cause. It was also pointed out that no regard was paid to the fact that Thermal Plants fall under the negative list of Industries in the State's Industrial Policy. The note also highlights the fact that while granting consent to establish no heed was paid to environmental safeguards and

guidelines including those contained in State's Hydro Power Policy of 2006 wherein Hydro Power has been specified to be the preferred source of electricity generation. It was specifically pointed out that Thermal Plants generate carbon dioxide and sulphur dioxide and cause very high level of pollutions. It was clearly pointed out that the Pollution Control Board had not properly examined these proposals. Further, the note pointed out that during the public hearing held on 27.6.2007 which was attended by more than 1500 people of 12 Panchayats, the entire public in one voice had opposed the setting of the Thermal Plant. This note was approved by the Hon'ble Minister of Environment, Science and Technology and thereafter put up before the then Hon'ble Chief Minister who made the following observations:

> "1.It is a serious matter. Particularly NOC for thermal Power which is on negative list and against power policy of the State.
> 2.This officer may be suspended with immediate effect and charge-sheeted.
> 3.File also shows that the Electricity Board was also involved in issuing NOC for Thermal Power stations, the Board very well knew that Thermal Power is against the Power Policy and also it had no powers to decide allocation of thermal Power Stations J.P. Associates (25 MW) for plant at Bagheri; Mahabir Spinning Ltd. (8.5 MW); M/s.Deepak Spinners Baddi (5 MW); and Tannu Alloys Una 6 MW. All officers for this may be identified within one week and case put up.
> 4.All the permissions and NOC's granted for setting up of Thermal Power Stations for above Companies and any other may be withdrawn forthwith.

Sd/-
13.7.2007".

41. At this stage, it would be pertinent to mention that as per the office memorandum dated 7th January, 2003 issued by the Government of India, Thermal Power Plants were placed in the negative list in the State of Uttaranchal and Himachal Pradesh.

42. JAL also started writing letters to the various authorities praying that the consent to establish Thermal Power Plant which had been revoked may again be granted. Initially, as is apparent from the noting portion of the file, this move was resisted. However, later we find that the Chief Secretary to the State of Himachal Pradesh reopened the matter and held meeting with other senior officials. Despite the clear-cut observations of the earlier Head of the Government the bureaucracy started reopening the matter.

43. On 18th October, 2008 a meeting was held under the Chairmanship of the then Chief Secretary to the Government of Himachal Pradesh and attended by a number of senior officials and it was recorded in the meeting that a consensus had emerged that there should not be any objection to setting up of the Thermal Power Plants in the State if in such units latest pollution control invoices are installed. We do agree that policies change from time to time and no policy can be stagnant forever. However, we are constrained to observe that in this

meeting which was held under the Chairmanship of an official of the rank of Chief Secretary, the Committee very conveniently ignored the very pertinent observations quoted hereinabove.

44. After this meeting was held a memorandum was put up for consideration of the Council of Ministers. The points put up for consideration before the Council of Ministers are whether Thermal Power Plants, including coal based plant should be permitted in the State of Himachal Pradesh and whether such plants could be permitted only for captive consumption or commercial Thermal Power Plant should also be allowed. In the memorandum no reference was made to the observations made earlier and these were conveniently ignored. All these facts were hidden from the Council of Ministers. A note was put up to the Cabinet for approval of the change in policy permitting Thermal Plants to be set up and in this note also, no reference was made to the observations quoted hereinabove.

45. The Government thereafter took a decision which was conveyed on 10th November, 2008 to the various Departments. Surprisingly on the same date when this decision was conveyed by the Principal Secretary (Power) to various officials, JAL through its Executive Chairman sent a letter to the Principal Secretary, MPP & Power seeking permission to set up a 60 MW Thermal Captive Power Plant at Bagheri. This was a proposal

very different from the earlier proposal. This absolutely new proposal materialized on the same day when the change in the policy decision was made by the Government. JAL seems to have its eyes and ears in every wing of the Government, because even before the ink had dried on the letters conveying the new policy of the Government, JAL had sent its own detailed proposal for setting up a thermal plant on the same date itself.

46. We are constrained to observe that while making the change in policy for setting up of Thermal Power Plants the memorandum prepared for approval of the Council of Ministers did not deal with the objections and reservation expressed by the previous Government. The policies of the State must be consistent and if a change has to take place there must be valid reason for the change and while making changes the reservations and views expressed earlier must be dealt with.

47. It would also be pertinent to mention that clearance of the MoEF for diverting forest land was taken only for setting up a cement plant and there was no permission for diverting forest land for setting up a thermal power plant. Till date there is no permission of the Ministry of Environment and Forests permitting the forest land to be used for setting up a thermal Plant.

48. Though the proposal was for setting up a 60 MW unit, the EAC only permitted setting up a 10 MW Unit treating it to be a new proposal. We are also constrained to observe that the EAC in its minutes has not dealt with the various issues raised by the public especially with regard to the setting up of the Thermal Plant. As pointed out above, earlier JAL proposed setting up of a 25 MW plant. After the permission was withdrawn, JAL submitted to the Government a proposal for setting up a 60 MW plant and finally its proposal was only for setting up a 30 MW Plant. The EAC came to the conclusion that the actual requirement of power for the Cement Grinding Unit is only 10 MW and therefore asked JAL to restrict CPP for 10 MW only. How the EAC came to the conclusion that the requirement of the Cement Plant was 10 MW is not understandable because even according to the Project proponent the requirement of the Cement unit at Bagheri is only 3 to 3.5 MW. This clearly shows that the EAC mis-directed itself while granting approval for setting up of the thermal plant. The objections of the public have not been considered by the EAC and have been just brushed aside.

49. From the aforesaid facts, certain things clearly emerge. Firstly, the EIA notification of 2006 had come into force before grant of CTE by the Board but the CTE was granted. Even after the

Board realized its mistake and asked JAL to get environmental clearance it did not recall the CTE and JAL continued with the construction. The Government also took a policy decision to withdraw all NOCs for Thermal Plants and further took a decision that no such permission would be granted in future. This decision was over-turned within a year and the Government changed its policy without taking into consideration the factors which weighed with Government while arriving at the earlier decision. From the document dated 6th June, 2006 which is on record it is apparent that JAL started construction of the Thermal Power Project on 6.6.2006 even before the consent to establish was given by the Board on 27.9.2006 and the construction was completed despite the CTE being withdrawn. Therefore, we are of the considered view that the permission granted by MoEF for setting up the Thermal Plant is based on wrong projection of facts and here again JAL succeeded in hoodwinking the MoEF and this environmental clearance was improperly obtained. The same is consequently void and illegal.

Wrongful grant of environmental clearance:

50. JAL applied to the MoEF vide letter dated 18.2.2009 for environmental clearance for an integrated project of 62 MW Captive Power Plant, 2 MTPA grinding unit and 3 DG sets of

10.89 MW each. On 16.3.2009 JAL filed a revised application in which the capacity of the captive power plant was reduced from 62 MW to 30 MW. In the 93rd meeting of the Expert Appraisal Committee (EAC) held between 14th to 16th April, 2009, the EAC proposed the terms of reference for preparation of the EIA/EMP report and these were finalized in the 94th meeting held in June, 2009. On June 2, 2009, the MoEF sent a letter to JAL regarding the settlement of the terms of reference (TOR). It considered the integrated project of cement grinding and the captive power plant while finalizing the TOR. This letter is dated June 2, 2009 and recommends that one of the terms of reference is collection of base line data on air, water, soil, noise, flora and fauna etc. for one season other than monsoon. The draft EIA report prepared by the consultants refers to the letter dated June 2, 2009 and the terms of reference prepared therein in the following terms:

> "As per the requirement of EIA notification, JAL had submitted the necessary application to MoEF for approval of Terms of Reference (TOR). The Terms of Reference approved by MoEF for carrying out the Environmental Impact Assessment study vide letter No. J-11011/123/2009-IA-II (1) dated June 02, 2009 is enclosed as Annexure -1A alongwith compliance.
>
> Draft EIA report incorporating the Terms of Reference is presented below."

51. Surprisingly and shockingly, though the terms of reference were prepared only in June, 2009 the environment monitoring

study to prepare this report was reportedly carried out during the months of March- May, 2009. This means that either JAL knew what were the terms of reference before the terms of reference were finalized and JAL also knew that they would only be required to carry out environment monitoring for 3 months of one season, or that the study is a sham study like in the case of Thermal Plant. How could the study be carried out even before the Terms of Reference were finalized by the MoEF. Though the project proponent has placed a lot of material on record, no material has been placed before us prior to the issuance of letter dated 2nd June, 2009 showing that there was any official intimation about the terms of reference by EAC to JAL. We also fail to understand how the Committee of the MoEF glossed over this matter.

52. Another surprising aspect is that as per the information supplied under the Right to Information Act the EIA report was submitted by JAL to the Board on 29.6.2009 i.e. within 27 days of the settlement of the terms of reference on 2.6.2009. This again indicates that this report was ready even before the TOR were prepared.

53. The public hearing was fixed in the matter on 7.9.2009 and as we have discussed above, JAL made great efforts to get exemption of the public hearing on one pretext or the other and

projected that the Cement Plant was only a grinding Unit. This is not a simple mistake but a deceitful action on behalf of the JAL to avoid public hearing. In any event, public hearing was held but it is important to note that the MoEF terms the project as a B-Category project requiring no EIA which on the face of it is a wrong decision which shows total lack of application of mind on behalf of the officials of the MoEF.

54. One of the conditions of any environment clearance is that if the Project Proponent has misled the authorities and has made false statements then the environmental clearance can be revoked. We are not going into the merits of the public hearing though many arguments on this aspect were urged before us but in the inspection report which we have referred to above, which was carried out on 9.11.2009 after some complaints were received, it was found that most of people had objected to the manner in which the public hearing was done and even the Additional Chief Secretary to the Government of Himachal Pradesh who was holding charge of Principal Secretary (Environment) had sent letters to the Secretary of the MoEF complaining that there was an unanimous protest against the establishment of Thermal Power Plant and therefore the State Government would like the Government of India to constitute a Special Expert Committee to examine the issues that had been raised by the stake holders

regarding environment impact after visiting the site. It was also brought to the notice of the Committee that a public interest litigation had been filed in this Court in this regard. Even the public hearing records clearly indicate that Court cases were pending at that time. The EAC however did not really go into the objections raised by the Additional Chief Secretary of the State of Himachal Pradesh but relied on JAL's response in which it is stated that no litigation was pending in any Court. The Additional Chief Secretary had already brought it to the notice of the MoEF that a writ petition was pending in this Court but this fact was glossed over. The Statement made by JAL before the EAC was totally false. In fact, we are constrained to observe that the EAC was not even clear as to what was the project to which it had granted clearance. Till now, the stand of the EAC is that JAL was setting up a 2.0 MTPA stand alone grinding Plant which required no environmental clearance. If the EAC had been aware that in addition to the Thermal Power Plant the Plant which had already been set up was a 2 MTPA grinding and blending plant the approach may have been totally different.

55. The matter does not end here. On 31st March, 2010, after complaints were received, the Director of the MoEF issued a notice to JAL to show cause why the environmental clearance

be not revoked in view of the fact that JAL had made a wrong statement before the EAC that no Court cases were pending. JAL responded to this notice and stated that there were four High Court cases lodged by some petitioners and gave the details of the petitions in the following terms:

Sr. No.	**Case No. & Title of case**	**Date of filing**	**Receipt of notice at JAL**	**Current Status**	**Copies of Petitions & JAL's reply**
1	CWPIL No. 15/09	21.10.09	5th February 2010	Next date of hearing is 22.04.2010	Annexure-I
2	CWP No. 30/10 Harbhajan Singh Vs State of HP & others	03.01.10	No notice issued	Next date of hearing is 22.04.2010	Annexure-II
3	CWP No. 426/10 Hakam Ram Vs State of H.P. & others	22.02.10	No notice issued	Next date of hearing is 22.04.2010	Annexure-III
4	CWP No. 586/10 Him Parivesh Vs State of H.P. & others	03.03.10	No notice issued	Next date of hearing is 22.04.2010	Annexure-IV

56. This information supplied by JAL is also totally false. As far as CWPIL No.15 of 2009 is concerned, JAL had been served on 27th January, 2010 and not on 5th February, 2010 as stated by it. We have verified this fact from the record of the case. As far as CWP No.30 of 2010 was concerned, the statement made by JAL is totally false. In fact when this case was taken up for admission by this Court on 06.01.2010, counsel had appeared on behalf of the JAL. This Court had granted interim stay and restrained JAL from operating the cement plant. Thereafter, JAL filed SLP No. 1056 of 2010 in the Apex court and the interim order granted by this Court was stayed by the Supreme

Court on 12.01.2010. How could JAL inform the MoEF that no notice had been issued? Therefore, the information given with regard to CWP No.30 of 2010 was totally false and material facts were withheld. As far as CWP No.426 of 2010 is concerned the statement made by JAL that no notice had been issued or received by JAL is totally false. In fact the matter was listed for admission in Court on 23.2.2010 when Himachal Cement Grinding and Blending Unit of JAL was duly represented by a team of lawyers. Notice was issued in the writ petition. Thereafter, the matter was taken up on 5th March, 2010 when JAL was again represented by counsel. Then the matter was taken up on 22.3.2010 when JAL was represented by a team of lawyers. The writ petition was withdrawn on 29th June, 2010. It is thus obvious that the JAL was guilty of making false averments with regard to CWP No.426 of 2010. Obviously, this false information was given with a view to get out of the show cause notice issued by MoEF with regard to wrong information supplied by JAL in respect of legal proceedings. What is shocking is that JAL during the pendency of this writ petition could go to the extent of giving false information to the EAC with regard to the cases pending before this Court. We fail to understand why the MoEF could not get details from its counsel about the various court cases.

57. This clearly shows that JAL was not telling the truth and concealed very important facts from the EAC and told lies that no cases were pending. There is no explanation as to why the correct facts were not brought to the notice of the EAC. It would be pertinent to mention that Environmental clearance was finally granted to JAL only on 27.2.2010 but even as per the averment made by JAL as is clear from para 2 of the reply filed by it the Unit started on 14th January, 2010 after the Apex Court passed order on 12th January, 2010 in the SLP filed by JAL. It is thus apparent that the Environmental clearance was obtained by supplying totally false information and by withholding material facts.

58. Sh.Upadhaya, learned senior Counsel for the Project Proponent has placed strong reliance on the judgment of the Apex Court in case titled **Lafarge Umiam Mining Private Ltd. –T.N. Godavarman Thirumulpad vs. Union of India and others, (2011) 7 SCC 338.** In that case the project proponent had applied in the year 1997 for grant of environmental clearance for a lime stone mining project in East Khasi Hills in Meghalaya. The Khasi Hills Autonomous District Council issued a certificate in favour of the project proponent stating therein that it had no objection for mining operation in the area in question since the area was not forest land. Thereafter, the

site was approved by the MoEF. Then, the Company applied for grant of environmental clearance. At this stage again a question was raised whether the site clearance was proper or not. Another certificate was issued by the DFO that the land was not forest land. However, the MoEF felt that the area is the home of endemic insectivorous plants, butterflies etc.; all this, according to the MoEF, would require a detailed survey of plants and animals to be carried out with the help of BSI and ZSI offices located in Shillong. Thereafter, the MoEF again directed the Project proponent to obtain forest clearance under the 1980 Act. One of the issues raised before the Apex Court was whether the permission under the EIA notification of 1994 had been obtained without candid disclosure of the facts and the effect thereof. The Apex Court culled out the following issues:

> "74. (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."

Sh.Upadhaya urges that the Apex Court in such circumstances held the ex-post-facto environmental clearance to be valid even though the Company had wrongly stated that the land was not forest land.

59. We do not feel that this decision applies to the present case. The Apex Court in the said case has noted at various places that the Forest Department as well as the Khasi Hills Autonomous District Council which was a constitutional authority had repeatedly stated that the land in question was non-forest land. Even the Chairperson of the Expert Committee who was also the Principal Chief Conservator of Forests had given a similar report expressly stating that the mining lease did not fall in forest area. It was after 9 years that there was a change of view by the MoEF. It was in these circumstances that the Court held that the public hearing which took place in the year 1998 was valid. In the public hearing the Headman of Nongtrai was present and in the villager durbar the villagers gave their approval to the proposal of the project proponent. The observations of the Apex Court which are very pertinent read thus:

> "103. 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."

Thereafter, the Apex Court held as follows:

> "107. 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 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-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 2008-09. 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 wish to express any conclusive finding on this aspect at this stage.
>
> 108. 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 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."

It would also be relevant to refer to the findings of the Apex Court in paras 119 and 120:

> "119. 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).

120. 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."

60. The Apex Court also gave various guidelines which mainly pertain to identification of forest land. In our view this judgment has no applicability in the facts of the present case. In the case before the Apex Court, the only issue was whether the land was forest land or not. For 9 long years the Khasi Hills Autonomous District Council as well as the Forest Department had been taking the stand that the land was not forest land and therefore there was no conscious misrepresentation on the part of the Company. The facts of the present case are totally different. JAL is guilty of mis-representing and mis-stating facts at various stages as has been pointed out by us above. A Writ Court is a Court both of law and of equity. We may take a lenient view in a matter where the project proponent may have been under some mis-conception of law or fact but was not guilty of trying to tell lies.

61. The entire foundation of the environmental clearance obtained by JAL is based on falsehood. Firstly, the Company lied about the cost of the cement plant. Then when it came to the Thermal Plant it managed to get permission without EIA clearance and even after it was brought to the notice of JAL that EIA clearance was required it continued to build the Thermal Plant. When JAL submitted a new proposal for grant of environmental clearance it successfully managed to fool the H.P. State

Pollution Control Board, the MoEF and the EAC into believing that the plant being set up by it was a stand alone grinding unit not requiring environmental clearance. This statement was also totally false.

62. Even after the clearance was granted and the MoEF wrote to JAL that it had not supplied correct information to the EAC about the court cases pending before this Court, JAL had the audacity and temerity to again give totally false information with regard to the cases and tried to give an impression that JAL was not aware about these cases at that time. Furthermore, the manner in which JAL obtained possession of the property as well as managed to get the Government to allot land from the common pool clearly indicates that JAL was successfully managing to exert its influence to get highly illegal decision taken in its favour.

63. True it is, that as held by the Apex Court in **N.D. Jayal and another vs. Union of India and others, (2004) 9 SCC 362,** the right of development is also a part of Article 21 of the Constitution but when we go through the law laid down by the Apex Court from time to time, it is apparent that the Apex Court has time and again laid down that the balance between environmental protection and developmental activities can only

be maintained by strictly following the principle of sustainable development. The Court held as follows:

> "The balance between environmental protection and developmental activities could only be maintained by strictly following the principle of "sustainable development". This is a development strategy that caters to the needs of the present without negotiating the ability of upcoming generations to satisfy their needs. Strict observance of sustainable development means a path that ensures development while protecting the environment, a path that works for all peoples and for all generations. It is a guarantee to the present and a bequeath to the future. All environment-related developmental activities should benefit more people while maintaining the environmental balance. This could be ensured only by strict adherence to sustainable development without which life of the coming generations will be in jeopardy.
>
> Right to clean environment is a guaranteed fundamental right. May be, in a different context, the right to development is also declared as a component of Article 21. The right to development cannot be treated as a mere right to economic betterment or cannot be limited to a misnomer to simple construction activities. The right to development encompasses much more than economic well being, and includes within its definition the guarantee of fundamental human rights. The 'development' is not related only to the growth of GNP. This idea is also part of the UN Declaration on the Right to Development. The right to development includes the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples' well being and realization of their full potential. It is an integral part of human right. Of course, construction of a dam or a mega project is definitely an attempt to achieve the goal of wholesome development. Such works could very well be treated as integral component for development."

64. We are aware of the aforesaid principles and we are not against setting up of a cement plant but the question is, can a party set up a cement plant without obtaining environmental clearance? Should a party be allowed to go scot free when it obtains

environmental clearance after mis-stating facts? In our considered view this Court cannot and should not help those who subvert or try to circumvent the law.

65. It has been urged by Sh.Upadhaya that since public hearing did take place and the EAC has considered all the relevant factors there is no need to re-open the matter. We cannot agree with him. If we go through the record of the public hearing, it is apparent that the public was not informed about the pros and cons of the Project. In this behalf, we may submit that the Pollution Control Board, the MoEF and the EAC must play a more pro-active role than what is being done at present. Sitting in the Green Bench, we have heard hundreds of matters and we are constrained to observe that in almost all, if not all, cases the word of the project proponent is accepted to be the gospel truth. Obviously, the project proponent and/or the consultants who prepare the project reports will paint a rosy picture about the project and will gloss over and in fact hide the ill effects of the project. This is where the role of the Pollution Control Board and the MoEF starts. Why should we wait for NGO's or local inhabitants to come to Court to question the validity of the project. They do not have the wherewithal, the finances, the capability or the knowledge to oppose the report. We are of the considered view that the duty of the Pollution Control Board

and the Officers of the Board or the MoEF is to verify the facts stated by the Project Proponent. It is the duty of the Pollution Control Board, the EAC and the persons who conduct the public hearing to ensure that the pros and cons of the project are explained in simple language to the villagers. How will the poor villagers know that a project is going to affect their health or not? In fact no layman would know what is hazardous waste or pollution generated by a particular project. In our considered view it is the duty of the Pollution Control Board, the MoEF and EAC to examine each project report and thereafter bring forth even the negative aspects of the project to the knowledge of the people. There is no use of having a public hearing if the public is not aware of the effects of the project both positive and negative. We have not come across a single case in the last two years, during which we have been hearing environmental cases where the Pollution Control Board or the MoEF have actually brought such facts to the notice of the Public during public hearing. A public hearing without first informing the public is a total sham.

66. In the present case, as noticed by us above, there is another inherent defect in the EIA reports. The draft EIA report prepared in the year 2009 refers to the letter dated June 2, 2009 as noticed by us above. The EIA report states that a 2.0 MTPA

cement grinding unit with multi fuel based captive power plant 3 DG sets is to be set up. Therefore, the report on the first aspect was false since even according to the JAL no new plant was being set up. What sort of consultants are these persons who prepare these reports without even knowing whether the capacity of the old plant is being enhanced or a new plant is being set up. In fact the Project Report is totally mis-leading since in para 1.6.2 it is stated that the project will be located within the blending complex, thus, giving the impression that the earlier project was only a blending complex and now a stand alone grinding unit is also being set up. As pointed out above, how did the consultants carry out study for environmental monitoring during the month of March to May, 2009 when the terms of reference were conveyed to the Company only in June, 2009. This coupled with the fact that the EIA report for the Thermal Plant which was prepared in the year 2007 but relied upon data purported to have been collected in the year 2004 clearly indicates that neither the project proponent nor their consultants who prepared the report had actually carried out any studies as claimed by them.

67. We are also constrained to observe that we have not come across any case where either the Ministry of Environment and Forest or the H.P. State Pollution Control Board have directed

any project proponent to carry out environmental studies over a long period. All such reports are based on rapid environment impact assessment over one season. Time has come when the MoEF must take action in the matter and frame guidelines as to in which project(s) clearance can be granted on the basis of rapid EIA and in which projects detailed study of one year or more should be carried out. In most cases, studies are carried out in the summer months since this is conducive and helpful to the project proponents. Studies should also be carried during the other seasons to properly assess the impact on the environment. In the case of the Thermal Plant in para 1.7 it is noted that the studies were carried out from April to June, 2004 whereas at that time even the site had not been approved. On what basis were the studies carried out?

68. The EAC while approving the project has no doubt laid down many stringent conditions but we find that in the meeting of the EAC the queries expressed by the people have not been properly addressed. As pointed out above, not only the people but even the Additional Chief Secretary of the State had written to the MoEF raising serious objections especially with regard to the setting up of the Thermal Plant. No doubt, the EAC at one stage appointed a Committee which went to the spot but then final approval was granted, the EAC did not look into the

adverse effects of the Thermal Plant or even the Cement Plant. In fact the EAC while granting the permission treated the unit as the cement grinding unit covered under category B. This itself shows the lack of seriousness of approach. In the entire proceedings of the EAC the only observations with regard to the public hearing and the objections raised therein are as follows:

> "The Committee deliberated upon the issues raised during the public hearing/public consultation meeting conducted by the H.P. Pollution Control Board on 7th September, 2009. It is recorded that public refused to sign attendance sheet and 90% participants protested against the project. The other issues raised included why to conduct public hearing when the proposal was earlier rejected by the State Government for setting up of thermal power plant. The other issues were related to extraction of ground water, impact of dust on the crop, land transfer in the name of J.P. Associates Ltd., revision of the capacity of the CPP from 25 to 30 MW + DG set (31 MW), cement grinding (1.75 MTPA to 2.0 MTPA), starting of construction activities prior to environment clearance, fly and bottom ash disposal etc. and why CPP when hydro power is available in the State? Pas clarified to the public regarding control of SPM levels within 20-60 mg/Nm3 and water within 1075 m3/day. Permission for the drawl of water is already obtained. Air cooled condenser will be provided to reduce water consumption. Ash will be used in cement manufacture (PPC) and question of disposal does not arise at all. Rain water harvesting is proposed for recharging the ground water. Hydro power can't provide continuous electric supply for 365 days. Pas have also clarified that there is no correlation between Bagheri and Panipat Grinding Unit since one is located in H.P. and another one in Panipat. Land is allotted by the Govt. of H.P. The issues raised have satisfactorily been incorporated in the final EIA/EMP report."

69. Therefore, in one line that the issues were satisfactorily incorporated in the final EMP report the EAC dealt with all issues raised by the public. When 90% of the people who participated in the public hearing protested against the project, were not their wishes to be taken into consideration? Do these villagers have no say or voice in what is to be set up in their areas? It is their common land which was handed over to the Company and when 90% of them were protesting, their grievances should have been redressed in a proper manner. All that we can say is that the manner in which environmental clearance was granted leaves much to be desired.

D.G. Sets:

70. In the year 2009, 3 D.G. sets were made part of the draft EIA report. In fact no environment clearance was required for this purpose. However, permission of the PCB was required. Be that as it may, Environmental Clearance was granted for only one DG set on 27.2.2010, but actually construction for the 3 DG sets had already been completed and without any permission whatsoever. Now according to the report of the Principal Secretary of the Board two DG sets were being dismantled. This clearly shows that without any valid permission three DG sets had been set up. This shows the scant respect which JAL has for the rule of law.

Zoning Atlas:

71. It has been argued on behalf of the petitioners that cement and Thermal Power Plants are not suitable for Solan District as per the zoning atlas and no micro studies were done before granting permission to these plants. These factors were also not looked into by the EAC.

Land Issues: (i) Possession

72. An important issue which arises in this petition is how the property of the people was handed over to the Company for setting up a Cement Plant without even following the basic formalities. Another serious question is whether the State could have in fact used this village common land for industrial purposes but for the first part of the discussion we will proceed on the assumption that the State had the power to do so. Even then some formalities had to be followed before handing over the possession of the land to the project proponent. The speed at which the action was taken and the manner in which JAL was put into possession of the Plant clearly reflects that everything is not above board. As pointed out earlier the MOU was signed on 9.7.2004. The MOU did not identify the specific site where the cement manufacturing plant was to be set up. Surprisingly, on 8.4.2004 i.e. 3 months prior to the signing of the MOU the respondent Company had applied for lease of 325 bighas and 16

biswas of land as is apparent from list of dates furnished by the Company itself. One fails to understand how even before the MOU had been signed could the Company apply for lease of the land.

73. Be that as it may, as per the documents which are on record single window clearance for the plant was conveyed to JAL on 16.9.2004. JAL thereafter approached the State level Site Appraisal Committee for approval of the site at village Pandiyana (Tikkri) near Bagheri and the proposed site was finally recommended and approved by the Committee on 27.5.2005. The version of the State is that the land selected was forest land and therefore permission for diversion of the forest land was sought under the Forest Conservation Act, 1980 for being diverted for use of non-forest purpose for setting up a cement plant. This permission was granted on 8.9.2005. Thereafter, on 18.10.2005 the Industry Department took up the matter with the Revenue Department for leasing out the land to JAL. Admittedly, the Revenue Department transferred the land to the Industry Department only on 29.11.2008 and the Industry Department took notional possession of the land on 4.3.2009.

74. Admittedly, the Company had been put in possession of the land in October, 2005 without any legal document or order. We vide our order dated 30.9.2011 had directed the Chief Secretary

to the Government of Himachal Pradesh to explain how the possession of the land was handed over to JAL. She has filed a detailed affidavit, the relevant portion of which reads as follows:

> "10.That as reported by Tehsildar Nalagarh, District Solan to Deputy Commissioner, Solan, Respondent No. 10 has informed that they moved into the land in October, 2005 after receipt of approval from the Ministry of Environment & Forests, Government of India and thereafter started the construction work of the plant.
>
> 11. That indeed, the land had not been formally transferred to Respondent No. 10 when it started construction of plant/ installation of machinery. This should not have happened and erection of plant should have been started after possession of the land was handed over formally after signing of lease agreement.
>
> 12. That the whole matter was brought before the Cabinet for taking an appropriate view and the Cabinet, in its meeting on 25.2.2010, decided as follows:
>
> > "Taking into consideration the fact that the State Government had cleared the Project and thereafter recommended the case to the Government of India under Forest Conservation Act and the Company had paid Rs. 2.57 Crore for diversion of Forest Land, the Cabinet decided as under:-
> >
> > (i) The Government land in question be leased out to M/s. J.P. Associates Ltd. for 95 years w.e.f. the date of signing lease deed @ Rs. 5,58,189/- per bigha.
> >
> > (ii) To levy occupation charges of Rs. 4.10 Crore on M/s. J.P. Associates Ltd. for un-authorised occupation of the land.

(iii) To fix responsibility of the officials of the concerned departments for not taking timely action against the un-authorised".”

75. We are indeed shocked to note that 325 bighas of land worth crores of rupees was handed over to the Company without any authority whatsoever. India is a country governed by the Rule of Law. The Constitution of India is the fountainhead of the powers vested in the various functionaries of the State. Article 299 of the Constitution provides for the manner in which a contract has to be entered into by the State. It reads as follows:

> "**299. Contracts.**
>
> (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.
>
> (2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof."

76. Shockingly in a matter which was being dealt with at the highest levels of the Executive nobody looked into this aspect of the matter as to how JAL had been put in possession of this land merely because the MoEF had granted permission to divert

the forest land for non-forest purpose. In the affidavit there is virtually no explanation, except to state that the Company has paid the lease money assessed as well as the use and occupation charges for the past 4 years. Though, in the affidavit it is stated that the responsibility on the officials concerned is to be fixed but till date no such responsibility has been fixed. In fact, we are of the considered view that the responsibility has to be fixed at the highest levels and not at the lower levels. As per the affidavit of the Chief Secretary referred to above, all that the Cabinet decided to do was to levy lease charges and impose penalty upon JAL. However, the Cabinet did not consider the question whether the Government had any jurisdiction to transfer the village common land or not.

77. There was a Monitoring Committee headed by the Chief Secretary of the Government of Himachal Pradesh and which had other senior members like the Principal Secretary (Industries), Financial Commissioner (Revenue), Director (Industries), Chief Conservator of Forests, State Geologist etc. This Committee was monitoring the execution of various cement plants in the State and this Monitoring committee could not have been unaware of the fact that possession of the land had been handed over to JAL. In fact the land even as per the Government was village common land and possession was not

of the Revenue or Industry Departments. If the possession of the land was not with the Departments how was the possession of public land handed over to the Company. Can the State act like a land mafia, take over the possession of the village common land and hand it over to a private company without even following the semblance of the Rule of Law? Can a private company take possession of public property and erect a factory thereupon without any legal authority? Obviously the answer has to an emphatic NO. It is apparent that if the matters had not before this Court the Company would have been sitting on the land without any legal right whatsoever. Therefore, we have no doubt in our mind that possession of the land was handed over to JAL in a totally illegal manner without following the rule of law.

Violation of H.P. Village Common Lands Vesting and Utilization Act, 1974:

78. The petitioners have strenuously urged that not only was the initial possession of JAL totally illegal but the State Government itself had no authority to lease out the land since the land did not belong to the State but belonged to the villagers. It would be pertinent to mention that the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 was enacted by the State of Himachal Pradesh and Section 3 of said Act provides that land which had vested in the

Panchayat in terms of Section 4 of the Punjab Village Common Lands Regulation Act, 1964 would deem to have vested in the State of Himachal Pradesh. Village Bhageri prior to the States Reorganization Act of 1966 was a part of Punjab State.

79. Under Section 4 of the Punjab Act, all rights, titles and interest in 'Shamlat Deh' land of the villagers would vest in the Panchayats and after coming into force the Himachal Act the land would vest in the State of H.P. Similarly, all land described as Shamlat, Taraf, Pattis, Pannas, Thola and not used for benefit of the village community would also vest in the State. As per Section 3 of this Act all common land of the villagers was to vest in the State Government.

80. At this stage we are not required to go into this question in detail but vide the amendment Act of 2001 certain amendments were introduced in Section 3 and some of these lands were given back to the villagers. Section 8 of the Act provides that out of the land so vested 50% shall be kept in the common pool for common purposes of grazing etc. of the inhabitants of the State and the remaining land can be allotted to landless or other eligible persons, handicapped or houseless persons for construction of the houses and to eligible persons under the schemes belonging to poor sections of the society. The land

reserved for the common pool was required to be demarcated by the Revenue Officer.

81. Section 8-A was introduced by the Act of 2001 and this reads as follows:

> "**8-A Utilization of land for development of the State-** Not withstanding anything contained in section 8 of the Act, the State Government or any other officer authorized by the State Government in this behalf may utilize any area of the land vested in it under the Act by lease to any person or by transferred to any Department of the Government in the interests of the development of the State, if the State Government or the Officer authorized by it is satisfied that there area sufficient reasons to do so subject to the condition that land for the purposes mentioned in clause (a) of sub-section (1) of section 8 in no case shall be less than fifty percent of the land vested in the Government under the Act.
>
> Provided that when land is not used by a person for the purpose for which it has been leased, the lease shall stand terminated free from all encumbrances and the Government shall re-enter on the demised premises and lease money, if pay to the Government, shall be forfeited and no person shall be entitled to any compensation for any improvement made and for any building constructed thereon."

82. This Section enables the Government to transfer the land by lease to any Department of the Government. This section has been the subject matter of a detailed decision rendered by this Court in **Khatri Ram and another vs. State of H.P. and others, CWP No.1077 of 2006 decided on 22.11.2007.** The Division Bench of this Court held that though Section 8-A was unconstitutional being violative of Articles 14 and 19 of the

Constitution of India, by invoking the principle of reading down the words in Section 8A were given a restricted meaning and therefore the Government could use the land vested in it under the Act only for those development activities which are akin to agricultural pursuits read with the expression 'common purposes' defined in the Act. The Division Bench held that these common lands could not be leased out for mining purposes. Relying upon this judgment the petitioner contends that the State had no authority to lease out the common pool land for industrial use. On the other hand it is contended by the respondents that this judgment is under challenge before the Apex Court and the judgment has been stayed. The stay order passed by the Apex Court reads as follows:

> "Delay condoned.
> Issue notice.
> Stay in the meantime.
> Ms.Revathy Raghavan, learned counsel waives notice on behalf of respondent Nos.1&2.
> Counter affidavit to be filed within four weeks. Rejoinder affidavit to be filed in four weeks thereafter.
> List thereafter."

83. This Court in **Khatri Ram's case** (supra) held as follows:

> "It is thus evident from the scheme of the Act that 50% of the land was reserved for the purpose of grazing and other common purposes of the inhabitants of the estate and the remaining 50% was to be allotted to a landless person or any other eligible person as well as for allotment of site to handicapped or houseless person for the construction of a house. The land which as per the Amendment Act No. 18 of 1981 is being allotted for

developmental activities was the remaining 50% which was reserved for landless person or any other eligible person. The expression “landless person” and other “eligible person” had been defined. It is clear from the combined reading of both the expression as defined under section 2 (c) (dd) that the land was to be allotted to agricultural labourer, who had no land or had land less than an acre. The utilization of 50% land, which was to be allotted to the landless and other eligible persons for mining activities will run counter to the spirit of the Principal Act. It is not that the land to be allotted to the landless or other eligible person has drastically been reduced but the same has also been put to other non-agricultural purposes i.e. mining activities etc. This was never the intention of the legislature at the time of the enactment of the Principal Act. These observations also strengthen our findings that the land which has been vested in the State under section 3 of the Principal Act, could not be permitted to be used for mining purposes.

It is in this backdrop that we have to consider whether section 8-A inserted in the Principal Act by way of Act No. 18 of 1981 is unconstitutional being violative of Articles 14 and 19 of the Constitution of India. It is reiterated that the H.P. Village Common Lands Vesting and Utilization Act, 1974 is an agrarian piece of legislation and it was for this reason alone that it was put at Sr. No. 139 in Schedule-IX of the constitution of India. The Amendment Act 18 of 1981 whereby section 8-A has been inserted in the Principal Act has never received the assent of the President of India and its vires can be challenged being violative of the fundamental rights enshrined under Part-III of the Constitution of India. The land which had vested in the State in view of the Principal Act, 1974 was reserved for grazing pasture as well as for allotment to landless and other eligible persons. The landless and other eligible persons are the persons who are primarily dependent on agriculture labour and ancillary activities. Section 8-A though talks of utilization of the land for development but read as a whole it runs contrary to the spirit of the Principal Act. Section 8-A is unreasonable and arbitrary, thus

violative of Article 14 as well as Article 19 of the Constitution of India. We are also fortified in taking this view for declaring Section 8-A ultra vires of the Constitution on the basis of definition given to the expression "common purposes" by way of amendment carried out in the year 2001. The mining activities could never be treated as part of agrarian reform as projected by the respondents at the time of hearing of the petition. The grant of mining lease in favour of respondent No.3 is alien to the spirit of the Principal Act, 1974. The petitioners and other co-villagers are bound to get back their land which had earlier been vested in the State in the year 1974 after the insertion of clause (d) in sub-section (2) of Section 3 with effect from 1974. Though in clear terms we have declared Section 8-A of the Amendment Act, 1981 unconstitutional, but we can avoid its striking down by reading down Section 8-A harmoniously with other sections of the Principal Act, 1974. The intent and the will of the Legislature is to protect the rights of the tillers of the land as is evident from the main Objects and Reasons discussed here in above. Striking down of Section 8-A can be saved by this Court by giving a very very restrictive meaning to the expression utilization of land to the development by confining it to the agricultural pursuits/occupation and by not agreeing to the submissions made by the learned Advocates appearing on behalf of the respondents to give the expression 'development' extensive meaning…….

In view of the law laid down by the Hon'ble Supreme Court and after harmonizing Section 8-A of the Amendment Act, 1981, and other sections of the Himachal Pradesh Village Common Lands Vesting and Utilization Rules, 1975 , the Himachal Pradesh Lease Rules, 1993 and the Himachal Pradesh Village Common Lands Vesting and Utilization Scheme, 1975, we read down Section 8-A instead of striking it down by declaring that the mining activities/operations etc., cannot be termed as developmental activities as mentioned in section 8-A and the action of the State to grant lease to respondent No.3 from the allotable pool is contrary to the Principal Act. Section 8-A will not get immunity under Article 31-A if the developmental

> activities carried out by the State are against the agrarian reforms. It is for this reason that the Court has to give very restrictive meaning towards developmental activities by restricting the word "development" to agriculture pursuits to achieve the purpose of this Statute as evidence by the context."

84. On behalf of the JAL it has been contended that the judgment in **Khatri Ram's case** is per in-curium because of the following reasons:

    i) statements and object of the Act No.18 of 1981 by which section 8A was introduced was not considered;

    ii) Provisions of Rules 2-f and Rule 4 of the H.P. Lease Rules 1993 alongwith Section 3-f (VII) of Land Acquisition Act, 1894 were not considered;

    iii) The non-obstante clause of Section 8A of H.P. Village Common Land Vesting and Utilization Act, 1974 was not considered. Refer 1984 Supp. SCC 196, UOI Versus Kokil, para 11 was not considered.

    iv) The paragraph 19 of Sukhdev Versus State of H.O., 1995 (2) Shimla LC 381 was not considered.

85. The judgment in **Khatri Ram's case** was delivered by a Division Bench. In this detailed and lengthy judgment, we find that objections raised have been dealt with. The statements and objects have been considered. The H.P. Lease Rules have no effect whatsoever because they cover a large variety of land legislations and are not confined to the Village Common Lands

Act. Furthermore, the dominant legislation i.e. the Act cannot be interpreted on the basis of the subordinate legislation i.e. the Rules.

86. The non-obstante clause of Section 8A has been considered by the Division Bench. The entire Section 8A has been considered by the Court and it is too much for the coordinate Bench to hold that the earlier Division Bench was not aware of the non-obstante clause. The decision in Sukh Dev vs. State of H.P., 1995 (2) Shim.LC 381 has no relevance to the interpretation of Section 8A because in that case the Court was not considering the constitutional validity of Section 8A.

87. It was next urged that the judgment in **Khatri Ram's case** has been made inoperative by the stay order referred to above and we should not follow the said decision. Reference in this behalf has been made to the judgment of the Apex Court in **M/s. Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association Madras, (1992) 3 SCC 1 and Kunhayammed and others vs. State of Kerala and another, (2000) 6 SCC 359.** In our view both these judgments are not at all applicable to the facts of this case. As far as the judgment in **Chamundi Moped's case** is concerned that has no relevance to the facts of the present case. Even the judgment in **Kunhayammed's** case does not help the case of JAL. The said judgment relates

to the theory of merger but in the present case the Apex Court has not passed any final order on the SLP. In fact the Apex court held that when a SLP is dismissed by a non-speaking or un-reasoned order the order of the High Court did not merge in the order of the Supreme Court and therefore can be reviewed by the High Court.

88. In any event, we are of the view that once a coordinate Bench has taken a decision then this Bench should not take a different view especially when the judgment of the coordinate Bench is under challenge before the Apex Court. Judicial propriety and discipline demands that we should respect the judgment of the coordinate Bench till it is set-aside by the Apex Court.

89. We are of the considered view that when the Apex Court in a given case stays the judgment the stay is only applicable to the parties covered by the said order. When the Apex Court wants to stay the declaration of law made in a judgment then specific orders in this regard are passed. The Apex Court while granting stay has not stayed the declaration of the law laid down by this Court in **Khatri Ram's case** (supra) and therefore we are bound by the said decision.

90. The Calcutta High Court considered the following identical question in **Niranjan Chatterjee and others vs. State of West Bengal and others**, **2007 (3) CHN 683**:

> "14.Therefore, the question that arises for determination is, simply because in an application for grant of special leave, the Supreme Court has stayed the operation of an order passed by the Division Bench of this Court declaring a statutory provision as ultra vires the Constitution of India as an interim measure by imposing further conditions upon the State in those cases, whether a citizen who is not a party to the previous litigation can be deprived of the benefit of doctrine of precedent in resisting the action of the State on the ground that it could not invoke the ultra vires provision of the statute against him."

The Calcutta High Court held as follows:

> "20.Therefore, the effect of the order of stay in a pending appeal before the Apex Court does not amount to "any declaration of law" but is only binding upon the parties to the said proceedings and at the same time, such interim order does not destroy the binding effect of the judgment of the High Court as a precedent because while granting the interim order, the Apex court had no occasion to lay down any proposition of law inconsistent with the one declared by the High Court which is impugned.
>
> 21. We, therefore, find substance in the contention of the writ petitioner that a Division Bench of this Court having declared the provision contained in the West Bengal Land Reforms Act regarding vesting without making any lawful provision for compensation for such vesting in the Act as ultra vires the Constitution of India, the State cannot be permitted to proceed with the said provision of vesting against the petitioner so long adequate provision is not made in the statute for compensation."

We are in agreement with these views.

91. The order of stay passed by the Apex Court only stays the judgment but not the law laid down in the said judgment. As far as this Court is concerned, we are bound by the judgment

rendered by the earlier Bench. We cannot set-aside the earlier judgment of the Division Bench as that would be against the judicial propriety. We cannot also stay the proceedings in this case to await the judgment of the Apex Court. Therefore, we are bound by the judgment delivered in **Khatri Ram's case** (supra) and if this judgment is applied it is apparent that the land which vested in the State Government could not have been allotted for industrial purposes of setting up a cement plant.

92. The Apex Court in a recent judgment in case **Jagpal Singh and others vs. State of Punjab and others, AIR 2011 SC 1123,** dealt in detail with the Punjab Common Lands and the rights of the villagers. The Apex Court held as follows:

> "4. The protection of commons rights of the villagers were so zealously protected that some legislation expressly mentioned that even the vesting of the property with the State did not mean that the common rights of villagers were lost by such vesting. Thus, in Chigurupati Venkata Subbayya vs. Paladuge Anjayya, 1972(1) SCC 521 (529) this Court observed :
>
> "It is true that the suit lands in view of Section 3 of the Estates Abolition Act did vest in the Government. That by itself does not mean that the rights of the community over it were taken away. Our attention has not been invited to any provision of law under which the rights of the community over those lands can be said to have been taken away. The rights of the community over the suit lands were not created by the landholder. Hence those rights cannot be said to have been abrogated by Section 3) of the Estates Abolition Act."
>
> 5. What we have witnessed since Independence, however, is that in large parts of the country this common village land has been grabbed by unscrupulous persons using muscle power,

money power or political clout, and in many States now there is not an inch of such land left for the common use of the people of the village, though it may exist on paper. People with power and pelf operating in villages all over India systematically encroached upon communal lands and put them to uses totally inconsistent with its original character, for personal aggrandizement at the cost of the village community. This was done with active connivance of the State authorities and local powerful vested interests and goondas. This appeal is a glaring example of this lamentable state of affairs.

6 to 12 xxxxxxxxxxxxxxx

13. We find no merit in this appeal. The appellants herein were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. We are of the opinion that such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village. The letter dated 26.9.2007 of the Government of Punjab permitting regularization of possession of these unauthorized occupants is not valid. We are of the opinion that such letters are wholly illegal and without jurisdiction. In our opinion such illegalities cannot be regularized. We cannot allow the common interest of the villagers to suffer merely because the unauthorized occupation has subsisted for many years.

14. xxxxxx

15. In many states Government orders have been issued by the State Government permitting allotment of Gram Sabha land to private persons and commercial enterprises on payment of some money. In our opinion all such Government orders are illegal, and should be ignored."

If we were to apply this judgment, it would be apparent that Section 8A would be wholly unconstitutional. We are however not saying anything in the matter since that question is pending before the Apex Court.

93. Applying the aforesaid decision to the facts of the case, we are of the considered view that the Government had no authority to allot this land to the Departments and further allot it to JAL.

94. Assuming for the sake of arguments that land falling in the reserved pool could be transferred to the allotable pool and vice versa, we find that no material has been placed on record before us to show how a portion of the land was taken out of the reserved pool and placed in the allotable pool. The total land allotted to JAL is 325 bighas and 16 biswas out of which 119 bighas 10 biswas was in the common pool i.e. reserved for grazing etc to be used for common purpose as defined under Section 3 of the Act. The balance 126.6 bighas was in the allotable pool. Assuming that this land could be leased out, we fail to understand how the Government could have taken out the land from the reserved pool/common pool and transferred it to the allotable pool and transferred some land from the allotable pool to the reserved pool.

95. Section 8 of the Act provides that the land reserved under clause (a) of sub-section (1) shall be demarcated by the

Revenue Officer in the prescribed manner. Once the land is demarcated and set aside for common purposes we do not find any power in the State to re-transfer the land from the common pool to the allotable pool. The power to modify the scheme under Section 8(4) only relates to the schemes framed in terms of Section 8(b)(i) and once the land is put in the common pool we find that there is no power remaining in the State to take it out of the common pool and put this land in the allotable pool.

96. Even if, we presume that such power exists, we are clearly of the view that this power, if any, to transfer the land from the common pool to the allotable pool and vice-versa cannot be exercised without taking the local inhabitants into confidence. It is their rights which are going to be affected and no order transferring the land which will definitely affect their rights can be passed without giving them reasonable hearing. No such hearing was given and in fact the record reveals that the land was transferred by the stroke of a pen four years later without giving any hearing to the villagers.

97. In this behalf, we may also add that after the amendments brought about in 2001 certain lands which had vested in the State Government again went back to the villagers. The Act was amended in the year 2001 with a view to define the expression ‘common purposes’. It further provided that the land which

reverted back to the co-sharers in terms of Section 3(d) could not be re-transferred by them. Therefore, the land which was recorded as "*shamlat tika Hasab Rasad Malguzari"* or any other such name and recorded to be in the cultivable possession of the co-sharers before 1950 was to go back to co-sharers. In this case no exercise was done to ascertain whether the land which was transferred to JAL fell within this category or not.

98. As far as the proposal of transfer of land is concerned, we find that nobody first of all applied their mind as to in what manner the land from the common pool could be transferred to the allotable pool. This was done by a stroke of the pen only on the ground that the government had allotted this land to JAL. The cart was placed before the horse. Instead of first deciding whether this land was required for common purposes and whether the land which was being transferred from the allotable pool to the common pool was fit for common purposes the land was transferred. In fact the Law Department had clearly opined that this could not be done and was contrary to the judgment of this Court in **Khatri Ram's case** (supra). Despite this fact, the proposal was approved only on the ground that there is stay of the judgment. We feel that it would have been much better if the Government had approached the Apex Court for clarification of the stay order rather than interpreting the same

itself. Be that as it may, as held by us above, there is no conscious decision shown to us as to how it was decided that the land should be transferred from the common pool to the allotable pool. Again only the interest of JAL was watched and the interests of the common people were totally forgotten. It appears that the officials were more concerned about the interest of the project proponent and nobody bothered about the interest of the villagers or the purposes of the Village Common Lands Act.

99. **Delay and Laches:** Sh. Upadhaya next contended that since the plant had been set up and construction activities started in the year 2004 these petitions which were filed in the year 2009 or 2010 are belated. He relies upon the decision of the Apex Court in **Delhi Development Authority vs. Rajendra Singh and others, (2009) 8 SCC 582.** We are not at all impressed by this argument. Can a party who is guilty of deceitful conduct which may also amount to fraud claim that its illegal actions should not be struck down because there is delay in filing the petitions. We are of the firm view that this cannot be the case. It is a well settled principle of law that fraud vitiates all action. Furthermore, the environmental clearance was actually granted to JAL only in the year 2009 and this gave a fresh cause of action and therefore writ petitions were filed well within time.

100. In view of the above discussion we come to the following conclusions:

i) That JAL is guilty of making false statements for obtaining environmental clearances for all its Projects. JAL has successfully misled and hoodwinked the State of Himachal Pradesh, the H.P. State Pollution Control Board, the Ministry of Environment and Forest, Environment Appraisal Committee and all other authorities. These authorities and the officials who were manning these authorities are supposed to act like watch dogs to fiercely protect the interest of the public. They unfortunately behaved like meek lambs being led for slaughter.

ii) Firstly JAL wrongly projected that the Project cost of the cement plant was less than Rs.100 crores. As held by us above, it was and should have been aware that the project is going to cost much more but only with a view to circumvent the EIA notification of 1994 the project cost was shown to be less than Rs.100 crores.

iii) When the second integrated draft EIA report was prepared, it was wrongly projected that what was being set up was a stand alone grinding unit. Before this Court, it has been admitted that the capacity of the

existing plant had been increased without any change in the plant but as has been clearly set-out above at all stages JAL projected as if the plant is only a stand alone grinding unit and this has been done only with a view to circumvent the EIA notification of 2006.

iv) As far as the Thermal Plant is concerned, the very setting up of the Thermal Plant was in total violation of the EIA notification of 2006 which had come into force at the time when consent to establish this plant was given.

v) The Thermal Plant was set up without any valid approval and construction was carried out even after the consent to establish was withdrawn. In fact the H.P. Pollution Control Board was negligent in not withdrawing the consent to establish the Thermal Plant much earlier.

vi) That the draft EIA report prepared in the year 2007 in respect of Thermal Plant is absolutely a sham report. It purports to be based on baseline data collected during the summer of 2004 i.e. April to June, 2004. At that time there was not even a proposal to set up a captive power plant. We fail to understand how the consultants could have collected data in the year 2004

before the signing of the MOU, much before the site had been selected or approved and much before there was any proposal to set up a Captive Power Plant.

vii) That the draft EIA report prepared in the year 2009 is also based on a wrong data. The draft EIA report itself refers to the letter dated June 2, 2009 which has been enclosed as Annexure-1A and states that the draft EIA report has been prepared after incorporating these terms of reference. Here again the baseline data is supposed to have been collected during the months of March to May, 2009 and this shows that the report virtually is a fictitious document.

viii) That EAC has glossed over various issues and has totally ignored the concerns of the public especially with regard to the Thermal Plant.

ix) That despite no permission having been granted 3 DG sets were actually set up.

x) That the EAC was totally misled into believing that the plant falls in category-B whereas it falls in category-A. The entire approach of the EAC is that the plant is a category-B plant and as such the entire action taken by it is wrong and illegal.

xi) That JAL was put in possession of the land without any legal order or authority.

xii) The land from the common pool was transferred to the allotable pool and vice versa without consulting the villagers and without carrying out any proper inquiry in this behalf.

xiii) In view of the judgment in **Khatri Ram's case** (supra) the land which had vested in the State under the H.P. Village Common Lands Vesting and Utilization Act could not have been allotted for the purpose of setting up a cement industry.

101. Having come to the aforesaid findings and in view of the discussion made hereinabove, it is apparent that the entire project of JAL is based on a tissue of lies. At every stage JAL has either given wrong information or has tried to mis-lead the authorities. This Company has behaved like a law unto itself. Having come to this conclusion, normally, the only course open to the Court would have been to revoke the environmental clearances and direct that the Cement Plants and Thermal Plants be dismantled. This Country is supposed to be governed by the Rule of Law and every citizen of the Country howsoever high or howsoever lowly placed is entitled to the equal protection of laws. We are of the considered view that the rich and powerful

like JAL cannot present the Court with a *fait accompli* and say that now since the plant has already been erected and is functioning the same should not be demolished. The time has come to deal sternly with people who violate the law and have no respect for the Law.

102. As far as the Thermal Plant is concerned we find no extenuating circumstances to permit the Thermal Plant to continue. We accordingly quash the environmental clearance in respect of the Thermal Plant and direct JAL to dismantle the Thermal Plant within three months from today. We are giving separate directions in respect of the Cement Plant.

103. Being a Court of law and equity, we are also not oblivious to the effect which our order may have if we quash the environmental clearance and direct that the cement plant be demolished. If this was going to affect JAL alone we would not have hesitated to pass such an order. We are sadly aware that if we pass such an order the livelihood of thousands who are totally innocent and not guilty like JAL will be adversely affected. Hundreds of villagers have purchased trucks to ferry clinker from the mines at Baga to the Cement Plant at Bagheri and may be utilizing these trucks to transport the cement produced in this plant to various places all over India. These persons are innocent and not at fault. We are concerned with

the workmen employed in the plant who would lose their employment if we were to order the shutting down of the plant. We are also concerned with the hundreds of others who may have set up an ancillary units based on the cement plant. We are deeply worried about what impact our order will have on the persons who have set up 'dhabas', the small 'Chai Wala', the owner of a petty puncture repair shop and various others whose livelihood will come to an end in case we order the plant to be shut down. At the same time JAL cannot be allowed to go scot-free.

104. After having discussed the matter in detail above and finding JAL guilty of deceit, we must make sure that neither JAL nor any other Company in the future behaves in such a manner. We have, therefore, decided to impose damages on JAL. In exercise of its writ jurisdiction, this Court is entitled to modify the relief to see that the ends of justice are met.

105. The principle of "*polluter pays"* is a principle which has become a part of our environmental legal jurisprudence and reference in this behalf may be made to the following judgments of the Supreme Court:

I) **M.C. Mehta and another vs. Union of India and others, AIR 1987 SC 965.**

II) **Vellore citizens' Welfare Forum vs. Union of India and others, (1996) 5 SCC 647.**

III) **Indian Council for Enviro-Legal Action, etc. vs. Union of India and others etc., AIR 1996 SC 1446.**

IV) **Indian Council for Enviro-Legal Action vs. Union of India and others, (2011) 8 SCC 161.**

106. The situation in the present case is even worse where the polluter is also guilty of blatant falsehood. While assessing the damages, we are also taking into consideration the fact that the damages should not bring the Company to a halt but at the same time the Company should feel the pinch of the damages and that these damages act as a deterrent in future to each and every person. We are also taking into consideration the fact that this is a Company which according to its own saying could easily absorb a fivefold increase in the cost of the project. The cost of the project as is apparent now is between Rs.400/- to Rs.500/- crores. We feel that the penal amount should be about 25 percent of the total cost of the project. Since the total cost of the Cement Plant is between Rs.400/- to Rs.500/- crores, we impose damages of Rs.100 crores upon JAL. This amount may be paid in four equal installments of Rs.25 crores each; the first to be paid by 31st August, 2012, second by 31st March, 2013, third by 31st March, 2014 and the last installment by 31st March, 2015. We may make it clear that the damages shall be used only for improving the ecology and environment of the area and

to ameliorate the sufferings of the people of that area by making hospitals, etc. The State may use Rs.10 crores of the damages so awarded to compensate the villagers for the mis-utilization of their village common land which was wrongly transferred from the common pool to the allotable pool and illegally handed over to JAL. The villagers can be compensated by creating common facilities which can be used by all the villagers such as schools, community halls, tube wells etc. We may also make it clear that this amount can not be used by the Government for any other purpose. The State shall file detailed accounts reflecting the manner in which the amounts are used on six monthly basis in the Registry of this Court till the time the entire amount is utilized by the State for the purposes referred to hereinabove.

107. Since we have permitted the Cement Plant to function by way of an exception, we are making it clear that if it is brought to the notice of this Court that JAL is not complying with the conditions laid down by the EAC while granting environmental clearance or is guilty of causing pollution, we shall not hesitate to recall the aforesaid order and direct that the plant be closed down. We direct the H.P. State Pollution Control Board to effectively and continuously monitor the effluents released by the Cement Plant and ensure that they meet the para-meters laid

down by law. Any violation shall be brought to the notice of this Court forthwith.

108. As observed by us above, we are of the view that if the officials who manned the important organizations like the Pollution Control Board, the Ministry of Environment and Forests and the members of the EAC had conscientiously discharged their duties, the situation would not have reached this unfortunate stage. We are also of the considered view that JAL could not have succeeded in its illegal endeavour to establish the plant and get permissions without the active connivance of some officials who may have either knowingly, for extraneous reasons, abetted the activities of JAL or they were totally callous and negligent in discharging their duties. It is not for this Court to comment as to which official is at fault and what is the extent or nature of culpability. This can be only found out by properly investigating the matter. We, therefore, constitute a Special Investigating Team (SIT) who shall investigate the matter and identify the public servants who connived with and helped JAL and also those who were negligent in the discharge of their duties. The SIT may recommend initiation of criminal action/disciplinary proceedings against the erring public servants/officials keeping in view the facts of each case. The SIT shall be headed by

Sh.K.C. Sadyal, A.D.G. (Vigilance) and Sh.Himanshu Mishra, DIG (Vigilance) shall be a member of the SIT. These two members may co-opt a third member not below the rank of Deputy Superintendent of Police as Member of SIT to assist them in the investigation. The SIT shall also investigate whether any officials/public servants have directly or indirectly received undue benefits from JAL or any of its associate Companies whether in the form of grant of business outlets, re-employment etc. The SIT shall submit its report to the Court latest by 31st December, 2012.

109. We also are of the view that certain guidelines need to be issued to ensure that such events do not re-occur in future and accordingly issue the following guidelines:

a) The H.P. State Pollution Control Board shall ensure that consent to establish is not granted just for the asking. Even at the time when consent to establish is granted the H.P. State Pollution Control Board, MoEF/EAC shall verify the facts stated in the project report and they shall also indicate to the project proponent what are the para-meters and the laws which the project proponent will have to comply with keeping in view the nature of the project.

b) The statement made by the project proponent shall not be accepted without verification. It shall also be made clear that if any statement made by the project proponent is found to be false the permissions granted shall automatically stand cancelled.

c) The Pollution Control Board shall ensure that whenever any public hearing is held, the people of the area are well informed about the public hearing and they are also informed about the benefits and the ill-effects of the project. The Pollution Control Board must have its own machinery and own scientists who should give an independent opinion on the pros and cons of the project. These shall also be placed on the website of the PCB.

d) In future whenever any studies are being carried out by any project proponent while preparing the EIA reports, the study shall be carried out only after notice to the State Pollution Control Board, MoEF/EAC in case the project requires clearance at the central level and also to the inhabitants of the area where such studies are to be carried out and project has to be established. Notice to the public shall be given in the same manner notice of public hearing is given.

110. Both the petitions are disposed of accordingly. We place on record our appreciation for the valuable assistance rendered by the counsel for the parties especially Ms.Jyotsna Rewal Dua, Advocate.

(Deepak Gupta)
Judge.

May 04, 2012
PV

(Sanjay Karol)
Judge