BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI
.....

APPEAL NO. 12 / 2012

In the matter of:

M.P. Patil,
S/o Sri Parappagouda V. Patil,
499, 9th Main, 12th Cross, ISRO Layout,
Bangalore-560078 ..... Appellant

Versus

1.Union of India
Through the Secretary,
Ministry of Environment and Forests,
Paryavaran Bhawan,
CGO Complex, Lodhi Road,
New Delhi-110003

2. NTPC Ltd.,
Through its Managing Director,
Engineering Office Complex,
Plot No.A-8A, Sector 24,
NOIDA-201301

3. The Special Land Acquisition Officer,
Karnataka Industrial Area Development Board,
Zonal Office,
Lakkammanahalli I.A.,
Poona-Bangalore Road,
Dharwad-580004 ..... Respondents

Counsel for Appellant:

Mr. Ritwick Dutta along with Ms. Richa Relhan

Counsel for Respondents :

Ms. Neelam Rathore with Ms. Syed Amber
for Respondent No.1
Mr. Vikash Singh, Sr. Advocate,
Mr. Bharat Sangal, Ms. Srijana Lama,
Advocates for Respondent No.2 along with
Mr. Vijay Prakash, Mr. P.R. Rao and
Brahmraj Rao from NTPC

ORDER/JUDGMENT

PRESENT :

Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Mr. Justice U.D. Salvi, Judicial Member
Hon'ble Dr. G.K. Pandey, Expert Member
Hon'ble Prof. A.R. Yousuf, Expert Member
Hon'ble Dr. R.C. Trivedi, Expert Member

Dated : March 13, 2014

JUSTICE SWATANTER KUMAR (CHAIRPERSON):

In the present appeal, the appellant has raised a challenge to the order dated 25th January, 2012 passed by the Ministry of Environment and Forests (for short the "MoEF"), Government of India, granting Environmental Clearance (for short the "EC") to the project for setting up a 3x800 MW Stage-I Kudgi Super Thermal Power Project near village Kudgi, in Bijapur District, Karnataka. The necessary facts giving rise to the present appeal can be summed up as under:

2. The appellant claims to be a public spirited citizen and the President of Parisara Raksana Seva Vedike, a Registered Society, having its office at Masuti, Basavana Bagewadi Taluk, District Bijapur, Karnataka. The appellant has a property in the said village and the project proposed by the respondents is feared to have devastating effects - both long term and short term - in the region. The appellant claims that he has neither any personal nor any financial interest in the matter and has brought the present appeal in the interest of environment and protection of the area in question. The project proponent, the

National Thermal Power Corporation Limited (for short the "NTPC") on or around 28th January, 2009 submitted a proposal for seeking EC for setting up a 3x800 MW Stage-I project of ultimate capacity of 4000 MW. On the basis of this project proposal, the MoEF stated the Terms of Reference (for short the "TOR") vide letter dated 30th March, 2009. According to the applicant, while seeking the EC, the NTPC had stated that the land is mostly barren & rocky and partly agricultural with single crop cultivation. In its 36th meeting held on 14th-15th November, 2011, the Expert Appraisal Committee (for short the "EAC") recommended the project for EC subject to certain stipulations and specific conditions stated by it. On the basis of the recommendations of EAC, MoEF, which is the Regulatory Authority, accorded EC for the project under the provisions of the Environmental Clearance Regulations dated 14th September, 2006 (for short the "EIA Notification"). The total land required for Stage-I was stated to be 2440 acres and the total land notified for acquisition at an elevation of 580 to 590 metres was approximately 2398.36 acres.

3. It is the specifically pleaded case of the appellant, that as per Rights & Tendency Certificates (for short the "RTCs") (Form 16) substantial lands notified for acquisition clearly indicate that the lands are "Bagayita" (Garden land) irrigated by wells and bore wells and yield two crops per year. The final journal of the measurements for the project on 30th September, 2011 indicated that more than 50 per cent of the

land was irrigated and the remaining land was also agricultural land, mainly dependent upon rain. As on 3rd September, 2011, the payments were made for 272 acres of irrigated land and 472 acres of dry land on the basis of compensation rates fixed for the two types of land. Some photographs have been placed on record by the appellant showing that the acquired lands as on 4th November, 2011 in village Kudgi were pieces of the fertile land having irrigation facilities and yielding two crops for horticultural yields like grapes, lemon, betel leaves, etc. This fact is even further substantiated in the minutes recorded by the EAC (Thermal) held from 15th April, 2009 to 8th August, 2011. In the Memorandum of Understanding dated 12th January, 2009, NTPC had demanded and Government of Karnataka had agreed to provide 3000 acres of land which was nearly 230 acres more than that recommended by the Central Electricity Authority (for short the "CEA"). The excessive land had been acquired without having any concern for the representations of the people. The CEA, in its recommendations had stated that the land for power project shall be strictly as per latest CEA norms and if they were to apply for a power project of 3x800 MW capacity, the land limit would be 1765 acres.

4. The NTPC had made available the Draft Environmental Impact Assessment Report (for short the "DEIAR") and summary reports in English and Kannada for the information of the public to enable them to participate in the Public

Hearing which was arranged on 25th March, 2010. However, the facts in the DEIAR were not discussed and there was concealment of facts or submission of false, misleading and incomplete information/data. The DEIAR did not comply with the TOR, particularly, on the issue of alternative sites. The ash utilization, as mentioned in the DEIAR, was too general and without any commitment on arrangements and figures. As per TOR, the Ambient Air Quality (for short the "AAQ") data to be monitored were for SPM, RSPM, SO_2, NO_X, Hg and Ozone. The impact of the project and the resultant AAQ data of Hg and Ozone were not given without assigning any reason though these pollutants are of importance from health and environmental perspectives. Fuel analysis for heavy metals that was required, as per TOR, was not furnished. The DEIAR did not mention the impact of the project on the Krishna River and Almatti Dam water. DEIAR failed to study the impact on the environment from the increased movement of the traffic and increase in other small industrial activities which will be the direct and indirect result due to the setting up of the project. To appropriately determine the location of the AAQ monitoring stations, the relevant considerations are the predominant downwind direction, population zone and sensitive receptors including forest area. It is stated that in the present case, these factors were not considered appropriately and thus placement of the monitoring stations is improper. There should be at least one monitoring station in

the predominant downwind direction at a location where maximum ground level concentration is likely to occur.

5. The appellant referred to the DEIAR and the stack releases from 3x800 MW Stage-I mentioned therein, which are as follows:

"SO_2	1064.700 g/sec/unit
NO_x	654.000 g/sec/unit
PM	43.600 g/sec/unit

> "The release of the above air pollutants in such quantities will cause enormous harm to humans, plant life, aquatic life, soil chemistry and water bodies without any doubt. In long time, like 20 years what happens to a nearby water body like Almatti dam water, irrigated lands by its water and the people who have used that water for drinking only time will tell. Along with ash, there is huge quantity of SO_2 and NO_x, the release which under certain conditions, produces acidic rain and dry acid particulates which settle down and mix with rain water. All these factors though not amenable for exact scientific analysis, considering the large magnitude project, together are conducive for causing enormous damage to the environment."

6. Besides this, a number of other facts have been specified in the petition on the basis of which it is stated that grant of EC to the NTPC is ecologically and socially disastrous and will have dangerous impact on future generations in violation of the environmental laws. It is also stated that there was no Rehabilitation and Resettlement (for short the "R&R") scheme in place at the time of public hearing to enable the public at large, particularly the project-affected persons, to put forward their views in that behalf.

7. The appellant has also referred to a 50-km protest walk from 4th June, 2011 to 26th June, 2011, from Basavana Bagewadi to Kudul Sangam, in which thousands of persons from various walks of life had participated. This was to protest against the diversion of Almatti Dam water for industries, at the cost of farmers' interest, and acquisition of fertile lands of the farmers whose livelihood is based on agriculture.

8. Referring to the 'Precautionary Principle' and the 'Polluter Pays Principle', the applicant stated that the statutory authority must anticipate the environmental measures to prevent and attack the causes of environmental degradation. Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

9. From the above narrated averments, it is clear that the appellant is challenging the EC granted to the NTPC on, *inter alia*, the following grounds:

(i) The EC was obtained from MoEF by making misrepresentation with regard to the land use/land cover of the project area and nature and categorisation of the land, claimed to be mostly barren and rocky, as opposed to mostly agricultural and fertile land.

(ii) The 'public hearing' was not held in accordance with the prescribed procedure. Material information was withheld from the public and the objections raised

during the public hearing have not been considered by the EAC. It has completely frustrated the advantages of the public hearing, as contemplated under the EIA Notification.

(iii) Various terms of the TOR have not been adhered to. Even the AAQ data collected for grant of EC was not from proper locations, as required under the TOR. Monitoring stations have not been set up to check pollution levels from the downward wind direction, as contemplated under the TOR/EC.

(iv) The EC had been granted without R&R plan being in place. The R&R plan was not put up before the public during the public hearing thus depriving a fair opportunity to the affected parties to examine objectively the pros and cons for establishment of the thermal power project even though prescribed at TOR Stage by MoEF. The R&R plan, in fact, was not ready at the relevant time and was not prepared covering all aspects even at the time of grant of EC to the NTPC. This has entirely vitiated the process of grant of EC.

(v) The coal source and its quality were changed several times including at the stage of EAC recommendations as also at the stage of EC. This factor was also ignored by different authorities at the relevant time.

Thus, the authorities have taken into consideration irrelevant materials while ignoring the relevant considerations.

10. The appellant has also raised an issue that the TOR, which were issued as long back as on 3rd March, 2009, had specifically provided for some of the above matters.

11. Condition (iv) of the TOR required study of the land use of the area as well as the project area to be provided. Condition (xxiv) obligated the NTPC to prepare a detailed R&R plan/compensation package in consonance with the National/State R&R policy for the project-affected people, including that due to fuel transportation system/pipeline and their ROW, if any. This was to be prepared while taking into account the socio-economic status of the area, homestead oustees, land oustees and landless labourers. Condition (xi) provided for the location of the monitoring stations, which were to be decided by taking into consideration the pre-determined downward wind direction, population zone and sensitive receptors including reserved forests. Condition (xxvii) required the NTPC to prepare an action plan to address issues raised during the public hearing and allocate the necessary funds for the same.

12. To the above case of the appellant, the NTPC has responded by making legal submissions as well as raising factual controversies. According to the NTPC, the appellant had filed Writ Petitions No.32189-190 of 2011 in the High Court of Karnataka, challenging the acquisition proceedings and praying for quashing of the Memorandum of Understanding (for short the "MOU") dated 21st January, 2009

entered into between Respondents No.2, 3 and 6 i.e. Department of Energy, Govt. of Karnataka; Power Company of Karnataka Ltd. and NTPC Ltd. respectively for setting up the project and for stopping the acquisition proceedings for the project in question. These writ petitions came to be dismissed by the order dated 21st June, 2012 of the High Court. The appellant had raised similar grounds in the writ petitions as have been done in the present appeal. As such, the present appeal is an abuse of the process of law.

13. Further, it is denied that the recommendations of the EAC dated 15th November, 2011 have been issued without any application of mind and without giving any reasons for disposing of the objections raised during the public hearing held on 25th March, 2010. The project is stated to be of public importance. It is stated that the project will make a significant improvement in the development of economy of the State of Karnataka as well as the country. The State of Karnataka has faced an energy deficit of 5.45% in terms of total energy requirement against the energy deficit of 13.64% in terms of peak energy requirement.

14. The site in question, according to the NTPC, has been selected upon due consideration. The site near Kudgi village was selected after examining three alternative sites and taking into consideration various environmental and techno-economic criteria. It was in conformity with the criteria laid down for selection of thermal power plants. Besides the efforts

put in by NTPC for selection of the site, the State Government officials as well as the CEA have also explored the site and the report of CEA categorically states that the area is mostly barren and suitable for setting up of a large scale thermal project. The lands for the power plant concerned were acquired vide Notifications dated 6th January, 2010 and 20th April, 2010 and the same were shown in the said notification as dry and barren land, based on the information contained in the RTCs of that period. The gazette notification for acquisition of 2938 acres of land had been published and the entire land had been categorized as *Kushki* or dry land by the Government of Karnataka. The RTCs relied upon by the appellant are of 2011, which are of much later period and may show the character of the land as changed by the land owners subsequent to the identification of land and start of acquisition process, which according to the said respondent, cannot be relied upon. According to NTPC, the said land is not fit for agricultural purposes. According to this respondent, the ultimate capacity of the project is 4000 MW while the Environmental Impact Assessment (for short the "EIA") study has been undertaken and EC obtained for Stage I i.e. 2400 MW only. Before starting activities for Stage II, NTPC would approach MoEF for fresh TOR for EIA study and then would take proper steps in accordance with law and obtain EC from MoEF for Stage II.

15. In response to the allegation of changes in the source of coal, it is stated that MoEF had issued a circular dated 1st November, 2010 stating that the thermal power project with coal sourcing from dedicated coal blocks shall be considered for EC only after firm coal linkage was available and the status of EC/Forest Clearance (for short the "FC") of the linked coal mine was obtained. Further, the circular dated 19th January, 2011 clarified that the firm coal linkage was required only at the stage of grant of EC and not at the stage of TOR. Keeping this in view, initially the source of coal was to be Mand Raigarh coalfields, to which in-principle approval for allocation of captive coal blocks to NTPC was considered. NTPC allocated coal to Kudgi STPP Stage I from its own mines, named Talaipalli Coal Mine. The EAC meeting appraised the project, based on coal characteristics and emission characteristics based on Talaipalli coal. However, as the EC and FC of Talaipalli coal mine were delayed, the coal linkage was changed to Pakri Barwadih coal mine for which EC and FC were already available. As the coal characteristics of Pakri Barwadih were better than those of Talaipalli, MoEF accorded the EC, based on Addendum to EIA Report. This change in the coal mine source would not affect the environmental quality. In relation to monitoring stations for AAQ, it is submitted that the TOR for EIA study for Kudgi specifies that the AAQ data should be provided for one full season. However, the monitoring has been undertaken for a period of one year from

June, 2009 to June, 2010 covering all the seasons. The AAQ monitoring results indicate that the AAQ was well within the National AAQ Standards. According to this respondent, during the operation phase of the project, four numbers of continuous automatic AAQ monitoring stations shall be set up in consultation with Karnataka State Pollution Control Board and continuous monitoring of all AAQ parameters including PM 2.5 would be undertaken.

16. The NTPC, does not propose to draw any water from the Krishna river. Therefore, there will be no impact on the flow and ecology of Krishna river upstream of the Almatti Dam. The water proposed to be drawn from Almatti Dam is only 0.014% of the live water storage capacity on daily basis and 0.41% of the live water storage capacity on monthly basis. However, the reservoir of Almatti Dam has a continuous inflow and outflow of water. The raw water collected from Almatti Dam shall be subjected to a number of treatment-processes before the same can be used in various plant usages. The raw water treatment system proposed to be provided at Kudgi STPP shall consist of clarification, filtration, demineralization and chlorination. It is submitted that the project will not have any devastating effect on the environment or on the life of the people.

17. Denying the allegation that the NTPC did not disclose complete and proper information for the purposes of determining the TOR and during public hearing, it was stated that NTPC had provided information in full compliance with

the EIA notification, and that the EAC was totally correct in recommending the case to the MoEF. The report of the public hearing would show that the local villagers and the project-affected people attended the hearing and expressed their views in presence of the Chairman of the public hearing and other officers. No scientific basis was submitted by any villager to substantiate their apprehensions. However, the public who attended the hearing walked out of the hearing before NTPC could respond. The NTPC had provided answers to all the queries. According to the NTPC, the public hearing is not a forum to democratically decide the fate of the project. The decision regarding implementation of the project is based on a number of techno-economic and environmental considerations, which are considered by the various institutions set up by the Central Government. It is not necessary to consider each point raised by the public in detail. The Tribunal can examine whether the EAC had considered in its report the objections raised by the public or not. However, the report specifically mentions that the EAC had considered the said objections and the response of NTPC. In regard to the current status of the project, it has been stated that the project activities had been started only after obtaining all requisite clearances including the EC from the MoEF, and that the site levelling and infrastructural development work was in progress. The main plant package for steam generators and

turbine generators had been awarded on 17th February, 2012 at a cost of Rs.600 crores approximately.

18. Further, according to NTPC, the Karnataka State Pollution Control Board was again approached on 24th February, 2012 by NTPC for grant of consent under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981. These consents to establish the STPP have been accorded vide letter dated 9th August, 2012. The consent to operate has still to be obtained, which, according to the respondent, would be obtained during operation of the project.

19. A separate reply has been filed on behalf of MoEF, Respondent No.1. The stand taken by this respondent is that NTPC had informed MoEF that the site for the proposed Kudgi Stage I power project comprised mostly of barren and rocky land with some areas having single crop agricultural land. Neither in the EIA report nor in the questionnaire furnished by the NTPC for appraisal of the said project, it was disclosed that the proposed site is in command area of Mulwad Lift Irrigation Scheme, being under implementation at present by the State Government concerned. According to this respondent, the site was inspected by the CEA and in the report dated September, 2008, it was said that the site is at an elevation of 580-590 metres whereas the minimum draw down level of Almatti Dam is at 504 metres. The report thus had identified the site at Kudgi as more suitable. The MoEF does

not encourage use of fertile agricultural land for industrial purposes. The EAC comprising of subject matter experts is a statutory committee, constituted under the EIA Notification by Respondent No.1, and had duly appraised the above project for EC, and it was only after assessing the environmental impacts due to the proposed project, that the EAC recommended the project for EC, subject to adherence of environmental safeguards for compliance by NTPC.

20. In the 36th meeting of the EAC held on 14-15th November, 2011, the EAC deliberated the issues raised in the public hearing and while granting the clearance vide order dated 25th January, 2012, stated that the land requirement shall be strictly in accordance with the CEA norms. The EC is based on the principle of sustainable development and provides for sufficient environmental safeguards and mitigating measures. The EC, according to this respondent, is primarily based upon the information provided to the answering respondent by the NTPC.

21. It is in view of the above pleadings of the parties that we are called upon to examine the merits and otherwise of the contentions raised before the Tribunal by the parties and more particularly the appellant.

22. The first and foremost issue that we are required to examine is the effect, of the order dated 21st June, 2012, of the

High Court of Karnataka, dismissing the Writ Petitions No. 32189-190 of 2011, upon the present appeal.

23. There is no dispute to the fact that the WPs No.32189-190 had been filed by a registered society along with the present appellant, who was Petitioner No.2 in those Writ Petitions. The challenge in those Writ Petitions was to the MOU dated 12th January, 2009 entered into between Respondents No.2, 3 and 6 for setting up the coal based STPP at Kudgi with the prayer to stop acquisition of the land for the same purpose, though there was no specific challenge to the process of acquisition. However, the quantum and purpose of acquisition was raised as an issue in the Writ Petitions. The High Court noticed that nearly 60% of the compensation payable had been distributed to the erstwhile owners of the land pursuant to the agreed amount of compensation in the first phase and 10-12% of the compensation payable was disbursed in the second phase. The petitions also disclosed that the main dispute revolved around the issue that there was failure on the part of the NTPC to get the EC, which had been granted during the pendency of those proceedings. Now, the present appeal has been filed against the said EC before this Tribunal.

24. The High Court, after considering some of the issues, did not find merit in the challenge to the decision of setting up the power project. However, it made it clear that the dismissal of the Writ Petitions by the High Court would be without

prejudice to the contentions of the parties and pendency of the appeal before this Tribunal. It will be useful to refer to the following relevant extracts of the judgment of the High Court dated 21st June, 2012:

> "4. In these circumstances, we are unable to appreciate any perversity in the impugned decision. We do not find any unreasonableness so far as the decision is concerned. It is for these reasons, we do not think it necessary to entertain the present public interest litigation. The petitions are rejected for these reasons. Any observations made by us, shall not prejudice the submission that may be made by the petitioners in the pending appeal before the National Green Tribunal, with respect to the legality of the clearance granted by MoEF.
>
> In view of the disposal of the main writ petitions, I.A.No.1/2012 does not survive for consideration."

25. A bare reading of the above concluding paragraph of the judgment of the High Court clearly shows that the present appeal and the contentions of the parties which may be raised before the Tribunal are specifically saved by the order of the High Court. It is not hit either by the principles of *res judicata* or constructive *res judicata*.

26. In view of the limited findings recorded by the High Court and particularly the fact that the High Court had specifically saved the proceedings before the Tribunal from operation of its order, we do not find any merit in the objections raised on behalf of NTPC in regard to the maintainability of the present appeal. Thus, we reject this contention of NTPC.

ISSUES IN REGARD TO LAND USE/LAND COVER – WHETHER ANY MISREPRESENTATION HAS BEEN MADE BY THE NTPC IN REGARD TO THE NATURE AND CATEGORISATION OF THE LAND REQUIRED FOR THE PURPOSE OF THE PROJECT IN QUESTION:

27. According to the NTPC, the site comprises of mostly barren and rocky land. The NTPC had informed the MoEF at the stage of TOR that the land proposed to be acquired (about 3000 acres) was mostly barren and rocky and partly agriculture with single crop. This statement appears to be doubtful as it is clear from the proceedings of the public hearing held on 25th March, 2010 that Kudgi is well known for its betel leaf crop for more than the last 100 years. In addition, onion, grapes, banana, and other crops including other horticultural products are grown in the area. The major occupation of most of the families whose land is being acquired is agriculture and horticulture and it is stated that the approximate annual income per acre is about Rs. 2 lakhs. It is seen from the R&R plan (July 2012) presented by NTPC that the land under acquisition includes 3500 acres of private land and approximately 20 acres of Government land. As mainly the private land being acquired belongs to the farmers, who are basically dependant on agricultural activities for their livelihood, they are the affected persons who will be ultimately forced to migrate to other places in search of their livelihood due to acquisition of their lands. It is pertinent to observe that the EC was granted on 25th January, 2012 whereas the R&R Plan was prepared by the NTPC in July 2012, which is

about 6 months after the grant of EC. Even in the EC given by MoEF on 25th January, 2012, it is stated that the land to be acquired for the project was comprising of mostly barren and rocky land with some areas under agricultural land. There is a mismatch in the figures of actual land required for the project, as in the EC, it is written that 2440 acres of land will be acquired whereas in the R&R Plan prepared by NTPC in 2012 and submitted to MoEF, it indicates that about 3500 acres of private land and approximately 20 acres of Government land is under acquisition. During the public hearing, the farmers have opposed the proposed power plant on their agricultural land on which their livelihood is based but it appears that no satisfactory answer was given by the NTPC during the public hearing except mentioning that proper compensation, as applicable, would be paid to them. In fact, the MoEF should have looked critically into the aspect of land acquisition, primarily concerning agricultural land and not mostly barren and rocky, as has been stated in the documents submitted to the MoEF by the NTPC. In fact, it amounts to concealment of facts/suppression of factual information regarding the type and the nature of land proposed to be acquired by the NTPC.

28. Mr. Ritwick Dutta, learned counsel for the Appellant, has stated that the land in question gives two crops and as per revenue records, it is designated as *kushki* land/dry land which means that irrigation facilities are not provided by the

Government. However, the farmers have installed a number of pumps for extraction of ground water for irrigation of their fields. Mr. Dutta also brought to our attention that even the satellite imagery does not show that the land is barren and rocky. In reply to the contention of Mr. Dutta, about the agricultural land giving two crops, Mr. Vikas Singh, learned senior counsel for NTPC, stated that as per the revenue records, it is dry land and the CEA report has indicated that it is rocky and barren land.

29. According to the siting criteria of MoEF for thermal power projects, it is mentioned that location of thermal power plant should be avoided on prime agricultural land. Learned Counsel for Appellant, Mr. Ritwick Dutta, while arguing the matter, stated that there have been a number of instances wherein the EAC has not agreed to acquisition of fertile agricultural land for location of power plants and rather has advised the project proponents to locate alternative land. As such, had it been known to the EAC that the land in question is basically agricultural land at the time of the appraisal of the project, it was quite possible that the EAC/MoEF would have asked for alternative sites and, quite possibly, may not have given approval to the present project site in question. He further stated that, to avoid rejection at the Scoping Stage itself, the NTPC deliberately gave a false and misleading statement that the proposed land is mostly barren and rocky and only partly agricultural.

30. The learned Senior Counsel for NTPC, Mr. Vikas Singh, in his counter submissions, stated that as per the revenue records, the land is categorised as dry land. He further stated that the land in question has been indicated as rocky and barren in the CEA Report (September 2008) pertaining to the sites identified by the Government of Karnataka in Bijapur district for siting of a large thermal power station. It is seen from the CEA Report that during the site visit, it was noted that adequate land is available at Kudgi site consisting of mostly barren land. It is also stated that the Government of Karnataka had identified an area of about 3384 acres near Kudgi which is a mix of cultivated and barren land but nowhere in the CEA Report, it appears to have been mentioned that it is a rocky land whereas NTPC, while applying for TOR to MoEF, has stated in the documents that land is rocky and barren.

31. According to the submissions made by the learned counsel for MoEF, Ms. Neelam Rathore, neither in the EIA report nor in the questionnaire furnished by the NTPC, it was disclosed that the proposed site was in the command area of Mulwad Lift Irrigation Scheme being under implementation at present by the State Government. She further stated that three alternative sites were identified and the present site at Kudgi had been chosen after consideration of various factors. It was also mentioned by her that the MoEF did not encourage use of fertile agricultural land for industrial purposes.

Further, she stated in her submissions that NTPC had informed the MoEF that the site of Kudgi Stage-1 Project comprised of mostly barren and rocky land with some areas having single crop cultivation.

32. The response of NTPC on the issue of character of land is that the land required for the power plant was being acquired vide the notifications dated 6th January, 2010 and 20th April, 2010 based on the information contained in the RTCs of that period which designated the said land to be dry and barren. Till date, gazette notification for acquiring 2938 acres of land had been published and the entire land had been categorised as *Kushki* or dry land by Government of Karnataka. NTPC has further clarified that none of the RTCs submitted by the appellant relate to any wet land or irrigated land. They are all shown as dry land or land irrigated by wells, and as such, the said land cannot be termed as prime agricultural land and at best would remain marginally agricultural land. Further, NTPC has undertaken geo-technical investigation in the project area which indicated that the surface strata consisted of hard, brownish grey, clayey silt/silt clay with decomposed rock particles overlaid by weathered rock. The depth of the top of weathered rock below the ground level varies from 0.10 m to 5.15 m. However, at most of the bore hole locations, (175 out of 203), the top of weathered rock existed within 1 m from ground level and at only 3 locations, it exceeded 2 meters. On the basis of the above findings, NTPC has concluded that

surface and sub-surface soil conditions are not conducive to agriculture in the area marked for the plant. We are not able to understand this proposition of the NTPC that the soil conditions are not conducive to agricultural activities as for such purposes, the requirement of the depth of the soil may not be more than 6 inches to 12 inches especially for seasonal crops and horticultural produce such as grapes, pomegranate and lemon. The appellant, in his submissions, has stated that even during the public hearing, it was mentioned that the area was irrigated and was producing a number of agricultural and horticultural products. He further stated that in the area, a number of pumps had been installed by the farmers for the last 40 years which were evident as per the records of Hubli Electric Supply Company. Further, it was brought to our notice by Mr. Dutta, Counsel for Appellant, that satellite imagery appended to the EIA report did not indicate that major part of the site was barren. Thus from the above, it may be concluded that the land in question is not mostly barren & rocky as informed by NTPC to MoEF, which may be taken as wilful suppression of facts.

33. At this stage, it will also be necessary for us to notice the contents of Appendix A, Form I which was submitted by the NTPC on 28th January, 2009 to the MoEF for grant of EC. This marks the very initiation of the process for considering the application for EC. In Columns 1.1 and 2.1 of this Form,

under the heading 'Activity', the applicant had made the following comments:

S. No.	Information/Checklist confirmation	Yes/ No	Details thereof (with approximate quantities/rates, wherever possible) with source of information data
1.1	Permanent or temporary change in land use, land cover or topography including increase in intensity of land use (with respect to local land use plan)	Yes	The proposed land which is mostly barren & rocky and partly agricultural will be used for industrial purpose.
2.1	Land especially undeveloped or agricultural land (ha)	Yes	Approximately 1250 ha of land is required. The land is mostly barren & rocky and partly agricultural with single/commercial crops.

34. Thus, according to the NTPC, the land was mostly barren and rocky and only partly agricultural with single crop plantation. This laid down the foundation for consideration and grant of the EC. In the letter dated 30th March, 2009 written by the MoEF to the NTPC, this fact was taken to be gospel truth and it was stated that the land was mostly barren and rocky and partly agricultural with single crop plantation and there was no homestead at the project site. According to this letter, the EAC for the project, in its meeting held on 12-13th March, 2009, had considered the project based on the information furnished and, the presentation made and the TOR were prepared accordingly. Under clause (vi) of the TOR,

land requirement for Stage I of the project had to be optimized and furnished. Furthermore, the issues regarding land acquisition and R&R scheme were directed to be clearly discussed in the EIA report. According to the appellant, this was never done and there was no deliberation even during the public hearing on this issue. Even while granting the EC vide order dated 25th January, 2012, identical language was noticed in the opening paragraphs of the order in relation to land – nature and categorization.

35. It is noticed that the CEA also noticed that the Government of Karnataka had identified an area of about 3,384 acres near Kudgi, which is a mix of cultivated and barren land. However, no details of such bifurcation were provided in that report. The appellant has further relied upon the document (Annexure R-2/2) filed by NTPC and averred that a total of 2,938.36 acres of land was agricultural land while 71.11 acres was the *Pot Kharab* (barren land). The respondents have also filed some photographs on record showing that the land was barren and rocky. From the various documents on record, it is clear that the land is partly agricultural and partly barren/rocky. However, a larger part of the acquired land is agricultural – either irrigated or non-irrigated. A few photographs have also been placed on record showing that the over-burdened soil is varying from 0.3 metre to 2.3 metres. In the DEIAR submitted by the NTPC under paragraph 3.1.2, it has been shown that the study area

comprises of built-up land, agricultural land, plantations, waste land and water bodies. In Table 3.1 on Land Use Pattern of Kudgi Study area, as on 2008, it has been shown as follows:

S. No.	Class	Area in Ha.	% of the Study area
1.	Agriculture	28384.828	90.34
(a)	Cropped Land (with crop)	5256.566	16.73
(b)	**Cropped Land (infertile)**	**23128.26**	**73.61**
2.	Settlements (Residential)	1844.354	5.87
3.	(Plantation/green belt)	543.566	1.73
4.	Waste Land	623.3728	1.984
5.	Water bodies (pond/drain/distributaries)	23.8792	0.076
Total		**31420.00**	**100.00**

Total Area (10 km) = 31420 ha.

36. From the above data, it is clear that the use of land is pre-dominantly for agriculture in that area.

37. The revenue records filed clearly show that major part of the land in question is agricultural land. The source of irrigation for such land is stated to be tube wells, pump sets, etc. In the RTC Form No.16, the land undoubtedly has been declared as garden land and even the names of the crops have been described as grape, sunflower, lemon, bajra, onion, maize, etc. There also, the source of water has been shown as tube wells and pump sets. In these reports, it has also been reflected that even dry/*Kushki* land is giving crops. The appellant has also relied upon the letter dated 3rd September,

2012 written by the Special Land Acquisition Officer, Karnataka Industrial Area Development Board (for short the "KIADB"), Dharwad, which shows that out of 2,938.36 acres of total agricultural land (*Kushki* land) under acquisition, more than 50% of the land is irrigated with wells and bore wells and the remaining area is under dry cultivation i.e. dependent solely upon rains, etc. The appellant has also placed documents to show that the land in the district consists of two types of soil – the first one is mixed soil with predominantly black soil and the second one is layered mixed soil predominantly consisting of red/brown soil. These soils are suitable for dry crops, and dry and irrigated crops respectively. This is based upon the document issued by Bijapur District Statistical Office of Government of Karnataka in July, 2006. It deserves to be noticed that as per the NTPC R&R Policy, 2010, 'agricultural land' has been defined to include lands being used for agriculture, horticulture, dairy farming, poultry farming, pisciculture, breeding of livestock, nursery growing medicinal herbs, raising of crops, grass or garden produce and land used by agriculturists for the grazing of cattle. However, it does not include any land used only for cutting of wood. This definition in the policy would certainly throw light on the scope of the agricultural land. It is an inclusive definition and thus would take within its ambit lands which are not being used purely for agricultural purposes. The appellant has filed photographs showing that majority of the land is irrigated and

fertile land suitable for double crop-cultivation and the farmers actually take two crops from such land. From this documentary evidence consisting of Government documentation, it is clear that the NTPC had not correctly filled in the above columns and these have been so relied upon by the authorities, particularly MoEF without any verification. Besides that, land in excess of the stated land is being used for the project in question. It, thus, further shows that it is largely agricultural land, which is sought to be acquired and is intended to be used for the project.

38. A perusal of the satellite imagery appended by the EIA Consultant to the EIA Report on record does not support the contention of the NTPC that the major part of the project area is barren. Further the revenue documents as well as the photographs of the area placed on record by the Appellant clearly indicate that the area under reference is mostly agricultural land. Hence the plea taken by the NTPC for seeking EC for the project, i.e., "most of the area is barren" clearly indicates that the NTPC misled the EAC. This is also clear from the observation recorded by the MoEF while issuing the EC vide document No.J 13012/06/2009-IA.II (T) dated 1st January, 2012 which states that "most part of the 2440 acres required for the Stage-I comprises of mostly barren and rocky with some area under single crop agriculture land". The MoEF vide its Reply-Affidavit dated 18th May, 2012 concedes that NTPC had informed the EAC (Thermal Power) that the site

comprises of mostly barren and rocky land with some areas having single crop agricultural land. Further, it also concedes that the Committee didn't know that the proposed project site lies in the command area of Mulwad Lift Irrigation Scheme.

39. From the above discussion, it can safely be concluded that the land in question is primarily not barren and rocky land, as informed by NTPC and there appears to be improper disclosure of facts on the part of the NTPC which remained unverified even till the stage of issuance of the EC.

ISSUE WITH REGARD TO REHABILITATION AND RESETTLEMENT POLICY WITH REFERENCE TO THE FACTS OF THE PRESENT CASE:

40. R & R is an essential feature of any project which comes up for consideration before the competent authorities in accordance with the EIA Notification.

41. If one examines the scheme of the EIA Notification, it becomes evident that at the time of preparation of the TOR, the NTPC had to place all relevant material before the EAC. The EAC is required to address all relevant concerns for the preparation of EIA Report in respect of the project or activity for which clearance is sought. Besides the information with regard to undeveloped or agricultural land, as contemplated in Appendix I, Form I, the NTPC is also expected to disclose the effect on the welfare of the people, vulnerable group of people, who could be affected by the project along with such other information, the disclosure of which would be significant for

the purposes of fair consideration of the project. Furthermore, the NTPC is required to provide full information and, wherever necessary, attach explanatory notes with the Form in relation to land environment, water environment, aesthetics and socio-economic aspects besides environmental management plan.

42. The concept of sustainable development is to drive a balance between environment on the one hand and development on the other. One of the essential facets of this balancing approach is to find out the impact of development upon civilization, particularly with reference to human beings. If as a result of establishment and operation of any project, a large chunk of land belonging to a large number of persons is expected to be acquired and they are likely to be displaced in one form or the other from their livelihood, R & R scheme would be one of the most pertinent aspects to be considered by the EAC. This would be a matter which must be elaborately deliberated upon and the general public must be heard on such an issue during the public hearing. Formulating an R&R scheme would be necessary not only in the interest of the project but also in the interest of the public at large.

43. Persuaded by this approach, while drawing up the TOR, the competent authority stated in paragraph (xxiv) as under:

> "Detailed R&R plan/compensation package in consonance with the National/State R&R Policy for the project affected people including that due to fuel transportation system/pipeline and their ROW, if any, shall be prepared taking into account the

socio-economic status of the area, homestead oustees, land oustees, landless labourers."

44. As is evident from the above, submission of a comprehensive R&R scheme was of paramount consideration right from the initial stages of drawing up the TOR till even after passing of the order of EC. Submission of such scheme, despite being so significant, had not been submitted by NTPC even after passing of the order of EC.

45. Particularly in the facts of the present case, we may notice that the TOR given by MoEF required for preparation of R&R plan, which was an integral part of the DEIAR, which in turn, was the basis for organising public hearing, as required under EIA Notification. But the DEIAR did not contain a detailed R&R plan at the time of the public hearing, and as such, it amounts to non-compliance of TOR. Even the EAC, while considering the project, has noted that the R&R plan is too general but the EAC recommended the project for EC and in fact R&R plan was submitted to MoEF only a few months (5 to 6 months) after the EC was granted to the project. Learned Senior Advocate for the NTPC, Mr. Singh, stated that R&R policy of NTPC was placed before the public hearing and in the 36th meeting of the EAC held on 14-15th November, 2011, the project was recommended for grant of EC. It is, therefore, evident that the NTPC did not submit the R&R Plan as was required before EAC/MoEF at the time of appraisal of project and rather it was submitted about 5-6 months after the EC

was accorded by MoEF which is clearly in violation of TOR conditions.

46. The appellant also pleads that the concerns regarding the negative impact of the project on the people, raised by the participants of the Public Hearing meeting, were not given consideration by the EAC and the Committee has not applied its mind while recommending the grant of EC. However, from the observation recorded in the minutes of the EAC meeting, i.e., "that the NTPCs have not submitted R&R for Project-Affected Persons (for short the "PAPs") even though the project entails large acquisition of private land by KIADB. It was observed that the sustenance of these poor villagers is based on the few acres of land either owned or working on the said land" it does appear that the points raised in the Public Hearing were considered. However, it may be noted that the Public Hearing was conducted on 25th March, 2010 much before the issuance of notification under Section 28 (4), (5) & (6) of the Karnataka Industrial Area Development Act and as such the public was not knowing as to whose land was going to be acquired for the project. In other words, it means that nobody actually knew who was going to be affected by the said power project.

47. While deliberating on the EIA report submitted by the NTPC, the EAC noted that the NTPC had not submitted R&R Plan for project-affected persons even though the project entailed large acquisition of private land by KIADB. It was

observed that the sustenance of these poor villagers is based on the few acres of land, which they either own or work on. It was therefore decided that a comprehensive R&R action plan with requisite details including financial parameters (for compensation, scheme for upliftment of marginalized section etc.) shall be submitted within four months. Accordingly, a specific condition regarding the R&R was set in the EC.

48. While issuing the EC dated 25th January, 2012, the MoEF set a number of conditions for compliance by the NTPC. As stated above, one of these conditions pertained to the R&R of the Project-affected persons. The NTPC was directed to prepare a comprehensive R&R plan for the project-affected persons in a well spelt time-bound manner. The said conditions read as under:

> "4. A. Specific Conditions
>
> (xxxi) A comprehensive R&R action plan with requisite details such as details of land losers and financial budget for compensation etc. shall be submitted to the Regional Office of the Ministry within four months. The R&R action plan shall also include scheme for upliftment of marginalized section that are indirectly affected on account of dependence for their sustenance on the land not owned by them."

49. The Ministry of Rural Development (Government of India) has framed a comprehensive R & R Policy for project-affected persons in 2007 (NRRP-2007). In the preamble of the NRRP-2007, it is stated thus:

> "1.1. Provision of public facilities or infrastructure often requires the exercise of legal powers by the State under the principle of *eminent domain* for

acquisition of private property, leading to involuntary displacement of people, depriving them of their land, livelihood and shelter; restricting their access to traditional resource base, and uprooting them from their socio-cultural environment". These have traumatic, psychological and socio-cultural consequences on the affected population which call for protecting their rights, in particular of the weaker sections of the society including members of the Scheduled Castes, Scheduled Tribes, marginal farmers and women. Involuntary displacement of people may be caused by other factors also.

1.2. There is imperative to recognize rehabilitation and resettlement issues as intrinsic to the development process formulated with the active participation of the affected persons, rather than as externally-imposed requirements. Additional benefits beyond monetary compensation have to be provided to the families affected adversely by involuntary displacement. The plight of those who do not have legal or recognized rights over the land on which they are critically dependent for their subsistence is even worse. This calls for a broader concerted effort on the part of the planners to include in the displacement, rehabilitation and resettlement process framework not only those who directly lose land and other assets but also those who are affected by such acquisition of assets. The displacement process often poses problems that make it difficult for the affected persons to continue their earlier livelihood activities after resettlement. This requires a careful assessment of the economic disadvantages and social impact of displacement. There must also be a holistic effort aimed at improving the all-round living standards of the affected people.

XXXXX XXXXX XXXXX

1.7. It is acknowledged that many State Governments, Public Sector Undertakings, agencies and other bodies concerned, either have their own Rehabilitation and Resettlement (R&R) policies or are in the process of formulating them. The provisions of the National Rehabilitation and Resettlement Policy, 2007 (for short the "NRRP-2007") provide for the basic minimum requirements, and all projects leading to involuntary displacement of people must address the rehabilitation and resettlement issues comprehensively. The State Governments, Public Sector Undertakings or

agencies, and other bodies concerned shall be at liberty to put in place greater benefit levels than those prescribed in the NRRP-2007."

50. The above statement makes it amply clear that State Governments/PSUs and other bodies concerned are obliged to provide R&R benefits to the affected people at a rate not, in any case, below that prescribed in the NRRP- 2007 and, further, the procedure has also to be at par with the NRRP-2007. This is acknowledged by the NTPC in its own R&R Policy issued in June, 2010. The considered opinion of the NTPC regarding the land acquisition as reflected in its R&R policy (June, 2010) is as follows:

i. The land that is acquired for power projects is for a public purpose and necessitates Rehabilitation and Resettlement (R&R) of PAPs, a task often accompanied by socio-economic adjustment. The PAPs have to involuntarily face the new social set up (NTPC R & R Policy June 2010: Section 1.1.1).

ii. The land acquisition and consequent displacement disrupts the traditional social system. The changes in the land use pattern alter the agro-based rural economy and affect the life style of people. This calls for a concerted effort to provide means to ensure sustainable livelihood of these PAPs, considering them as stakeholders (Section 1.1.2 supra).

iii. The Rehabilitation and Resettlement Plan (R&R Plan) is to be formulated so that after a reasonable transition period, the affected families improve, or at least regain their previous standard of living, earning capacity and production levels. In case a one-time negotiated settlement is reached, individual R&R benefits must be paid at the time of payment of land compensation itself (Section 1.1.3 supra).

51. In the preamble of its R&R Policy (issued in June 2010) the NTPC declares as follows:

> "Government of India had a National Policy on R&R (NPRR-2003) since February 2004 and the NTPC had earlier revised its R&R policy in June 2005 to make it in line with NPRR-2003 and in light of the experience gained over the years, now the National Policy on Rehabilitation and Resettlement of Project Affected Families (NRRP-2007) has been issued on 31st October, 2007 by Ministry of Rural Development and Department of Land Resources, Government of India, which aims at laying down basic norms and packages for Project Affected Families (PAFs). The NTPC proposes to review and modify its R&R policy to make it in line with the NRRP-2007."

52. It further points out that the NTPC believes that the most effective way of addressing the R&R issue is through a proactive approach and appropriate planning of land acquisition (NTPC R&R Section 1.2.1 supra). In regard to this, it states thus:

> i. "Whenever it is desired to undertake a new project or expansion of an existing project, which involves involuntary displacement of four hundred or more families *en masse* in plain areas or two hundred or more families *en masse* in tribal or hilly areas, DDP blocks or areas mentioned in the Schedule V or Schedule VI to the Constitution, a Social Impact Assessment (SIA) along with Environment Impact Assessment (EIA) will be carried out in such manner as may be prescribed. Guidelines on the same as and when prescribed by the Government will be followed. Alternatively, the EIA will continue to cover the social aspects as well as per the existing practice (NTPC R&R Section 1.2.7.2 supra). As per the NRRP-2007 (NRRP Section 4.3.1) where it is required as per the provisions of any law, rules, regulations or guidelines to undertake environmental impact assessment also, the SIA study shall be carried out simultaneously with the Environmental Impact Assessment (EIA) study. As per Section 4.3.2 of NRRP 2007, in cases where both EIA and SIA are required, the public hearing done in the project- affected area for EIA shall also cover issues related to SIA. Such public hearing shall be organized by the appropriate Government.

ii. A Socio Economic Survey (SES) will be conducted by a professional agency to collect detailed demographic details of the area, which shall form the basis for the preparation of R&R Plan. In case the SIA is done separately than the EIA, the need for conducting SES as well could be re-examined (NTPC R&R Section 1.2.7.3). The SES should be generally conducted immediately after land boundaries are frozen and preferably after publication of Notification under Section 4 of Land Acquisition Act (NTPC R&R Section 3.8 supra). Human resource base of each PAP, including age as on date of notification under Section 4 of Land Acquisition Act, Family tree, Economic status of each PAP, Ownership of movable and immovable property, Deprivation of property including lands, structures, trees, houses, either occupied or owned, with tenancy rights or even as encroachers, loss of property, loss of access to clientele, loss of jobs due to physical re-location, loss of gainful employment, loss of access to income generating resources, Deprivation of community life, community properties and resource base, community amenities and services, socio-cultural relationship/institutions should be considered. A videography of the entire area including the SES process should be undertaken so as to build a reliable data base of the socio economic status prior to acquisition (NTPC R&R Section 3.8.1 supra).

iii. Implementation of R&R policy within specified time and with a consensual approach and participation of all stakeholders will be a matter of pride for NTPC (NTPC R & R Section 1.5.3). Any specific R&R conditions/ stipulations as part of MOEF clearance shall also be made part of R&R Plan (NTPC R&R Section 1.15 supra).

iv. To eliminate/minimize the possibilities of usurpation of rights to reap the advantage of various R&R benefits, the date of publication of the notification under Section-4 of the Land Acquisition Act, 1894 or equivalent section, like section 7(1) of CBA (A&D) Act, 1957, will be treated as the cut-off for a family whose primary place of residence or other property as source of livelihood is acquired for a project for claiming R & R benefits (Section 2.1 (i) supra).

v. Any agricultural or non agricultural labourer, landless person (not having homestead land, agricultural land or either homestead or agricultural

land), rural artisan, small trader or self-employed person, who has been residing or engaged in any trade, business, occupation or vocation continuously for a period of not less than three years preceding the date of declaration of the affected area is required in order to avail R&R package. However, in such cases who are left out due to the cutoff date of 3 years, NTPC's approach will be flexible and they will be reviewed on a case to case basis and genuine cases such as family transactions of legal heirs due to death in family etc will be considered for R&R benefit (NTPC R&R Section 2.1 (i) supra).

vi. The list of tentative PAPs will be prepared initially as part of SES in consultation with project R&R group, and will be categorized as per the provision of this policy. However, the list will be got certified from the District Collector, after publicizing the list inviting the objections and examining each case, in a transparent manner through Public Information Centre with a consultative process through Village Development Advisory Committees once the land acquisition process is completed. Each Project-Affected Person (PAP) shall be assigned a unique identification number (NTPC R&R Section 3.7.1). The list for the PAPs losing private land shall be prepared based on the revenue records as on the date of Section-4 Notification under LA Act or equivalent Act (NTPC R&R Section 3.7.2 supra)."

53. As per the NRRP-2007, in case of a project involving involuntary displacement of less than four hundred families *en masse* in plain areas, or less than two hundred families *en masse* in tribal or hilly areas, DDP blocks or areas mentioned in the Schedule V or Schedule VI to the Constitution, where the appropriate Government decides not to appoint an Administrator for R&R, adequate administrative arrangements shall be made by the appropriate Government for the R&R of the affected families as per the said policy (Section 5.1).

54. A perusal of the documents placed on record by the NTPC leads one to observe that in the case of the Kudgi STPP,

the NTPC R&R policy seems to be restricted to paper only and the ground reality is that the NTPC has not even bothered to prepare the list of project-affected persons although about two years have passed from the date of issuance of Land Acquisition notice. The land for the proposed project has been acquired under the Karnataka Industrial Areas Development Act, 1966. Section 28 (Acquisition of Land) of this Act states:

(1) "If at any time, in the opinion of the State Government, any land is required for the purpose of development by the Board, or for any purpose in furtherance of the objects of this Act, the State Government may by notification, give notice of its intention to acquire such land.
(2) On publication of a notification under sub-section (1), the State Government shall serve notice upon the owner or where the owner is not the occupier, on the occupier of the land and on all such persons known or believed to be interested therein to show cause, within thirty days from the date of service of the notice, why the land should not be acquired.
(3) After considering the cause, if any, shown by the owner of the land and by any other person interested therein, and after giving such owner and person an opportunity of being heard, the State Government may pass such orders as it deems fit.
(4) After orders are passed under sub-section (3), where the State Government is satisfied that any land should be acquired for the purpose specified in the notification issued under sub-section (1), a declaration shall, by notification in the official Gazette, be made to that effect.
(5) On the publication in the official Gazette of the declaration under sub-section (4), the land shall vest absolutely in the State Government free from all encumbrances.
(6) Where any land is vested in the State Government under sub-section (5), the State Government may, by notice in writing, order any person who may be in possession of the land to surrender or deliver possession thereof to the State Government or any person duly authorised by it in this behalf within thirty days of the service of the notice.
(7) If any person refuses or fails to comply with an order made under sub-section (5), the State Government or any officer authorized by the State

Government in this behalf may take possession of the land and may for that purpose use such force as may be necessary.

55. Notices under Section 28 (4), (5) and (6) for the main power plant were issued on 11th June, 2010 and 9th July, 2010 respectively. Neither any data has been placed on record about the people whose land has been acquired, nor is there any record of the landless labourers and other artisans, who have been affected by the project. The fact that more than 80% of the people (83% as per the statement of NTPC) have already been paid compensation in lieu of the land acquired, clearly indicates that the NTPC has not been serious about the R&R Package, although it was mandatory as per the NRRP-2007 as well as its own R&R Policy of 2010. According to NRRP-2007, once the declaration (regarding the acquisition of land) is made as per the policy, the Administrator for R & R shall undertake a baseline survey and census for identification of the persons and families likely to be affected (Section 6.3). As per Section 6.4 of the NRRP-2007, such survey shall contain the following village-wise information of the affected families:

"(i) members of the family who are permanently residing, engaged in any trade, business, occupation or vocation in the affected area;

(ii) families who are likely to lose, or have lost, their house, agricultural land, employment or are alienated wholly or substantially from the main source of their trade, business, occupation or vocation;

(iii) agricultural labourers and non-agricultural labourers;

(iv) families belonging to the Scheduled Caste or Scheduled Tribe categories;

(v) vulnerable persons such as the disabled, destitute, orphans, widows, unmarried girls, abandoned women, or persons above fifty years of age; who are not provided or cannot immediately be provided with alternative livelihood, and who are not otherwise covered as part of a family;

(vi) families that are landless (not having homestead land, agricultural land, or either homestead or agricultural land) and below poverty line, but residing continuously for a period of not less than three years in the affected area preceding the date of declaration of the affected area; and

(vii) Scheduled Tribes families who are or were having possession of forest lands in the affected area prior to the 13th day of December, 2005."

56. As per Section 6.5 of NRRP-2007, every survey undertaken under Section 6.4 of NRRP-2007 shall be completed expeditiously and within a period of ninety days from the date of declaration made in respect of acquisition of land [Ref: KIADB Section 28 (4), (5) and (6)].

57. The authorities concerned should have taken into consideration the impact of establishment and operationalisation of the project upon the persons who were likely to be displaced, even though not the owners of the acquired land at the relevant stage, particularly at the time of public hearing, for formulation of a desirable R&R scheme.

58. Thus, from the above discussion, it can be concluded that there was no comprehensive R&R as required under EIA

Notification, and other policies even though the project entails acquisition of large private land.

LOCATION OF AAQ MONITORING STATIONS AND VARIATION IN COAL QUALITY - EFFECTS THEREOF:

59. The next contention that is raised on behalf of the appellant before us is that the AAQ monitoring stations are not located in the downward wind direction so as to provide correct AAQ analysis. Furthermore, the coal quality has been varied at different stages i.e. at the stages of submission of application, the preparation of EIA report and the grant of EC. The variation of coal quality would result in higher sulphur emission causing air pollution. There would be significant difference in the emission rate and the 24-hour maximum incremental value would be higher.

60. Opposed to this, the submission on behalf of the NTPC is that at no stage, coal quality and its source were changed so as to bring the sulphur content higher than 0.5%, which is the maximum value taken into consideration by the authorities concerned at any stage till the grant of EC. Reliance has also been placed upon MoEF's circular dated 19th January, 2011, which clarifies that a firm coal linkage is required only at the stage of grant of EC and not at the stage of TOR, which implies that previous activities may be undertaken with tentative source of coal and tentative emission characteristics. A firm coal source is to be provided at the EC stage only. In relation to monitoring stations, it is stated that wind direction has

been kept in mind while installing the monitoring stations and there would be no pollution resulting from the project.

61. As per the TOR granted by MoEF on 30th March 2009, one of the requirements of the TORs for undertaking detailed EIA study, was pertaining to the setting up of at least one monitoring station in the pre-dominant downwind direction at the location where maximum ground level concentration is likely to occur [Ref: TOR Condition No. 3(xi)]. A perusal of the EIA report placed on record and the documents provided by the appellant regarding the meteorological conditions of the area vis-à-vis the pre-dominant wind direction at the project site, it is observed that the selection of the air sampling sites has been not as per the above requirement. There has been no sampling site in the zone of down-wind direction. In this regard, it is important to consider the importance of the TOR in the present circumstances, in the interest of justice.

62. Atmosphere, by its nature, has a tendency to maintain homogenous quality. Hence, until there is a significant source of pollution, the quality of air would remain almost same in any direction in a particular area at a particular time. When air pollution is added from any source, composition of atmosphere changes. The concentration of air pollutants depends not only on the quantities that are emitted from air pollution sources but also on the ability of the atmosphere to either absorb or disperse these emissions. The air pollution

concentration varies spatially and temporarily, causing the air pollution pattern to change with different locations and time due to changes in meteorological and topographical conditions. The sources of air pollutants include vehicles, industries, domestic sources and natural sources. In the present case, the question of pollution has to be examined keeping in view the fact that the surrounding areas are green areas. The pollution emitted from the nearby villages and traffic is existent but it is likely to be small, which may alter the AAQ marginally at the local level. Due to dispersion and dilution in the vast atmosphere, its impact on AAQ of larger area may not be very significant. However, the downwind monitoring station would have given the actual prevailing AAQ level with respect to particulate matter, sulphur-di-oxide and oxides of nitrogen near human settlements. The data would have been helpful in providing the prevailing background pollution levels in the area, which is important to see the actual impact on the AAQ after the thermal power plant is in operation. Thus, the requirement of TOR has not been met by NTPC for reasons best known to it.

63. The issue regarding the coal linkage and its quality is to be handled at the MoEF level, as per circular issued on 19th January 2011 by MoEF, which stated as below:

> "It is clarified that firm coal linkage is required to be ensured at the stage of consideration of grant of EC and not at the stage of TOR."

64. The above circular of MoEF, makes it very clear that firm coal linkage is essential at the time of grant of EC and not at the stage of TOR. However, without the actual information pertaining to the coal quality, especially in terms of sulphur and ash-content, it would be unrealistic to work out proper impact on AAQ due to the proposed power plant. It is stated by Mr. Ritwick Dutta, learned counsel for the Appellant, that the sulphur content was taken as 0.35% during the time of the preparation of EIA Report whereas at the time of grant of EC the sulphur content was mentioned as 0.5% which is higher. DEIAR report indicated sulphur content of 0.35% at the time of the public hearing, showing that there would be less impact on AAQ on the ambient levels of sulphur dioxide in the area due to establishment of the power plant in the area.

65. NTPC, in its submissions, has accepted that there have been changes in the coal source and coal quality during the course of the appraisal of the project. In the DEIAR, Southern Eastern Coal Ltd. was considered as source of coal and while at the time of EAC meeting, Talaipalli and Pakri Barwadih Coal Mines of NTPC were considered as coal-sources. Finally, the EC was accorded with coal linkage from Barwadih Coal Mines of NTPC, based on Addendum EIA Report submitted by NTPC to MoEF indicating sulphur content as 0.5% which is considerably higher than the earlier projected figure of 0.3% at the time of Public Hearing.

66. The appellant has submitted that the environmental impact on air quality was worked out with less Sulphur content (0.35%) at time of DEIAR which was placed before the public hearing, but the Sulphur content was higher in coal (0.5%) at the time of final EC given by MoEF. Sulphur content was assumed as 0.35% based on the likely coal linkage from Mand Raigarh coal field and based on 0.35% sulphur content in the coal, the impact on AAQ was worked out, whereas at the time of appraisal of the project and grant of EC by EAC/MoEF, the sulphur content of the coal was taken as 0.5% due to the coal linkage from the other coal fields which was on the higher side. In fact, NTPC should have taken the worst quality of coal into account, especially the sulphur content should have been taken as 0.5% for working out the likely impact on the AAQ but the NTPC has taken a lower sulphur content (0.3%) in coal for working out the impact in terms of likely increase of sulphur dioxide in the ambient air levels with the proposed plant at the time of DEIAR. This appears to have been deliberately done by the NTPC to project low impact on AAQ at the time of public hearing, as contended by the learned counsel of the appellant.

67. The source deliberated upon during the Public Hearing was different than the one discussed in the EAC meeting. Later on, the source was again changed during the issuance of EC. Normally these changes should have been made public. However, as the EC has been granted keeping in mind the

worst scenario of sulphur content in the coal, the changes in sulphur content do not seem to matter much in terms of overall impact on air quality except that at the time of public hearing, lower impacts on air quality were projected by the NTPC, which may be taken as suppression of factual position at the time of public hearing.

68. From the above discussion, it is clear that some changes may be called for in so far as the question of providing AAQ monitoring stations is concerned. The downward wind direction, predominantly being south-east, is evident from the documents placed on record. These changes have to be effected upon due visit to the site and ensuring that the AAQ monitoring stations including on the downwind direction are situated at such locations that provide a true and correct picture of AAQ through all the seasons. However, changes in source and quality of coal may not result in any prejudice to the environment. It is evident that the worst scenario of sulphur content in coal has been taken into consideration i.e. at 0.5%. The change in source of coal or its quality has not gone above such percentage of 0.5%. Thus, we cannot find fault with the overall impact on AAQ and the consequential grant of EC on this ground which has taken into account a higher level of sulphur content (0.5%) in coal and has put a condition accordingly.

GENERAL DISCUSSION

69. Under the environmental jurisprudence, sustainable development is a widely accepted principle. In India, it finds statutory recognition in terms of Section 20 of the National Green Tribunal Act, 2010. One of the most significant precepts to examine sustainable development in the facts of a given case is the application of the balancing principle or the principle of proportionality. The Tribunal has to drive a balance between the rival factors, the risks associated with environmental and ecological damage and impact on livelihood of project-displaced or affected persons on the one hand and economic and other benefits for the public at large on the other, upon establishment of the project. A number of factors need to be considered in this regard. In the framework of Indian economy, there is a relation between poverty and environment. Poverty and degraded environment are closely inter-related, especially where people depend primarily on natural resources based on their immediate environment for their livelihood. Restoring natural systems and improving natural resource management practices at the grass root level are central to a strategy to eliminate poverty. If we examine, in the light of the above facts of the present case, then it becomes evident that the establishment of the thermal power plant at Kudgi would squarely satisfy the requisites of the doctrine of proportionality or the balancing principle and thus would fall within the ambit of permissible sustainable development.

70. Kudgi is a village located in the Basavana Bagevadi taluk of Bijapur district in Karnataka, which has a very low per capita income. There is no large industry or commercial activity in the district. Thus, the economy of the district and livelihood of its population is largely dependent on agriculture. Out of the total geographical area of 10,530 sq.km., 7,760 sq.km. is available for cultivation, which is 74% of the total area. Of the total area, the district has only 0.19% under forests. Thus, the ecological sensitivity is also not a serious cause for not allowing setting up of industry in the district. Electricity is not only ingrained in modern life but it is also critical for its continuous existence, as electricity will be the main source of power produced world-wide. All the modern energy alternatives are focused on creating electricity by renewable means, such as wind turbines, solar arrays and geothermic heating, ultimately using steam to turn large turbines for producing electricity. Electric power is and will continue to be one of the most important energy forms available to the human kind as a whole, and as fossil fuels steadily run out, more and more dependence upon it will become the standard. For economic development, industrialization and reducing poverty, electricity has a major role to play, particularly in the Indian reference.

71. According to the NTPC, it has already spent a considerable amount on acquisition of land and initial

establishment of the project. An amount of Rs.134 crores was allocated for R&R and a major part of it has been distributed.

72. The economists have reported a systematic relationship between income changes and environmental quality, the relationship known as the Environmental Kuznets Curve (for short the "EKC"). The EKC has become standard fare in technical conversations about environmental policy. Pollution often appears first to worsen and later to improve as countries' incomes grow. Because of its resemblance to the pattern of inequality and income described by Simon Kuznets, this pattern of pollution and income has been labelled as Environmental Kuznets Curve. The logic of the EKC relationship is intuitively appealing. At the low level of per capita income found in pre-industrial and agrarian economies, where most economic activity is subsistence farming, one might expect rather pristine environmental conditions, relatively unaffected by economic activities, at least for those pollutants associated with industrial activity. Once income increases, they prefer to pay for better and cleaner water quality, better air quality, better sanitation, etc. including services like sewage and garbage management. Cleaner technology furthers this cause.

73. Upon a cogent analysis of the above, it becomes evident that the present case is not one where the only alternative available with the Tribunal is to cancel the EC and direct

complete cancellation of the project. NTPC itself is a public undertaking and it is the public money, which is at stake. The principle of balancing would persuade the Tribunal to take an approach where environmental interests can be protected by taking certain reasonable and stringent measures and still ensure that the huge public investment is not permitted to go waste. The area in question needs development and establishment and operationalisation of such a big project is bound to improve the economy of that area. Certainly, while permitting such development, the ecological and environmental interests of the area as well as that of the public at large cannot be permitted to be entirely ignored. At the same time, irretrievable and irreversible damage to the environment and ecology cannot be permitted. Once this is ensured, permitting the establishment of the TPP would be sustainable development within the scope of the balancing principle. Normally, in the present case, the pollution load due to burning of coal would increase. However, we expect that the overall impact on environment would be within the prescribed limits by taking appropriate anti-pollution measures and strictly complying with the conditions imposed in the order of EC.

74. Every complex problem, in whichever field, including environment that arises, is capable of resolution with the aid of varied tools. However, what is important is to resolve such issue within the prescribed limitations of law and

environmental jurisprudence. The three principal maxims governing the field of environment are the sustainable development, the polluter pays and the precautionary principles. Under the Indian environmental jurisprudence, these three principles are statutorily prescribed. While permitting industrial development, caution has to be taken that such development does not disturb the ecology and environment of the area in question. Furthermore, the infrastructural development must not adversely affect the economic and other livelihood activities of the affected community so as to hamper their livelihood and render them incapable of resettlement. At this stage, we may also refer to the judgment of the Tribunal in the case of *Rayons-Enlighting Humanity and Ors. v. Ministry of Environment and Forests and Ors.* [2013(1) Part 6, NGT Reporter page 325], extracts of which are reproduced as under:

> "43. In *Susetha v. State of Tamil Nadu* AIR 2006 SC 2893, the Supreme Court observed that the doctrine of sustainable development is not an empty slogan. It is required to be implemented taking the pragmatic view and not on *ipse dixit* of the Court. Following the same principle, it cannot more so be applied on an administrative authority or a Corporation vested with the statutory obligation of providing environmental protection to the residents under its jurisdiction. Sustainable development means that the richness of the earth's bio-diversity would be conserved for future generations by greatly slowing or if possible halting extinctions, habitat and ecosystem destruction, and also by not risking significant alterations of the global environment that might – by an increase in sea level or changing rainfall and vegetation patterns or increasing ultraviolet radiation – alter the opportunities available for future generations. Sustainable development has been defined in many ways but the

most frequently quoted definition is from the Brundtland Report which states as follows:

"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- The concept of **needs**, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- The idea of **limitations** imposed by the state of technology and social organisation on the environment's ability to meet present and future needs."

44. The concept of sustainable development is rooted in this sort of systems thinking. It helps us to understand ourselves and our world. The problems we face are complex and serious – and we can't address them in the same way we created them.

45. While applying the concept of sustainable development, one has to keep in mind the "principle of proportionality" based on the concept of balance. It is an exercise in which courts or tribunals have to balance the priorities of development on the one hand and environmental protection on the other. So sustainable development should also mean the type or extent of development that can take place and which can be sustained by nature/ecology with or without mitigation. In these matters, the required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a 'reasonable person's test. (Refer *Research Foundation for Science and Technology and Natural Resource Policy v. Union of India* (2007) 9 SCR 906; *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664; *Chairman Barton: The Status of the Precautionary Principle in Australia* (Vol.22) (1998) *(Harv. Envtt. Law Review, p. 509 at p.549-A) as in A.P. Pollution Control Board v. Prof. M.V. Nayuder* (1999) *2 SCC 718*; *and M.C. Mehta v. Union of India,* AIR 2004 SC 4016. At this stage, we may usefully refer to a very recent judgment of the Supreme Court in the case of *G. Sundararjan v. Union of India & Ors.* Civil Appeal No. 4440 of 2013 (Arising out of S.L.P. (C) No. 27335 of 2012), Civil Appeal No. 4441 of 2013 (Arising out of S.L.P. (C) No. 27813 of 2012), Civil Appeal No. 4442 of 2013 (Arising out of S.L.P. (C) No. 29121 of 2012) and Civil Appeal No. 4443 of 2003 (Arising out of

S.L.P. (C) No. 32013 of 2012) decided on 6th May, 2013 the Court, while referring to the principles of balance inbuilt in the concept of sustainable development, elaborated the principles as follows:

"228. I have referred to the aforesaid pronouncements only to highlight that this Court has emphasized on striking a balance between the ecology and environment on one hand and the projects of public utility on the other. The trend of authorities is that a delicate balance has to be struck between the ecological impact and development. The other principle that has been ingrained is that if a project is beneficial for the larger public, inconvenience to smaller number of people is to be accepted. It has to be respectfully accepted as a proposition of law that individual interest or, for that matter, smaller public interest must yield to the larger public interest. Inconvenience of some should be bypassed for a larger interest or cause of the society. But, the present case really does not fall within the four corners of that principle. It is not a case of the land oustees. It is not a case of "some inconvenience". It is not comparable to the loss caused to property. I have already emphasized upon the concept of living with the borrowed time of the future generation which essentially means not to ignore the inter-generational interests. Needless to emphasize, the dire need of the present society has to be treated with urgency, but, the said urgency cannot be conferred with absolute supremacy over life. Ouster from land or deprivation of some benefit of different nature relatively would come within the compartment of smaller public interest or certain inconveniences. But when it touches the very atom of life, which is the dearest and noblest possession of every person, it becomes the obligation of the constitutional courts to see how the delicate balance has been struck and can remain in a continuum in a sustained position. To elaborate, unless adequate care, caution and monitoring at every stage is taken and there is constant vigil, life of "some" can be in danger. That will be totally shattering of the constitutional guarantee enshrined under Article 21 of the Constitution."

75. Rapid and unchecked development would adversely affect the environment. Protection of the vital resources is the

need of hour. Gandhian postulation recognized the rules for sustainable development and described them as follows:

> "1). CONSERVATION: Preservation and nurturing of the vital resources, that still remain, are the sine qua non for good environmental management. Conservation as an idea is not merely confined to retaining whatever that is left, but involves a whole range of activities aimed at rejuvenation and propagation.
>
> 2). PROTECTION: Securing the resource and insulating it from any shocks of destruction and degradation is in contemplation here.
>
> 3). NON-DEGRADATION: Ensuring the intrinsic quality of the resources is not lost, while putting the same to use, and constitutes the basic tenet of proper and scientific resource use.
>
> 4). ADMINISTRATION that is TRANSPARENT, ACCOUNTABLE and PARTICIPATORY is a major requirement. This acknowledges the fact that the resources cannot be managed from above and finding local solutions to environmental problems would ensure effective and efficient environmental management.
>
> 5). LAW, POLICY AND PRACTICE in environmental management should emerge from and evolve out of people's needs and compulsions and be the result of crystallized home spun wisdom.
>
> 6). EQUITABLE SHARING OF BENEFITS is another underlying principle of good environmental governance, and
>
> 7). CONFLICT AVOIDANCE AND CONSENSUS BUILDING THROUGH CONSULTATIVE PROCESSES in Environmental decision-making is the crowning aspect of the system of administration. The litmus test for the existence of a healthy and wholesome environment, in any system, depends upon the internalization of these principles in the legal ordering.

76. To an extent, there is a right to development. However, even this right is not free of limitations and regulations. It is not an unfettered right so as to completely give a go-by to the

issues of environment. Development may be carried out to satisfy the need of a developing society but it has to be regulated so as to satisfy the requirement of preservation and nurturing of the natural resources, which are the real assets of the society.

77. In light of the above principles, we have to ensure that the establishment of thermal power plant does not unduly hamper the means of livelihood of the residents. Wherever acquisition of land and displacement is an inevitable factor in the establishment and operationisation of the project, there it must be supported by an appropriate compensatory and R&R scheme. It must provide reasonable chances of employment and earnings to the displaced persons becoming unemployed as a result of acquisition of the land and establishment of the project.

78. The appellant has placed reliance upon the judgment of the Tribunal in the case of *Rudresh Naik v. Goa Coastal Zone Management Authority* [2013 ALL (I) NGT REPORTER (2) (DELHI) 47] to contend that the Wednesbury's Principle is attracted in the present case as some matters which were material have been ignored and not considered by the authorities on the one hand while on the other, the irrelevant considerations have been made the basis of recommendation of EAC as well as passing of the EC order. The counsel for the respondents have refuted the said contention and argued that

the EC order is free of arbitrariness and does not attract the Wednesbury's Principle.

79. In the case of *Rudresh Naik* (supra), the Tribunal has held as under:

> "16. Another ground which we are called upon to consider in the present case is that the finding of the GCZMA, in relation to hilly terrain is based on no evidence. Such a finding is based on conjectures and surmises on the one hand and on the other, completely ignores from the zone of its consideration a very important document which had been placed by the appellant for its consideration which has been referred to above. If this contention is adjudged to be correct, then it will introduce the element of unfairness and arbitrariness in the entire decision making process which may ultimately vitiate the order itself.
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> 17. The Wednesbury's Principle is the leading precept to determine such controversies relating to arbitrariness. The Constitutional Bench of the Supreme Court in *Rameshwar Prasad v. Union of India* [(1994) 3 SCC 1] stated that:
>
> "201. It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. (See: Smt. Shalini Soni and Ors. v. Union of India and Ors. 1980CriLJ1487).
>
> 202. The Wednesbury principle is often misunderstood to mean that any administrative decision which is regarded by the Court to be unreasonable must be struck down. The correct understanding of the Wednesbury principle is that a decision will be said to be unreasonable in the Wednesbury sense if (*i*) it is based on wholly irrelevant material or wholly irrelevant consideration, (*ii*) it has ignored a very relevant material which it should have taken into consideration, or (*iii*) it is so absurd that no sensible person could ever have reached to it."

18. Still in the case of *Tata Cellular v. Union of India* 1994 (6) SCC 615, the Supreme Court held that where the decision/action is vitiated by arbitrariness, unfairness, illegality, irrationality or unreasonableness, it will require judicial intervention and the Courts can set right the decision making process.

19. This doctrine covers various facets of arbitrariness. The Courts, more than often, have applied this principle to examine the merits or otherwise of the contentions. In the case of Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation 1947 (2) AELR 680 enunciating the aspects of unreasonableness in executive action of the public authorities, it was stated that if the power is exercised so as to give impression or inference to the Court that there has been unreasonableness in such action, it is taken in bad faith extraneous circumstances have been taken into consideration, there has been disregard of public policy and relevant consideration have been ignored then authorities would be said to have acted unreasonable. Lord Greene, M.R., expressing the unanimous view observed as under:

"He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "Unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. WARRINGTON, L.J. I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."

The aforesaid Wednesbury's principle has not only been adopted in various pronouncements by the Hon'ble Apex Court, but even its expanded principles have been applied extensively by other Courts. The apparent unreasonableness in executive action, whatever be its foundations, would normally invite chastisism upon judicial scrutiny. The requirement of fairness is in built in every rule and regulation be it an executive or an administrative act. This basic rule of law is ab

antique and its application has been consistently expanded.

20. As already noticed, it is neither evident from the order nor from any records produced before the Tribunal that the finding returned in the impugned order that it was a hilly terrain was well reasoned. It appears to be a finding that has been recorded on the basis of certain conjectures and surmises. The relevant and material documents that had been produced by the appellant have been ignored. In other words, relevant considerations have been ignored while irrelevant and imaginary facts have been taken into consideration for arriving at the conclusion, which in our mind, cannot be sustained in view of the fundamental principle of Wednesbury. This clearly reflects the element of arbitrariness in the action of the respondent. The administrative action which is tainted with the element of arbitrariness cannot be sustained in law. An administrative order must be free of arbitrariness and bias. We cannot help but take note of the legal proceedings that have repeatedly taken place in the present case. On all those occasions, the order passed by the respondent was set aside on one ground or the other. This Tribunal even directed the appellant to deposit Rs. 1.5 Lakhs in order to ensure remedying of the damage caused, if any, to the ecology or the environment around the site. This deposit of Rs. 1.5 Lakhs was made subject to the final order that may be passed by the authorities. The authorities have not even cared to touch upon that point in the impugned order. We are of the considered view that the authorities have compelled the appellant to approach the court and the Tribunal time and again, that too, without valid and good reasons. It is expected of a public authority to act in accordance with the law, fairly and without inducing the element of arbitrariness and bias. There is a specific obligation upon such authorities to ensure that they do not generate avoidable litigation. Hence, fairness in their action is a pre-requisite to ensure an efficacious discharge of their statutory obligations. In our considered view, the authorities, in the facts and circumstances of the present case, have not acted with complete fairness and have compelled the appellant to approach the courts and the Tribunal repeatedly, without any specific fault being attributed to him. Thus, he is entitled to receive the costs of the present proceedings".

80. The above enunciated law makes it clear that the order of the authorities has to be a speaking order and must be founded on relevant and material considerations. If material factors are ignored, then there is every likelihood that the order would stand vitiated partly or even in its entirety. A number of factors, which have material bearing on the life of the people, environment and ecology of the area, have not been made the basis of discussion of the authorities. These objections had been specifically raised, as noticed above, and it is not evident from the report as to why they were not considered at all, or even if partially considered, as to why they were not certainly considered in their correct perspective. It may be noticed that R&R plan, post-EC, loses its relevance, impact and very purpose. The purpose of an R&R plan is to put people displaced or ousted due to the project on notice and propose to them as to how their future is expected to be dealt with upon establishment of the project.

PUBLIC HEARING OR PUBLIC CONSULTATION:

81. The EIA Notification has different stages like categorization of projects, screening, scoping, appraisal and grant or refusal of EC. Screening, as indicated by the very language of the expression is to screen and scrutinize the application submitted by the NTPC in accordance with provisions of the EIA Notification. Scoping refers to the process by which the EAC or the State Level Expert Appraisal

Committee, depending upon the category of the project, would process the said application, prepare the TOR and submit a report, as contemplated under the said Notification.

82. Public hearing/public consultation is one of the most significant requirements which the authorities concerned are required to satisfy before an EC could be issued in accordance with law. The EIA Notification attaches a specific value and makes the public hearing/public consultation mandatory, non-compliance of which could have serious repercussions on the fate of the application for EC and the order thereupon. At this stage, we must clarify that public consultation and public hearings are not synonymous terms. However, the purpose of both of them is the same i.e. to provide due opportunity to the project-affected or the project-displaced persons to put up their grievances in anticipation of the project being established at the site in question. In terms of regulation 7 (III) (v) of the EIA Notification, it has been clarified beyond ambiguity that if the public agency or authority nominated, reports to the regulatory authority concerned that owing to the local situation, it is not possible to conduct public hearing in a manner which will enable the views of the local persons concerned, to be freely expressed, it shall report the facts in detail to the regulatory authority concerned, which may, after due consideration of the report and other reliable information, decide that the public consultation in the case need not include the public hearing. The public consultation is stated

to have two components, firstly a public hearing at the site or in its close proximity, district-wise and secondly, obtaining responses in writing from all other persons concerned having a plausible stake in the project or activity. Normally, both public hearing and public consultation are required to be complied with. However, as afore-noticed, there could be cases, of course as an exception, where it is not possible to hold public hearing and only public consultation may serve the ends for consideration of an application for EC.

83. Broadly speaking, public hearing is to provide an opportunity to the persons likely to be directly affected by the establishment of the project while the public response, as an ingredient of public consultation, would be from the persons who have some interest in the environmental aspects of the project, but may not even be directly affected persons.

84. At the public hearing, various affected persons would raise their grievances or objections to the project or activity which the NTPC is expected to answer and also provide due satisfactory resolution of the problems so posed. In the present case, various objections were raised by the persons/villagers affected by the establishment of the project. At this stage, we may notice the following objections which were raised on behalf of the farmers of Kudgi village by persons present:

(a) The total population of Kudgi, Telagi, Masuti and Golsangi villages, which are covered under the said project is nearly 50,000 and the power project is being established very near to the said villages. This will cause the noise pollution and will create ill-effects on the villagers.

(b) The coal used in the proposed project contains the sulphur and due to the continuous burning of the coal, there will be increase in temperature by 2 degree Celsius in the surrounding area by which the existing lands will become barren.

(c) The ash generated due to burning of the coal will fall on the crops in the surrounding area, especially on the leaves and will affect the chlorophyll pigment present in the leaves and interrupt the photosynthetic activity of the plants and crops, as a result of which the growth of the crops and plants in the area will be retarded.

(d) The ash generated after the burning of the coal will be disposed of in the form of slurry which percolates into the land and finally meets the water bodies and water sources like nalas, open wells, bore wells existing at the downstream of the project and get polluted.

(e) Kudgi is well known for its betel leaf crop since 100 years. The betel leaves are very sensitive and delicate. The ash particles falling on these leaves may destroy the entire crop.

(f) The availability of the water at the Almatti dam during the summer season is less than 1 TMC and the requirement of the water for the proposed project is 5 TMC. Under such circumstances, it is not possible to control the temperature by adopting latest water sprinkling technology.

(g) As per the rules and opinion of the scientists, such projects should not be established near the villages inhabited by the people and by violating the same, it is not fair to establish the same and is unacceptable as the authorities concerned have disturbed the will of the innocent farmers who are ignorant about the project.

(h) As per the Constitution, such project shall be established at the bank of the rivers or oceans whereas the said project is being proposed at the centre of the four inhabited villages.

(i) The project area mainly consists of irrigated lands and our national bird, peacock, existed on the bank of the lake area along with other birds and animals and the establishment of such project may vanish the generation of such species.

(j) The land acquisition notices served to acquire the land at the distance of about 50 ft. from the residential area may affect the women for their toilet and will also affect the collection and storage of the fodder for the domestic animals as these activities are carried out routinely and

will add to the unhygienic environmental conditions resulting in the spread of many diseases.

(k) The entire Kudgi village has to be shifted and the people will be forced to migrate to unknown places and will become the wanderers, thereby delinking their all the past memories, ancestors and cardiac relations that they had with their existing places. This type of activity will snatch the freedom, peaceful living in their choiced place and rights, as guaranteed by the Constitution to the citizens of India.

(l) Clarifications were sought on the motto of the proposed establishment of the 4000 mw coal based thermal power plant at the Kudgi village of Basavana, which is famous for cultivation of betel leaves.

(m) There is stiff opposition to the TPP all over and in every corner of the world, as it will be dangerous to the environment and cause great damage to bio-diversity of the area. It will also affect the terrestrial, aquatic and aerobic environment.

(n) The establishment of the TPP near Almatti dam will affect the dam. During rainy season, the ash slurry will be carried away by the storm waters and get deposited at the dam whereby the stored water at the dam cannot be utilised. About 4 to 6 ft. deep ash will get deposited in the river every year and it is not known which type of

technology will be adopted to de-silt the ash from the river.

(o) The major occupation of most of the families whose lands are being acquired is agriculture and horticulture. The approximate annual income per acre of land by cultivating the crops like betel leaf, onions, grapes and bananas etc. is about Rs.2 lakhs. Now such people are losing their lands and they have to migrate to other places like refugees and have to search for respectable means of livelihood and employment at different places, which is not possible.

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(p) Finally, all the assembled farmers shouted slogans against the MLAs, NTPC officials and Pollution Control Board and other officers present in the meeting and went away by completely opposing the power project. The Deputy Commissioner and the President, Environmental Public Hearing Committee, Bijapur, while addressing the meeting said that the appeals, suggestions, complaints and grievances of the farmers have been recorded through the audio and video and the same would be made into CDs and the proceedings of the meeting, as it is, would be sent to the Ministry of Environment and Forests for further action.

85. During its 36th meeting, held on 14th–15th November, 2011, the EAC, noticing the above objections, concluded as under:

> "The Committee noted that the NTPC have not submitted R&R for PAPs even though the project entails a large acquisition of private land by KIADB. It was observed that the sustenance of these poor villagers are based on the few acres of land either owned or working on the said land. It was therefore decided that a comprehensive R&R action plan with requisite details including financial parameters (for compensation, scheme for upliftment of marginalized section etc.) shall be submitted within four months.
>
> The Committee also discussed the issues raised in the Public Hearing and the responses made by the NTPC. The major issues raised were the plant being very close to Kudgi, Telagi, Masuti and Golsangi villages and the likely impact of noise and air pollutants; likely impacts on agricultural land and crops due to burning of coal and ash associated; ground water pollution due to ash slurry disposal; on betel leaf; due to drawal of water from Almatti dam; on peacock population; marginalization of population on account of land lost for the project; request for massive afforestation; compensation for land acquired; use of force to part with land etc. The NTPC also informed that there is no litigation pending with the proposed power plant in any courts.
>
> Based on the information and clarifications provided, the Committee recommended the project for environmental clearance subject to stipulation of the following specific conditions:
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> XXXXX XXXXX XXXXX
>
> (ii) Land for the power project shall be strictly as per latest CEA norms.

XXXXX XXXXX XXXXX

(xiv) A comprehensive R&R action plan with requisite details such as details of land losers and financial budget for compensation etc. shall be submitted within four months. The R&R action plan shall also include scheme for upliftment of marginalized section who are indirectly affected on account of dependence for their sustenance on the land not owned by them.

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(xvi) CSR schemes shall be undertaken based on need assessment in and around the villages within 5 km of the site and in constant consultation with the Village Panchayat and the District Administration and should also address other pertinent issues raised in Public Hearing. As part of CSR, employment of local youth after imparting relevant training, as may be necessary, shall be undertaken as committed."

86. From the above, it is clear that an appropriate R&R scheme was not available at the time of the public hearing. Also, the other objections raised at the public hearing were not properly answered during the public hearing. The Committee concluded that major issues had been noticed but it is evident that the nature and category of the land, location of monitoring stations, shifting of coal and deficiencies in the R&R plan were not dealt with in consonance with the TOR. The R&R plan, which was to be prepared within four months, in fact, had not been placed before the competent authorities at the time of consideration or even after the grant of the EC. The objections raised at the public hearing were intended to

bring to the fore the problems and difficulties which the affected persons were to face as a result of the establishment of the project which may be even beyond the environmental issues. The Public Hearing Committee is expected to hear and record its opinion so as to bring before the EAC the essence of the public hearing and providing pros and cons of the project in question. If this is not strictly adhered to, the EAC would be kept in the dark in relation to the actual position or ground realities at the site in relation to the project. This, besides being a legal flaw in the compliance with the EIA Notification, also deprives the affected persons of a valuable right.

87. It is now contended before us that there was no scientific basis submitted by the villagers to substantiate their apprehensions. This, to our mind, is a clear misappreciation of the scheme under the EIA Notification. Onus is not on the objectors to prove their objections by leading scientific evidence at that stage. It is the duty of the EAC to examine the worth of the objections raised and the consequences thereof. It was, in fact, for the NTPC to show that the various apprehensions of the objectors were not well-founded, and that the project is not likely to do any environmental damage or cause deprivation of the livelihood and income of the project-affected persons. The onus squarely lies upon the NTPC to bring the establishment and operation of the project within the ambit of balanced sustained development.

88. At this stage, we may refer to the importance in law and facts of a fair public hearing, as contemplated under the EIA Notification. In the case of *Utkarsh Mandal v. Union of India* [Writ Petition (Civil) No.9340 of 2009 and CM Application Nos.7127 of 2009 and 12496 of 2009], the High Court of Delhi held as under:

> "The requirement of a fair public hearing
>
> 28. The scope of the powers of judicial review of the High Court under Article 226 of the Constitution of India is limited to examining the decision making process and not so much the decision itself. The classical statement of law to this effect can be found in the decision of the Supreme Court in Tata Cellular Co. v. Union of India (1994) 3 SCC 651 (SCC, at p. 677-78)
>
> "77. The duty of the court is to confine itself to the question of legality. Its concern should be:
>
> 1. Whether a decision-making authority exceeded its powers?
>
> 2. committed an error of law,
>
> 3. committed a breach of the rules of natural justice, [WP (Civil) No. 9340/2009],
>
> 4. reached a decision which no reasonable tribunal would have reached or,
>
> 5. abused its powers.
>
> Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
>
> (i)Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii)Irrationality, namely, Wednesbury unreasonableness.

(iii)Procedural impropriety."

29. As far as the present case is concerned, this Court is concerned with the third ground of procedural impropriety. This in turn, on the facts of the present case, raises three distinct issues. The first concerns the requirement of making available the Executive Summary at least 30 days prior to the date of the public hearing and whether the failure to do so in the present case vitiates the environment clearance. The second issue reflects the legal requirement of compliance with the principles of natural justice. It touches on the aspect of bias in the functioning of the EAC. It is whether the fact that the EAC (Mines) was chaired by a person who was the Director of four mining companies himself impaired the fairness and credibility of its decision. The third issue reflects the aspect of procedural fairness and [WP (Civil) No. 9340/2009] the requirement of the administrative decision-making body to furnish reasons for its decision. The ultimate question is whether the non- compliance with any of the above procedural requirements vitiates the grant of environmental clearance to Respondent No.3.

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31. The purport of the above clauses is to make the public hearing a meaningful one with full participation of all interested persons who may have a point of view to state. The above clauses operationalise the de-centralised decision making in a democratic set up where the views of those who are likely to be affected by a decision are given a say and an opportunity to voice their concerns. This procedure is intended to render the decision fair and participative and not thrust from above on a people who may be unaware of the implications of the decision. In the above background, it is not possible to agree with the stand of the Respondents 1 and 3 that there is no requirement in terms of the above clauses to make available the Executive Summary of the EIA Report Project to the persons likely to be affected at least 30 days in advance of the public hearing. If their participation [WP (Civil) No. 9340/2009] has to be meaningful, informed and meaningful, then they must have full information of the pros and cons of the proposed project and the

impact it is likely to have on the environment in the area."

89. The authorities holding the public hearing have to fairly record the objections, the case of the project proponent and their reasoned views on the subject.

90. Reference can also be made to another judgment of Delhi High Court in the case of *Samarth Trust v. Union of India and Ors.* [Writ Petition (Civil) No.9317 of 2009] wherein while discussing what is the purpose of a public hearing contemplated under the environmental laws, it was held that "A public hearing is a form of participatory justice giving a voice to the voiceless (particularly to those who have no immediate access to courts) and a place and occasion to them to express their views with regard to a project." The nature and scope of a public hearing has to be participatory, objective and in accordance with the manner prescribed under the EIA Notification. It must give adequate notice for effective participation. Public hearing must be conducted in a disciplined manner, faithfully with video-recording done truthfully. Recording of the minutes of the public hearing must be fair.

91. Examined in the light of the above stated principles in the present case, the most serious objections are in relation to the category and nature of the land, absence of complete and comprehensive R&R plan, effects of the location of AAQ stations and source and quality of the coal, which find no

mention, much less appropriate discussion in the public hearing minutes.

92. Moreover, even in the recommendatory findings, these issues are conspicuous by their absence or have not been appropriately dealt with. Grant of EC is not only intended to lay down conditions with regard to such essential features of the project but also to ensure that appropriate remedy or relief is provided to the persons displaced by the project or whose lands are acquired. This undoubtedly has prejudicially affected the entire purpose of the public hearing and consequently the order passed thereupon.

RELIEF:

93. The above discussion on the various legal and factual aspects of the present case brings us to the last issue as to what relief can the Tribunal grant in the facts and circumstances of the present case. The defects in the process of grant of EC crept in right at the initial stages and have proceeded till the end. We have already held that there was an improper declaration in regard to the nature and category of the land acquired for the project. Furthermore, during the public hearing, there was non-declaration and non-disclosure of material factors like R&R scheme, source and quality of coal and location of AAQ monitoring stations. It had adversely affected the interests of the persons likely to be affected by the

project. The EAC, while recommending the establishment of the project, did not seriously dwell upon these very material issues and even permitted that the R&R scheme could be declared within four months of the recommendation. Despite this, R&R scheme was not presented even after the passing of the order of the EC. Thus there has been violation of the provisions of the EIA Notification and violation of the prescribed procedure. As opposed to this, the Tribunal cannot ignore the fact that huge public money has already been invested in the project, large scale acquisition has been completed and even majority of the land owners have been paid compensation. The basic development has taken place and contracts for establishment for the project have been awarded. Cancellation of the project and setting aside of EC in its entirety may result in wastage of substantial public funds as well as rendering the entire development project ineffective. The project, if properly completed with due protection in regard to environmental issues and the rehabilitation schemes, would help in improvement of socio-economic conditions of the area in question and the people living therein. It would also help in increasing the per capita income, as already noticed. The project would go a long way in uplifting the economy, the ecology and the environmental conditions of the area as well as providing adequate R&R scheme to the project-affected and displaced persons.

Economic growth has a direct nexus with the improvement in environmental measures.

94. While keeping in mind the precautionary principle and principle of sustainable development, we have to pass directions which will ensure compliance with all the conditions that may be imposed for protection of environment, ecology and prevention of pollution in the proposed order granting the EC. There has to be a definite and unambiguous R&R scheme in place before the project can be permitted to be fully established and completely made operational. Thus, while partially allowing this main application, we pass the following order & directions for their strict compliance by all concerned in the given facts and circumstances:

a) The order dated 25th January, 2012 is hereby remanded to the MoEF to pass an order granting or declining environmental clearance to the project proponent afresh in accordance with law and this judgment. Till then, the said order shall be kept in abeyance.

b) MoEF, in turn, shall refer the matter to EAC for its re-scrutiny and imposition of such conditions, as the expert body may deem fit and proper, *inter-alia* but primarily, in relation to R&R scheme, effects of improper disclosure in relation to nature and categorization of the land in question, providing of AAQ monitoring stations keeping in view the downward wind direction to ensure continuous adherence to the prescribed

standards of emission and providing of early warning system near the human settlements.

c) The EAC shall make its recommendations on all relevant matters of the proposed project, as it may consider necessary, whether or not specifically covered under this judgment.

d) Furthermore, EAC shall be well within its jurisdiction to recommend imposition of compensation or any other sum payable for causing environmental degradation, and/or for improper disclosure of facts in its application and non-compliance of the terms and conditions of the TOR, the EC, including non-timely furnishing of R&R scheme by the NTPC.

The authorities concerned, while considering the conditions to be imposed in relation to R&R scheme, shall include all project-affected persons in the R&R scheme, irrespective of the fact whether they have already received compensation or not, wholly or in part, or are still to be paid compensation for acquisition of their land, including the persons otherwise displaced.

e) The EAC shall visit the site in question, give public notice and hear the project-affected or displaced persons individually or in a representative capacity and then proceed to record its findings.

f) The EAC may impose such additional conditions to the order dated 25th January, 2012, as it may deem fit and proper,

unless the EAC comes to the conclusion that the project ought not to be granted EC.

g) The additional conditions shall be imposed in relation to environmental protection, providing of such anti-pollution devices, as may be necessary and particularly for complying with the R&R scheme so formulated, in terms of this order.

h) The entire above process shall be completed by the EAC within six months from the date of passing of this order.

i) During this period or till fresh order is passed by the MoEF, whichever is earlier, the project proponent shall maintain *status quo* as of today in relation to the project in question.

95. The application is disposed of with the above directions. However, in the facts and circumstances of the case, we leave the parties to bear their own costs.

Hon'ble Mr. Justice Swatanter Kumar
Chairperson

Hon'ble Mr. Justice U.D. Salvi
Judicial Member

Hon'ble Dr. G.K. Pandey
Expert Member

Hon'ble Prof. A.R. Yousuf
Expert Member

Hon'ble Dr. R.C. Trivedi
Expert Member

New Delhi
March 13, 2014