IN THE HIGH COURT OF SIKKIM AT GANGTOK
(Civil Extra Jurisdiction)

DATED : 14-10-2010

CORAM

HON'BLE MR. JUSTICE P. D. DINAKARAN, CHIEF JUSTICE

AND

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

WP(PIL) No.05 of 2010

Athup Lepcha,
S/o Late Chhala Lepcha,
R/o Passingdang Dzongu,
P.O. Passingdang,
P.S. Mangan,
North District, Sikkim. ... **Petitioner**

versus

1. The State of Sikkim,
through the Chief Secretary,
Government of Sikkim,
Gangtok.

2. The Secretary,
Land Revenue & Disaster Management Deptt.,
Government of Sikkim,
Gangtok.

3. The Secretary,
Forest Department,
Government of Sikkim,
Gangtok.

4. The District Collector,
North District,
Mangan,
Sikkim.

5. The Principal Chief Engineer-cum-Secretary,
Energy and Power Department,
Government of Sikkim,
Kazi Road,
Gangtok.

6. Union of India,
through the Secretary,
Ministry of Environment and Forest,
Government of India,
Parayavaran Bhawan,
C.G.O. Complex,
Lodhi Road,
New Delhi - 110 003.

7. The Managing Director,
Sikkim Power Development Corporation Ltd.,
31A National Highway,
Gangtok,
Sikkim.

8. The Managing Director,
Athena Projects Private Limited,
119, Jor Bagh,
New Delhi - 110 003.

9. The Managing Director,
Teesta Urja Ltd.,
119, Jor Bagh,
New Delhi - 110 003. ... **Respondents**

For Petitioner : Ms. (Dr.) Doma T. Bhutia, Ms. Mary Rai and Mr. Suran Rai, Advocates.

For Respondents No.1 to 5 and 7 : Mr. A. Mariarputham, Advocate General, Mr. J. B. Pradhan, Additional Advocate General with Mr. S. K. Chettri, Assistant Government Advocate.

For Respondent No.6 : Mr. Karma Thinlay Namgyal, Central Government Advocate.

For Respondents No.8 & 9 : Mr. Jayanta Mitra, Senior Advocate with Mr. Tarun Johri and Ms. Sunita Pradhan, Advocates.

JUDGMENT

Wangdi, J.

This is a writ petition filed in the form of a Public Interest Litigation (in short "PIL") seeking to challenge the ongoing 1200 MW Teesta Stage III Hydroelectric Project (in short "Project") by M/s. Teesta Urja Ltd. (in short "TUL"), respondent no.9, in Chungthang and Mangan Sub-Divisions of North Sikkim, *inter alia*, for having violated the provisions of Land Acquisition Act, 1894, (in short "LA Act") in acquiring Reserve Forest Land for the Project, commencing with the Project work without obtaining the necessary clearances under the Forest (Conservation) Act, 1980, and the Environment (Protection) Act, 1986, by the respondents.

2. The petitioner is a Member of the Lepcha Tribal Community and claims by profession to be an agriculturist and a social worker working for the benefit and upliftment of the people in general and is also a Member of a forum called Affected Citizens of Teesta (in short "ACT"), an organization said to be working for the cause of

environment protection and preservation of forests situated in the villages of the North District of Sikkim. The respondents no.1 to 5 are the State of Sikkim represented by the Chief Secretary and other authorities under the Government of Sikkim. The respondent no.6 is the Union of India through the Ministry of Environment and Forest (in short "MoEF") and the respondent no.7 is the Managing Director, Sikkim Power Development Corporation Ltd. (in short "SPDC") while the respondents no.8 and 9 are the Managing Directors of Athena Projects Private Limited and TUL respectively.

3. In the writ petition, the petitioner has primarily raised the following issues:-

(a) That in order to execute the Project an Agreement was entered into between the Energy and Power Department, Government of Sikkim, respondent no.5 and M/s. Athena Projects Private Limited and TUL, respondents no.8 and 9, in Clause 3.3(a) of which it had been provided that the Government of Sikkim would acquire lands in association with SPDC, respondent no.7, at the request and expense of the company in accordance with the LA Act. This was not permissible under the LA Act;

(b) That the aforesaid Agreement dated 18-07-2005 had not been published in an Official Gazette as is mandatorily required under Section 42 of the LA Act rendering the entire process of acquisition of land illegal;

(c) That the urgency provision in Section 17(1) of the LA Act was invoked in order to evade the provisions of Section 5A depriving the land owners of their right of raising objections to the acquisition and that the mandatory requirements under Section 4 of the LA Act was not complied with;

(d) That the declarations made under Sections 6 and 9 of the LA Act have been issued arbitrarily and mechanically without application of mind in violation of the laid down procedure under the LA Act and the Rules made thereunder;

(e) That the Power Project in question has been taken up in total disregard of the Proclamation dated 30-08-1956 and notification no.3069/OS dated 24-03-1958 by which entry of non-indigenous people into the North District of Sikkim is strictly prohibited;

(f) That the notification no.665/PS dated 27-03-1954 which bans the entry of all traders/agents into Dzongu area has also been ignored and, also that Dzongu protected area within which construction activities of the Projects are being carried on, falls within the Restricted Khanchendzonga Biosphere Reserve Area;

(g) That the acquisition of the land being for TUL, a private company, and funded by TUL is in violation of Part VII of the LA Act, and does not fall within the meaning of "public purpose" as defined under Section 3(f) of the LA Act;

(h) That the entire acquisition was bad in as much as the power under Section 17(1) was invoked arbitrarily without jurisdiction as the Protected Forest Lands were acquired without obtaining necessary Forest and Environment Clearance from the MoEF;

(i) That the right to livelihood of the people under Article 21 of the Constitution of India had been violated due to diversion of the Protected Forest Land resulting in environmental pollution.

Cardamom, the only cash crop of the people and main source of their income has been adversely affected thereby;

(j) That leasing of the land to a private company, namely, TUL, for use of the Project has resulted in causing dust and water pollution and destruction of the adjoining forests, environment and ecology of the area depriving the people of the right to life enshrined in Article 21 of the Constitution of India rendering the lease deed in respect of the land as void.

(k) That the lease deed is also bad for the reason that the land let out on lease falls within the Khanchendzonga Biosphere Reserve and protected areas of Khanchendzonga National Park;

(l) That the conditions laid down for Catchment Area Treatment (in short "CAT") Plan prescribed in the Environmental Management Plan (in short "EMP") report have not been complied with during the execution of the Project works;

(m) That the Environmental Clearance given in respect of 83.0405 hectares of Forest Land of North District

being vague, devoid of demarcations, plot numbers and blocks, enables the respondent no.9 company to encroach upon Forest Land at will;

(n) That none of the conditions laid down in the 'Provisional Clearance' under the Forest (Conservation) Act, 1980, including the mandatory Compensatory Afforestation have been complied with;

(o) That the entire exercise undertaken by the respondents for exploitation of the biodiversity condition is in contravention of the provisions contained in the Biological Diversity Act, 2002;

In the above circumstances, it has been prayed by the petitioner, *inter alia*, for issue of a writ of mandamus declaring the entire exercise of land acquisition by the Government of Sikkim as being illegal and in contravention of the LA Act and other statutory provisions, permanently restraining the Government from taking any action in furtherance of the impugned notifications, and for cancellation of the Project for violation of the Environmental Clearance and EMP for preservation of the Biosphere Reserve Areas and the Khanchendzonga National Park.

4. In the counter-affidavit filed on behalf of all the State-respondents through the Chief Secretary, for and behalf of the other authorities, namely, respondents no.2, 3, 4, 5 and 7, all material allegations set out in the writ petition have been categorically denied. At the outset, they have raised the following preliminary objections:-

(i) That the land measuring about 121.1676 hectares notified for acquisition under Sections 4(1) read with 17(1) of the LA Act for the purpose of development of the Project has already been acquired, compensation paid therefor and possession already taken over. Therefore, the acquisition proceedings stand completed. By the awards dated 25-07-2007, 03-12-2007, 16-12-2008 and 24-12-2008, compensation were disbursed to the claimants in terms of Section 11 of the LA Act except for an area measuring 2.4980 hectares being a portion of 3.8170 hectares (notification dated 24.12.2008 relates to 3.8170 hectares). Under such circumstances, the land in question stands vested completely in the Government free from all encumbrances under Section 16 of the LA Act leaving no scope for questioning the validity of the acquisition proceedings;

(ii) That having regard to the fact that the preliminary notifications for acquisition of the land had been issued in the year 2007-08 and the award passed on 25-07-2007, 03-12-2007 and 16-12-2008 and that the compensation for the acquired land disbursed and possession thereof taken by the Government, followed by the SPDC leasing them out to the respondent no.9 vide lease dated 20-03-2008 and 26-07-2008, and the work on the Project having progressed to an advanced stage which now is going on in full swing, the writ petition is clearly delayed and the petitioner was guilty of gross delay and laches.

(iii) That the petitioner is guilty of suppression of material facts in as much as it has not been disclosed in the writ petition that in an appeal filed by the ACT of which the petitioner is the President, before the National Environmental Appellate Authority (in short 'NEAA') under the National Environmental Appellate Authority Act, 1997, against the grant of Environmental Clearance to the Project in question, they had raised the very same issues contained in the present writ petition, i.e., the issues on the question of seismicity, Khanchendzonga National Park,

Earthquake, Public Hearing, Biodiversity, Faulty Environment Management Plan, Environment Impact Assessment Plan and that, the said appeal had been dismissed by the NEAA . The writ petition, therefore, deserves to be dismissed on this ground alone as no relief in equity can be granted in his favour, particularly in a PIL.

(iv) The State Government of Sikkim having agreed under the Implementation Agreement dated 18-07-2005 to provide land for the Project to the respondent no.9, TUL, the provisions of Sections 39 to 42 of the LA Act would have no application being covered by Section 43 of the said Act. Under such circumstances, all issues with regard to the alleged illegality of the land having been acquired for a private company by the State Government would be rendered redundant and irrelevant.

(v) That the State Government holding 26% of equity share capital in the respondent no.9, TUL, is a - constituent of the said company in terms of the Implementation Agreement dated 18-07-2005 and, therefore, it would be incorrect to state that the cost

of the acquisition of the land has been funded wholly by a private company.

5. That apart from the above forming substantial part of their reply, the State respondents have denied the allegations of violation of the provisions of the Forest (Conservation) Act, 1980, the Wildlife (Protection) Act, 1972, the Environment (Protection) Act, 1986 and the Biological Diversity Act, 2002. It has been stated that all requirements under those statutes as stipulated by the MoEF have been fully complied with before implementation of the Project work, a fact that was also considered by the Central Empowered Committee (CEC), a body constituted under the Orders of the Hon'ble Supreme Court, and on its recommendations the Hon'ble Supreme Court, vide its Order dated 28-09-2007 had directed the MoEF to confirm compliance of the Rules by the respondent and that only after such confirmation, the MoEF vide letter dated 02-11-2007, granted permission for diversion of Forest Land for the Project. The respondent no.9 commenced with the work on the Project only thereafter.

6. It has been categorically denied by them that Reserve Forest Land or Forest Land or Protected Forest

Land/Khasmal Land had been leased out by the Government of Sikkim to the respondent no.9. The land alleged to have been leased out to the respondent no.9 by the SPDC, respondent no.7 for implementation of the Project work, comprised of only the acquired private land and so far as the Forest Land is concerned it was diverted for its use for non-forest purposes in terms of the permission granted by the MoEF and that the ownership of such Forest Land as well as the private land acquired under the acquisition proceedings remain under the State-respondents.

7. That the conditions stipulated by the MoEF under the Environment (Protection) Act, 1986 and the Forest (Conservation) Act, 1980 have been meticulously complied with, a fact that has been confirmed by the Multi-Disciplinary Monitoring Committee (in short "MDMC"), a body formed by the MoEF, during their site visit on 09-03-2010. In the above premises amongst others, it has been stated that the writ petition being clearly not maintainable deserved to be dismissed.

8. The respondent no.9, TUL, in their counter-affidavit, has raised substantially the same preliminary

objections as raised by the State-respondents and have dealt with the various allegations contained in the writ petition reiterating the stand of the State-respondents that none of the laws had been violated by them as alleged in the writ petition. It has been stated that the writ petition has been filed by the petitioner for redressal of his political motives and had not approached the Court *bona fide*. That the petitioner is an Ex-MLA from the Project area who seeks to attain political mileage by instituting the present proceeding in the garb of PIL.

9. It has further been stated that in view of the advanced stage of the Project where the respondent no.9 has spent Rs.3083 crores out of the envisaged cost of Rs.5705.055 crores, after having undertaken major mitigative measures stipulated by the MoEF and major part of the work having been completed having regard to the fact that time is the essence of the Agreement requiring the completion of the Project by 2011-12, the respondent no.9 was now at a disadvantageous position and that any interference in the progress of the work at this juncture cannot put the clock back resulting in immense public loss in terms of revenue, employment opportunities to the people, benefits accruing from the social upliftment

programmes being undertaken by the respondents, etc. and, therefore, the writ petition is liable to be dismissed on this ground also.

10. The respondent no.6, the Secretary, MoEF, Government of India, in his counter-affidavit has dealt with the issues pertaining to the allegations of violation of the Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986 stating that the Ministry had conveyed the mandatory Environmental Clearances under those Acts for development of the Project after due consideration of all relevant aspects by following the laid down procedures. It is stated that the Environmental Clearance and the Forest Clearance issued by the MoEF contain several environmental safeguards, conservation measures and conditions for compliance by the Project developer while executing the Project work. As per the report of the MDMC, constituted by the MoEF for proper implementation of the conditions stipulated in the Environmental Clearance letter after their site visit on 09-03-2010, it has been stated that the respondent no.9 had made encouraging attempts to follow the terms and conditions stipulated in the letter granting the Environmental Clearance.

11. It is of relevance to note here that the case was fixed for final hearing on 06-09-2010 in terms of the Order of this Court dated 26-07-2010. On 06-09-2010 when the case came up for hearing, adjournment was sought for on behalf of the petitioner on the ground of the inability of a senior counsel from Delhi engaged to conduct the case in appearing on that day. Accordingly, the case was adjourned to 15-09-2010 on which day the matter was finally heard.

12. Before us, Dr. Doma T. Bhutia, Advocate, appearing on behalf of the petitioner, sought permission to press as preliminary submission on the question relating to restrictions imposed on entering into the North District of Sikkim. It was submitted that notification no.665/PS dated 27-09-1954 (Annexure 13 to the writ petition) entry of traders/agents into Dzongu area were strictly banned and by the Proclamation dated 30-08-1956 (Annexure 11) no outsider was permitted to enter into the North District without a valid permit issued by the Government. These laws being pre-merger laws are protected under clause (f) of Article 371F of the Constitution of India continues to be

laws in enforce. Therefore, permitting the Project within the restricted area specified in those laws was illegal.

13. That the respondent no.9 is a company registered under the Companies Act, 1956, and as per the recent amendment brought to the Registration of Companies, Act, Sikkim, 1961, it was essential for it to have been enlisted under the Registration of Companies, Act, Sikkim, 1961, before engaging in business in the State. This having not been complied with, the activity of the respondent no.9 company in carrying on with the Project is illegal. The learned counsel drew the attention of this Court to the following portion of the Registration of Companies (Amendment) Act Sikkim, 2007:-

> "2. In the Registration of Companies Act Sikkim, 1961, after clause (d) of sub Section (ii) of Section 2, the following shall be inserted, namely:-
>
> "(e) Notwithstanding anything contained herein, any company registered under Companies Act, 1956, shall apply for enlistment/identification under the Registration of Companies Act Sikkim, 1961 for the purpose of registration/ entry as a company under the Registration of Companies Act Sikkim, 1961."

14. By making reference to Annexures 6 and 6A being the notice under Section 4(1) and declaration under Section 6 of the LA Act respectively, it was submitted that from the very preamble appended thereto it would be quite

evident that the land is being acquired for TUL, a private company, by the SPDC, the respondent no.7, entirely funded by the said company. Secondly, from the declaration under Section 6 of the LA Act (Annexure 6A to the writ petition), it also becomes quite clear that amongst the land that are being acquired, are also large tracts of Forest Land. It has been stated that as Forest Land cannot be acquired under the LA Act and any user of such land for non-forest purpose being not permitted under Section 2(2) of the Forest (Conservation) Act, 1980, the acquisition was illegal and that, even otherwise, acquisition of land for a private company was impermissible under Part VII of the LA Act. As per the learned counsel, the Agreement entered into between the State-respondent and the respondent no.9 company having not been published in the Official Gazette, it was invalid and that any action taken thereunder would be a nullity and non *est*.

15. It was next contended that the acquisition of a total area of 64.147 hectares of Forest Land situated in Shipgyer, Ramam, Chungthang and Theng blocks under the Chungthang Sub-Division and Shinghik Sentam, Kazor and Salim-Pakyel blocks under the Mangan Sub-Division, for the company and its consequent dereservation were in gross

violation of the Forest (Conservation) Act, 1980, the Wild Life (Protection) Act, 1972, and the Environment (Protection) Act, 1986, having been done without the prior approval of the MoEF as required under those laws. The fact that the clearance from the MoEF had not been obtained is revealed by the letter dated 04-08-2006 (Annexure 19) issued by the MoEF, Government of India, respondent no.6, granting Environmental Clearance which was subject to the strict terms and conditions to be complied with. It is submitted that those terms and conditions had not been complied with and that respondents have carried on with the Project illegally despite such infraction of the mandatory conditions.

16. It was further submitted that from the letter dated 02-11-2007, Annexure R3, approval granted by the MoEF, respondent no.6, was an approval only in principle permitting diversion of 83.0405 hectares of Forest Land subject to fulfillment of mandatory condition and that it was only on those conditions being fulfilled was the final approval to be accorded by the MoEF. However, as per the petitioner, the respondents proceeded to commence with the Project works without waiting for the final approval in gross violation of the Forest (Conservation) Act, 1980, and

is an affront to the authorities thereunder. The learned counsel referred to Clauses 4.2, 4.3 and 4.4 of the Forest (Conservation) Act, 1980, Rules and Guidelines, which are reproduced below for convenience:-

> **"4.2 Two Stage Clearance of Proposals**
>
> Forestry clearance will be given in two stages. In 1st stage, the proposal shall be agreed to in principle, and after receipt of compliance report from the State Government in respect of compliance of the stipulated conditions regarding transfer and mutation of non-forest area identified for compensatory afforestation, if any, and transfer of funds in favour of Forest Department, etc., formal approval under the Act shall be issued.
>
> **4:3 Anticipatory Action by the State/UT Governments**
>
> Cases have come to the notice of the Central Government in which permission for diversion of forest land was accorded by the concerned State Government in anticipation of approval of the Central Government under the Act and/or where work has been carried out in forest area without proper authority. Such anticipatory action is neither proper nor permissible under the Act which clearly provides for prior approval of the Central Government in all cases. Proposals seeking ex-post-facto approval of the Central Government under the Act are normally not entertained. The Central Government will not accord approval under the Act unless exceptional circumstances justify condonation. However, penal compensatory afforestation would be insisted upon by the MOEF on all such cases of condonation.
>
> **4.4 Projects Involving Forest as well as Non-forest lands**
>
> Some projects involve use of forest land as well as non-forest land. State Governments/project authorities sometimes start work on non-forest lands in anticipation

> of the approval of the Central Government for release of the forest lands required for the projects. Though the provisions of the Act may not have technically been violated by starting of work on non-forest lands, expenditure incurred on works on non-forest lands may prove to be infructuous if diversion of forest land involved is not approved. It has, therefore, been decided that if a project involves forest as well as non-forest land, work should not be started on non-forest land till the approval of the Central Government for release of forest land under the Act has been given."

Referring to Clause 4.2, it was submitted that the respondents had proceeded with the Project without waiting for the second stage clearance in gross infraction of the terms of the Central Government and Clauses 4.3 and 4.4 of the guidelines referred to above.

17. It may be noted that the learned counsel for the petitioner before opening her arguments submitted a written argument which was taken on record. However, during the course of the hearing before us, her submissions were restricted only to what have been set out above. It is also of relevance to note that in paragraph 2.2(iv) of his rejoinder to the counter affidavit of the respondents no.8 and 9, the petitioner has specifically pleaded that "the issue of environment clearance has not been challenged in the present petition which only argues for proper implementation of the terms and conditions laid down by

the MoEF in Environment Clearance dated 4th August, 2006" thereby narrowing down the scope of the written petition. However, in the interest of dispensing with complete justice, we have deemed it appropriate also to consider all his contentions including those set out in the written argument that were not placed before us. For the sake of convenience, the written arguments are reproduced below in verbatim:-

"WRITTEN ARGUMENT ON BEHALF OF THE PETITIONER.

The humble submission of the above named petitioner MOST RESPECTFULLY SHEWETH:-

I. ISSUES

1.1. This case arises from the impugned Notification challenge on following accounts. (Anx-6 to 9-B, pp- 101-123)

A. PRELIMINARY

i)	27th of Sept. 1954	Govt of Sikkim strictly banned the entry of traders to the District North Sikkim (Anx - 13- pp-129)
ii)	30th/08/1956	As per the proclamation of the then Maharaja required permit to entry. (Anx-11, pp-126).

B. Kanchenjunga National Park (Protected Area).

1.2. a). 26th August, 1977 (Anx- 25-A, pp- 196) KNP declared by the State Govt.

b) 19th May, 1997 (Anx-25-B, pp-197) KNP Core Zone expended from 850 sq. Km to 1784 sq.kms.

c) 7th Feb, 2000 (Anx-25,pp-192) BR (Biosphere Reserved) Areas 2619.92 sq.km. by the MoEF

d) MAP of KNP declared as protected Areas. (Anx-25-C,pp-199).

C. SPDC company & TUL Company.

i) 16/12/1998 SPD company registered.

ii) 16/06/2010 Ref No. 16(341) LD/2007/950 (Anx-P-VIII, PP- :
State has not yet issued enlistment to TUL Company as required under Registration of Companies Act, Sikkim 1961.

D. Land Acquisition

Dates

a) **19th Oct, 2005** (Anx-2, pp-95) : TUL company letter to Secretary, E&P Deptt, Govt. of Sikkim for the requirement of forest and pvt. Land 161 hec for Teesta-Stage-III at Chungthang.

b) **14th Nov, 2005** (Anx-4 pp-98) Chief Engineer (T)P & E wrote to D.C. to initiate joint inspection to acquire both Forest and private lands for TUL Company.

c) **8th of April, 2007** (Anx-14, pp-130 w.p.) public objection against land acquisition for the said Project Stage-III HEP at Chungthang.

d) **05.03.2007**, No.**6**/301/LR&DMD(S), (u/s-4(1)) **[Anx-7**, pp-110-111 w.p.**]**

e) **30.03.2007** No.**8**/832/II/ LR&DMD(S) (u/s-4) **[Anx-6**, pp-101-103 w.p.**]**

f) **20.06.2008** No.**39**/301/II/LR&DMD(S), (u/s-4 (1) **[Anx-8**, pp-115-116 w.p.**]**

g) **24.12.2008** (u/s-4 (1) **[Anx-9**, pp-120-121 w.p.**]**

h) **22/05/2007** No. 15/301/LR & DMD(s) (declaration u/**s-6) [Anx-7-A,** pp-112-113 w.p.**]**

i) **27/08/2007** No.23/832/II/LR & DMD(S) - do - **[Anx-6-A, pp-104-107 w.p.]**

j) 25.09.2008 No.73/301/II/LR & DMD(s) -do- **[Anx-8-A,pp-117-118]**

k) 03/08/2009 No.38/301/II/R&DMD (S) -do- [Anx-9-A, pp-122]

l) 3rd July, 2007-Notice u/s-9 [nx-7-B.pp-114 w.p.]

m) 13th Nov, 2007 - do- [Anx-6-B, pp-198]

n) 13th Nov, 2008 - do- [Anx-8-B, pp-119]

o) 12th Feb, 2010 - do- [Anx-9-B, pp-123]

E. COMPENSATION OF PVT & FOREST LANDS.

i) **Form "A" Appendix '1' Rule-3** (Anx-3, pp-97) acquisition of land by TUL Company as proposed areas both of forest and pvt lands 72.569 hec Mangan Sub-Division & 95.5296 ha at Chungthang sub-division and entire compensation shall be borne by TUL Company (Respondent No.9).

ii) 31st May, 2008 : state entire cost of compensation paid by TUL [Anx-15, pp-131 -135 w.p.]

iii) 1st of July, 2008 [Anx-16, pp-136-137] states entire Compensation paid by TUL Company.

iv) 3rd July, 2009 (Anx-17, pp-138-139] compensation paid by TUL Company.

v) 30th January, 2010 (Anx-18, pp-140 w.p.) compensation amount paid by TUL Company.

II. SUBMISSION ON FACTS:

2.1. As reported by the State Respondent No. 3 in their own documents viz 2009 News letters **[Anx-26,pp- .200 to 204]** that the State of Sikkim is tiny Himalayan State is ecologically sensitive & fragile. Further states that rich wetlands has been the attraction for several hydro power Project and at the rate of diminishing water resources, in decades to come, Sikkim may no longer hold any of these hydro Project at all.

The report further states that "change in the water flows in rivers originating in the Himalayan region would adversely affect the ongoing hydel power station".

2.2. 30th August, 1956 **"proclamation"** of the then Chogyal protected under **Article-371F (k) of the Constitution** that the North Sikkim in particular Chungthang, Lachen, Lachung & Dzongu are restricted areas due to strategically sensitive as it is boarder areas shares it boundary with China and inhabited by the primitive tribes Lepcha and Bhutia tribes others are restricted from entering to the above said areas.

Kindly Note: **[Anx-11, pp-126-127, Anx-12, pp-128, Anx-24-C, pp188-191 w.p.].**

L.A. Act, 1894.

2.3. The following points may be noted:-

(i) as it clearly laid down that if the land is acquired for **"PUBLIC PURPOSE"**, the costs of acquisition for payment of compensation has to be paid wholly or partly out of **'Public Revenue'** or some fund controlled or managed by a local authority as held in the case of case of **Jhandu Lal vs State of Punjab**, reported in **AIR 1961 SC 343. Viljibhai vs State of Bombay** reported in **AIR 1963 SC 1890**, "entire compensation was paid out of the fund of the company; the acquisition would be bad in law." Public purpose could not have been declared under section-6,

(ii) **Form "A" Appendix '1' Rule-3 (Anx-3, pp-97)** acquisition of land by TUL Company as proposed areas both of forest and pvt lands 72.569 hec Mangan Sub-Division & 95.5296 ha at Chungthang sub-division and entire compensation shall be borne by TUL Company (Respondent No.9).

iii) **31st May,2008 : [Anx-15, pp-131 -135 w.p.]** states entire cost of compensation paid by TUL

iv) **1st of July, 2008 [Anx-16, pp-136-137]** states entire Compensation paid by TUL Company.

(v) **3rd July, 2009 (Anx-17, pp-138-139]** compensation paid by TUL Company.

(vi) **30th January, 2010 (Anx-18, pp-140 w.p.)** compensation amount paid by TUL Company.

(v) Rule-4 of company Rules, 1963 prohibit the State Government from making declaration u/s-6 in the case land is acquire for private company.

(vii) PUBLIC PURPOSE link with the Environment, right to protest as phrase person interested mean all persons rights

(viii) **The Counter Affidavit (pr. 4 and 5 pp. 14 -18)** does not speak of any contribution other than 26% equity in the Company. This is not a contribution to the Project for which the lands both the pvt and forest are acquired.

(ix) u/s-17 (1) & (4) on the plea of " URGENCY" to deprived the fundamental statutory rights u/s-5-A to file objection. It is apparent that urgency clause is invoked to evade sec-5-A

(x) No materials for consideration to dispense with sec. 5 'A' and no justification to evade sec. 5 'A' it was done in order to acquired illegally the forest land admeasuring 64.147 ha for company TUL invoked in colourable exercise of power.

(xi) on 24.12.2008- notification u/s-4 was done (whereas

(xi) on 03.08.2009- notification u/s-6 was done and

(xiii) on 27.01.2010 notification u/s- 9 is recently issued and

(xiv) 12/02/2010 objection if any, was called for u/s-8 LAAct. This by itself negates the exercise of power u/s-17(4) by which inquiry u/s-5-A was waived off.

2.4. Forest Clearance

a) **dt.27/08/2007** No.23/832/II/LR & DMD(S) declaration u/s-6.**[Anx-6-A, pp-l04-107 w.p]** acquired **forest land** of Chungthang & Shipgyer of North Sikkim are not denied by the State Respondents and the Respondent Companies.

b) **22/05/2007** No.15/301/LR & DMD(s) (declaration u/**s- 6) [Anx-7-A,** pp-112-113 w.p.] acquired **forest lands** from the Blocks of Singhik, Sentam, Kazor, & Salim Pakyel at North Sikkim are also not denied both the State Respondents and the Respondents companies.

[Kindly note: para-38, pp-31 of w.p. admitted by companies at their para-38, pp-437 of their counter affidavit with regards for forest lands of 64.147 ha acquired under L.A.Act,].

Note: Forest lands of 64.147 ha acquired in violation of sec-2 of FCA, 1980 without prior approval from MoEF of GoI

c) **dt.3rd June, 2009-[Anx-20,pg-146 w.p.]** clearly shows that no approval was ever sought from the Ministry with regard to the 64.147 ha of the forest land of which have been acquired vide thus this acquisition is completely illegal.

d) dt. 4th August, 2006 [Anx-19, pp-141 w.p.] clearly states FOREST CLEARANCE is yet to be obtained.

Kindly Note: -Statements showing the payment of compensation of Khasmal forest land of 64.147 ha u/s-17(4) of L.A.Act, 1984 [Anx-P-IX, pp-878 of rejoinder of petitioner & Note sheets at page No.924 of same rejoinder.]

Kindly Note:-Khasmal /Khasland is a forest land u/s-2 (i) of The Sikkim Forests, Water Courses and Road Reserve (Preservation and Protection) Act, 1988.

e) 2nd /11/2007 (Anx-30, pp-235 w.p.) 83.0405 of forest lands is in principal approval but not the final forest clearance.

f) <u>Application and approval</u>

i) **dt. 27.11.2006 (Anx-R-7, pp-609 of c.aff. of company)** made application to Forest Department (Respondent No.3) for the permission of diversion of 83.0405 forest land from MoEF.

ii) dt. 13-12-2006 Forest Deptt. submitted an application for proposal for the diversion of forest land of 83.0405 of forest land to non forest purpose u/s-2 FCA, 1980.

iii) 2nd Nov, 2007 is only the in principle approval from MoEF. (Respondent No.6).

Hence in principal approval or clearance is not final clearance and therefore pre-emptive that the final clearance will be given is malafide action on the part of the State Respondents and the Respondent company. (TUL).

iv) **1st of January, 2008.[Anx-B, pp-706 of c.f. of company]** states that Project construction work stared.

g) <u>Guidelines on FCA, 1980 & Rules,</u>

I) **4.2 of the** guidelines clearly laid down two stages of proposals First proposal shall be agreed in principle and after compliance of the stipulated terms and conditions for compensatory afforestation if any, transfer of funds, in favour of forest dept etc formal approval under the Act shall be given issued.

II) **4.3. of the guidelines:** Anticipatory action is neither proper nor permissible under the said Act.

III) **4.4. of the guidelines;** Project involving Forest as well as Non-forest lands work should not be started on non-forest land till the approval central Govt.

2.5. **<u>Wildlife</u>** As far as the National Park is concerned, the following should be noted;

(i) The Kanchenjunga National Park was declared on 19 May 2007 **[see Writ Petition pp.197}.**

(ii) The periphery and biosphere reserved were declared on 7 February 2007 **[see Writ Petition pp.182]**

(iii) It has been laid down that environmentally inimical activity should maintain a distance from the National Park.

(iv) And that the Project areas fall within the Biosphere reserved forest areas i/c buffer zone which is admitted by the answering company respondent in para-4 at pg 444 of their counter affidavit.

(v) **28th June, 2006 summary** report of 44th meeting of Expert Committee admitted the facts at **<u>Anx-R-17, pp-697</u>** of c.f. company **"Project site is within the buffer zone of biosphere reserved"** and further report **"regarding the impact on wild life during the construction to be submitted".**

(vi) **dt. 2/06/2006 [Anx-20,pp-713 c.f. company]** also reflects that "Project site is located near KNP so sufficient protection measures in terms of strengthening the existing man power" and further more states that "both lachen & Lachung rivers are the main habitat of the many fishes."

(vii) **Also state in the same letter dt.2/06/2006 at pp-715** at point-3 **"due to the submergence, the flora and fauna of the area is likely to be depleted forever.**

(viii) **Dt.18/02/2010 [Anx-18,pp-700 of c.f. company]** TUL company recently submitted the application to MoEF (Resp. No.6) for necessary clearance of NBWL

(ix) 30-4-2010 (Anx-P-II.pp-1026 of rejoinder to company] MOEF suggest to obtain clearance from the Steering Committee of National Board for Wildlife.

2.6. **<u>Hot-Spot of Bio-diversity:</u>**

a) State of Sikkim is considered as one of the Hot Spot of Biodiversity and it has been exhibited that numbers of medical plant & Herbs are found in the forest lands which is acquired for the Project. **(Report on Hot spot diversity are marked and annexed as Anx-P-I, pp 987-1025 of rejoinder to company).**

b) As far as the biodiversity is concerned it is not denied that biodiversity is affected.

Kindly Note: The following exhibits have not been challenged and are admitted: **{Anx-25, pp-192-195, Anx-25-A, pp.196-198, Anx-25-C, pp -199, Anx-26, pp.200-204, Anx-28 colly, pp.213-221} &** News letter -2009 (anx-26, pp-202 clearly mentioned that Sikkim may longer hold any of these Hydro-Project".

c) Due to mindless blasting and other activities without prior approval or clearance viz, Forest clearance, Environment clearance, wild life clearance etc.

Kindly note: **Anx-28 colly, pp-213 - 221 w.p.) Page-1021 Sikkim** Express report (rejoinder to Company) of death of endangered species

Kindly Note; **Anx-P-III, pp-1028** report of Department of Mines, Minerals & Geology, govt. of Sikkim reported damages caused by Stage-III HEP under construction of TUL Company.

Local News paper report-[Anx-P-IV pp-1040] damage caused by Stage-III HEP at Chungthang under TUL Company.

CAG report- Anx-P-V, pp-1062 clearly states the Compensatory Afforestation, CAT Plan, Wild life preservation need to implemented simultaneously.

dt. **21st of April, 2009** summary report of 25th meeting of Expert Appraisal Committee (EAC) (Anx-P-VI pp-1152 Sociocultural **impact on indigenous tribal community.**

2.7. Spending of large amount of money cannot be a defense for violation of all the mandatory statutory provisions, violation of rights of poor farmers and environmental degradation. These cannot be compensated in terms of money. It is not only the people but also the environment, wildlife and biodiversity which have been adversely affected by the Project.

SUBMISSION ON LAW:

I. On the Environment

1.1. The parameters under which environment decisions have to be made are indicated in various decisions of the Hon'ble Supreme Court.

i.) The Precautionary Principle an Polluter Pay Principle with lexical priority to the former. -

Vellore (1996) 5 SCC 647 at pr-10-20.
Jagannathan (1997) 2 SCC 87 at pr.49

ii) The principle of non-toleration of infringement and creating a positive power coupled with a duty to implement environment enhancing law and policy.

Indian Enviro (1996) 5 SCC 231 pr.26
Jagannathan (1997) 2 SCC 87 at pr.52 p-148 (duty to implement precautionary and polluter pay principle.)

iii) The principle of public trust in the environment.
Kamal Nath (1997) 1 SCC 388 at pr. 22-38.

iv) The Principle of inter-generational equity.
Ganesh Wood (1995) 6 SCC 363 at pr.36-42 esp. 42.
A.P. Pollution Board (1999) 2 SCC 718 at pr.53

v) The Principle of primacy to protect bio-diversity.
Godavarman (1997) 2 SCC 267 at pr.5 (2)

vi) The priority of precautionary principle and burden of proof.
A. P. Pollution Board (1999) 2 SCC 713 at pr.27-50.

vii) The Principle necessitating the replacement of the assimilative capacity approach by the precautionary principle.
A.P. Pollution Board (1999) 2 SCC 713 at pr.33-5.

viii) The power and duty of the court to refer matters to the appellate authority and experts in the face of technological and technical uncertainty.
A.P. Pollution Board (1999) 2 SCC 718 pr-55-7 & pr.27-3

ix) The importance of international conventions on the environment and converting them to form part of every person's right to life and liberty.

PUCL (1997) 3 SCC 433
Visaka (1997) 6 SCC 241 read with Vellore (1996) 5 SCC 647 at pr.10-20 and Article 253 of the Constitution

x) The Principle of sustainable development which was to be read with the precautionary principle and all other principles which gave lexical priority to protecting the environment and bio-diversity.

xi) The principle that large Projects must be subject to strict compliance of the terms of environmental effect, an effective rehabilitation policy and post monitoring mechanism. It follows that non-compliance Project may have to be stopped either fully or interlocutorially until compliance.

Narmada Bachao Andolan (2000) 10 SCC 664.

Such a duty flows from both the Constitution and sec-3 o the EPA, 1986
For examples of effective action by this Court.

See **Kamal Nath (1997) 1 SCC 388.**
Jaganathan (1997) 2 SCC 87,
TN Godavarman (1997) 2 SCC 267
India Envrio (1996) 5 SCC 231.

In these cases effective action was taken irrespective of the enormity of the effects of the decision.

xii) Any power under the EPA or in respect of environment is a power coupled with a duty.

a) **On power complied with a duty**: See Commissioner of Bombay v **Gordhandas (1952) SCR 135 at 147** (quoting Julius v Bishop of Oxford).

b) On powers coupled with a duty necessitated by the Constitution see Comptroller & Auditor General v K.S. Jaganathan (1986) 2 SCC 679 at pr. 21.

xiii) It is submitted that :-

The pari passu requirements are mandatory. Where conditions are mandatory, they are compulsory. Even otherwise substantial compliance is required.

State of UP v Manbodhan Lal Srivastava (1958) SCR 533 at 545.
Babu Ram Upadhaya (1961)2 SCR 679 at 709

xiv) It has not become the practice of the Government to permit construction without compliance in virtually all Projects. As such the continuation of the dam is both unreasonable in the narrow sense of wednesbury reasonabless as well as under article -21 of the constitution.

II. F.C.Act, 1980

2.1. As far as forest areas are concerned, we must proceed on the basis that the meaning of 'forest' has to be understood in the ordinary sense [see *T.N. Godavarman* (1997) 2 SCC 267] irrespective of whether the forest is shown as such in the forest or revenue records.

Thus the scheme of the Act and the Rules make clear that the Central Government's prior approval is mandatory. *(Vishnu Kumar Khattar v. State of Bihar,* AIR 1995 Pat 168)

2.2. In-principle approval is distinct from prior approval: *Life Insurance Corporation of India v. Escorts Ltd* (1986) 1 SCC 264 at pr.63

2.3 Prior Approval for Use of Forest land must precede any other statutory approval to a Project.

2.4. Only Prior Approval can make a Forest Land Transferable /Available for a 'non forest' activity: Forest land can be diverted for non forest use only once formal S.2 FCA approval is granted by the Central Government.

2.5. (X) Penal Provisions:

(a) The punishment for contravention of the provisions of sec.2 FCA is simple imprisonment which may extend to a period of fifteen days [s.3A of the FCA].

(b) Sec.3B of the FCA provides punishment even for government authorities for offences under FCA.

2.6 It should be noted that Sikkim is prime environmentally virgin area. In this context it is necessary to draw pointed attention to the Forest Department's own newsletter of 2009 which has been reproduced in the Writ Petition **[Annexure 26, pp.200-204; see also Annexure 27, pp.205-212].**

III. Wild Life Protection Act, 1972.

3.1. Most significantly, section 35 read as a whole is distinguished from a sanctuary in that no human activity can take place in a national park **[note especially section 35(3)].** Sec-35 (3) absolutely prohibits of any activities in National Park and its periphery viz buffer zone and biosphere reserved.

K.N. Chinnappa - AIR 2003 SC 724, Pr.

In the instant case justice Pasayat rightly observed that **"by** destroying nature, environment, man is committing matricide, having in a way killed Mother Earth. Technological excellence, growth of industries, economical gains has laid to depletion of natural resources irreversibly. Indifference to the great consequences, lacks of concern and foresight have contributed in large measures to the alarming position. In the case at hand, the alleged victim is the flora & fauna in an around .... "

3.2. **L.A. Act, 1894**

a) Public Purpose has to be in dispensable irrespective of sec-5A being important.

b) If clearance on various statutory laws are not obtained the land acquisition is not for public purpose.

c) That it is impermissible to apply the emergency provisions u/s- 17 (1) and to waive enquiry u/s-5A of the Act for construction of Project. Section 17(4), being an exception to the normal mode of acquisition, mere urgency or emergency is not sufficient for acquisition u/s-17(4). Section 5A confers a positive right. It cannot be taken away deeming it to be an empty formality. No relevant or valid consideration entered the minds of the authorities while proposing or approving the application u/s-17(4) of the Act. The applicability of sections 17 (1) & (4) is also bad on account of the malafide intention.

d) Section 5A is an important provision which cannot be easily dispensed with [on the importance of section 5A see *Hindustan Petroleum* v. *Darius Shapur Chenai* (2005) 7 SCC 627 at pr.9; *Union of India* v. *Mukesh Hans* (2004) 8 SCC 14 at prs.35, 36; *Union of India* v. *Krishnan Lal Arneja* (2004) 8 SCC 453. State of Punjab v Gurdial Singh AIR 1980 SC 319 at prs: 323. This purported reason has been held by the Hon'ble Supreme Court to be impermissible. The following judgment is relied upon as Om Prakash Pr & Another v State of UP & Others (1998) 6 SCC 1 (sec-6 notification issued 8 months after sec-4 notification and notice-u/s-9 called after more than 1 year) held to be illegal.

e) An acquisition purely for company does not constitute a valid public purpose. To do so is a fraud on the Act is a colourable exercise of power. Some contribution is required.

f) The respondent's understanding of the *Pratibha Nema's* case [(2003) 10 SCC 626] is incorrect (see counter pr.5, at pp.16).

Locus

3.3 The most significant point to note in regard to Public Interest Litigation is that it discards the traditional concept of Locus standi which means that only the person whose legal rights are being violated can approach the Hon'ble Court for redress. Further the Hon'ble Court has enunciated the need to relax the locus standi rule in the following words in the cases referred below:-

(i) Indian Council for Enviro-Legal, Action v UoI, (1996) 5 SCC 281 **(pr.41).**

(ii) In Labourers Working on Salal Hydro Project v State of Jammu & Kashmir, AIR 1984 SC 177.

(iii) Sanjit Roy v State of Rajasthan, AIR 1983 SC 328

(iv) Bandhua Mukti Morcha v UoI, AIR 1984 SC 802

(v) S.P. Gupta v UoI, AIR 1984 SC 811.

(vi) Janata Dal v H.S. Chowdhary AIR 1993 SC 892.

(vii) Lakshmi Kant Pandey V UoI, AIR 1985 SC 652.

(viii) R.L. & E. Kendra, Dehradum v State of U.P. AIR, 1985 SC 652.

(ix) Chaitanya Kumar v State of Karnataka, AIR 1986 SC 825.

(x) Vishwanath Chaturvedi v UoI (2007) 4 SCC 380

(xi) Indian Banks Association v Devkala Consultancy service (2004) 11 SCC 1.

(xii) Common Cause v UoI (2008) 5 SCC 511

(xiii) Shivajirao Nilangekar Patil v Mashesh Madhav Gosavi, (1987) 1 SCC 227. **(pr.36).**

(xiv) Ashok Lanka v Rishi Dixit (2005) 5 SCC 598

(xv) Guruvayoor Devaswom managing Committee v C.K. Rajan (2003) 7 SCC 546. **(pr. 50)**

3.4 Therefore, the whole proceeding initiated by the Respondents No. 1 to 9 without application of mind under in violation of Land Acquisitions Act, 1894, of Forest (Conservation) Act, 1980 & Environment Protection of Act, 1986 Biological Diversity Act, 2002, Wild Life Protection Act, 1972 and Constitution of India, were fundamentally bad and challenge impugned notifications upon which the proceedings started was invalid and void liable to be quashed as prayed in the writ petition by the petitioner.

Submitted written argument through the counsel on behalf of the petitioner."

In the above premises, it was submitted that the writ petition be allowed.

18. Mr. A. Mariarputham, learned Senior Advocate and Advocate General, appearing on behalf of the State-respondents at the outset preferred to press the preliminary objections as to the maintainability of the writ petition which we may set out as under:-

(i) The petitioner who claims to file the present writ petition as a PIL ought to come with clean hands if indeed the remedies that are being sought for are in public interest. In the present case, he is not, having held back the Order dated 05-07-2007 passed by the NEAA in Appeal no.8/2006 filed by the ACT through its General Secretary, Shri Dawa Lepcha of Lingdong village, Dzongu, North Sikkim, assailing the Environmental Clearance granted by the MoEF dated 04-08-2006. In that appeal, the very issue raised in the present proceeding with regard to the violation of the Environment (Protection) Act, 1986, and the Forest (Conservation) Act, 1980, had been raised and the NEAA on examination of the affidavit, counter-affidavits and rejoinder to the counter-affidavit filed by the parties, arrived at its conclusion that all necessary safeguards and requirements prescribed under the law had been duly taken care of in the EMP

so as to conserve and protect the local environment of the area and, therefore, the sufficient steps to protect and conserve the environment of the Project area had been taken.

(ii) The petitioner is a member of the ACT and is, therefore, was privy to the above facts and yet he has chosen not to disclose them in the present petition. Although, in paragraphs 2.1(iv) and 2.4(iv) of the rejoinder to the counter-affidavit of the State-respondents and in paragraph 2.2(vi) of the rejoinder to the counter-affidavit of the respondents no.8 and 9, the petitioner has stated that the petitioner in the present petition is Shri Athup Lepcha of Passingdang village, Dzongu, North Sikkim, while the appeal before NEAA, New Delhi, the appellant was one "Shri Dawa Lepcha" of Lingdong village, Dzongu, North Sikkim who are two different persons, it can be seen from the representation dated 29-06-2009 and representation dated 14-07-2009, constituting parts of Annexure 13 collectively, addressed to the respondent no.1, Chief Secretary, Government of Sikkim, with regard to the matter in *lis* in the present proceeding, it gets starkly revealed from the signatures appearing in those

applications that the petitioner, Shri Athup Lepcha, is the President of the ACT and Shri Dawa Lepcha (appellant before NEAA) is its General Secretary. Therefore, there can be no manner of doubt that the present petition has been filed by the same group, namely, ACT. The petitioner, however, has chosen to suppress this fact and further has misrepresented facts in the various pleadings indicated herein.

(iii) The averments on behalf of the respondents no.8 and 9 in their counter affidavit that the petitioner is an Ex-MLA hailing from the Project area who seeks to attain political motive by instituting this writ petition under the garb of PIL have not been denied and, therefore, in law it is to be presumed that the petitioner being an Ex-MLA from the Project area is trying to attain political mileage in instituting the writ petition in garb of a PIL.

(iv) The Order of the NEAA dismissing the appeal was neither challenged earlier nor is it a subject of challenge in the present writ petition also. Under such circumstances, the Order of the NEAA assumes finality.

(v) As appears from paragraph 2.2(vi) of the rejoinder to the counter-affidavit filed by the respondents no.8 and 9 it has been stated in categorical terms that in the writ petition the petitioner has not challenged the Environmental Clearance but only seeks for "proper implementation of the terms & conditions laid down by the MoEF in Environmental Clearance Report dated 04-08-2006," i.e., Annexure 19 to the writ petition. This as per the learned Advocate General reduces the scope of the writ petition to limit only to the question as to whether the conditions stipulated in the Environmental Clearance of the MoEF dated 04-08-2006 have been complied with or not and the forum for redressal of such grievance would be elsewhere, but not before this Court and that the other questions raised in the writ petition would no longer survive for consideration.

(vi) On the merits of the case, the learned Advocate General submitted that the basis upon which the land acquisition proceedings have been challenged cannot be sustained in law and in facts. The plea of the petitioner that the acquisition of land being for and on behalf of TUL, a private company funded by that

company would be violative of and impermissible under Part VII of the LA Act is grossly misconstrued. It is submitted that firstly the company is not a private company being in the joint sector with the State Government with the latter having 26% equity share in it as would be evident from clause 4.9.1 of the Agreement dated 18-07-2005 entered into between the Government of Sikkim and TUL.

(vii) Secondly, the preamble to the notice under Section 4(1) of the LA Act dated 30-03-2007 (Annexure 6) clearly reveals that the land was being acquired by the SPDC in the areas stated therein for public purpose at public expense and, therefore, it cannot be said that the land was acquired for a private company. As per the learned Advocate General, the land so acquired has been let out on lease to the TUL on a premium and on payment of annual lease with specified terms and conditions and does not involve transfer of its ownership which would remain with the SPDC. Alternatively, it has been argued under the Agreement dated 18-07-2005 the State Government is obliged to provide land on lease in association with the SPDC at the expense of the company in accordance with the

provisions of LA Act that may be required by the company for the Project. Reference was made in this behalf to clauses 3.3(a) and 3.4 of the Agreement. It is in keeping with such obligation that the land was acquired by the SPDC and by application of Section 43 LA Act, Part VII thereof containing Sections 39 to 42 would not be applicable even assuming that TUL is a private company. It was emphasised that the ownership of the land remained with the State Government and that the Project being on the basis of Build, Own, Operate and Transfer (in short "BOOT"), the lease hold land would be reverted back to the State Government after 35 years. Reference in this regard was made to clauses 2.2.1 and 2.2.3 of the Agreement dated 18-07-2005.

(viii) The embargo on the acquisition of land urged on behalf of the petitioner would apply to a situation where the acquisition is for a company. In support of his contention the Learned Advocate General referred to the recent decision of the Hon'ble Apex Court in ***Nand Kishore Gupta and Ors.*** vs. ***State of U.P. and Ors***. : ***MANU/SC/0681/2010***.

(ix) It was submitted that the land acquisition proceedings being complete with the compensations fully paid to the land owners, possession thereof taken over by the SPDC and leased out to TUL, and the TUL in turn having commenced with the Project has now reached at an advanced stage, the challenge to the acquisition was inordinately delayed. Moreover, none of the land owners have come forward to challenge the acquisition who rather had agreed to the acquisition and accepted the payment of compensation. The petitioner is not one of land owners and, therefore, has no *locus standi* to prefer the present writ petition. As per the learned Advocate General, the acquisition has been made for a public purpose, i.e., generation of Hydroelectric Power, which is so crucial for the economic development of the State and the Nation. The entire land acquisition proceedings and the Project works are being carried out in accordance with law ensuring minimum impact on the environment by strictly complying with conditions prescribed by the MoEF having due regard to the sensitivity of the people and the State.

(x) With regard to laws that either ban or restrict entry of non-indigenous people into the North District of Sikkim, the learned Advocate General submitted that the Proclamation dated 30-08-1956 (Annexure 11) and notification no.3069/OS dated 24-03-1958 (Annexure 12) prohibits only such entries that are without a permit issued by the Government, which is not the case here. Notification no.665/PS dated 27-09-1954 (Annexure 13) only bans the entry of traders/agents into Dzongu area from outside. Since the activities of TUL is not that of traders/agents but development of the power Project and, that it is a joint sector company with the State Government, those notifications would be inapplicable.

(xi) While dealing with the plea that the Forest Land involved in the acquisition was not permissible under the Forest (Conservation) Act, 1980, it was submitted that while it is true that the State on its own cannot permit use of Forest Land for non-forest purposes, it could do so with the prior approval of the Central Government under Section 2(2) of the Forest (Conservation) Act, 1980. In the present case, necessary approval of the Central Government had

been obtained prior to the State Government proceeding to assign them on lease to the TUL. It was further submitted that the Forest Land in question was not acquired but was dereserved for non-forest purposes. Forest Land being a property of the Government, the question of acquiring it did not and could not arise, the plea was, therefore, grossly misconstrued and liable to be rejected.

(xii) The learned Advocate General drew our attention to letter dated 02-11-2007 issued by the MoEF to the Principal Secretary (Forests), respondent no.3 (annexure R3) which is Annexure 30 to the writ petition, by which diversion of 83.0405 hectares of Forest Land was approved under Section 2 of the Forest (Conservation) Act, 1980, under certain terms and conditions. It was submitted that the grant of the said Clearance was preceded by the following sequence of events:-

(a) During the proceedings WP(C) no.202 of 1995 in the matter of ***T. N. Godavarman Thirumulkpad*** vs. ***Union of India & Ors.*** before the Hon'ble Supreme Court, the Central Empowered Committee, a body constituted

under its Orders, submitted its second report with regard to the proposals submitted by the MoEF in respect of a number of Projects, serial no.6 of which pertains to the Project in the present case. The Central Empowered Committee in its report recommended for clearance of all those Projects by the MoEF. The learned Advocate General referred to the following portions of the recommendation of the Central Empowered Committee (Annexure R9):-

"CENTRAL EMPOWERED COMMITTEE

REPORT (SECOND) IN IA NO.1413, 1414, 1426 AND OTHER RELATED IAs REGARDING THE CONSTITUTION AND COMPOSITION OF THE FOREST ADVISORY COMMITTEE (FAC) – PROPOSALS EXAMINED BY THE FAC

In the CEC's first report dated 16.8.2007 it has been recommended that 12 proposals pertaining to grant/renewal of coal mining leases in favour of Public Sector Undertakings, 4 proposals pertaining to regularization of encroachment in Orissa, two proposals pertaining to renewal of mining leases in favour of Orissa Mining Corporation, one proposal pertaining to Hydro Electric Project of NTPC in Chamoli District in Uttrakhand and one proposal pertaining to Tista Dam (Stage IV) of the NHPC in Darjeeling (West Bengal) may be permitted to be approved by the MoEF as per the recommendations made by the FAC. The details of these proposals are given below:

.....

3. .....

S. No.	File Number	Name of the Proposal/project	Date of the meeting of the FAC in which recommended
6.	8-142/2006-FC	Diversion of 83.0405 ha. of forest land for the construction of 1200 MW Teesta Stage-III Hydro Electric Project in favour of M/s. Teesta Urja Limited in Sikkim	17.5.2007

.....

This Hon'ble Court may please consider the above recommendations and may please pass appropriate orders in the matter."

(b) That the recommendations were considered by the Hon'ble Supreme Court on 28-09-2007 passed, *inter alia*, the following Order (Annexure R10):-

"....

I.A.1717-18 and I.A.No.2067 AND

I.A. Nos. 1413, 1414, 1426 and other related IAs regarding the constitution and composition of the Forest Advisory Committee (FAC).

I.A. No.2067 is taken on board.

These applications involve 55 projects sponsored by the various government agencies. Some of them are power projects and some relates to other activities. The CEC has examined the matters and has given approval to all these projects. MoEF may examine if there are any violations and thereafter pass appropriate orders regarding clearance at the earliest.

....."

(c) Following the above directions of the Hon'ble Supreme Court, the Clearance dated 02-11-2007 (Annexure 30) was issued by the MoEF.

(xiii) It was submitted most emphatically that the land had been utilised only after obtaining the Clearances required under the law. The Environmental Clearance dated 04-08-2006 (Annexure R2) accorded by the MoEF was based upon the EMP submitted by TUL which was the very letter under challenge in the appeal before the NEAA. It will be evident from paragraph 6.1 and sub-paragraphs and paragraphs 6.3 and 8 of the Order dated 05-08-2007 that all the objections which form the foundational grievance of the petitioner in the present writ petition were duly considered by the NEAA while disposing of the appeal.

(xiv) The learned Advocate General submitted that as the petitioner had not come with the clean hands having suppressed material facts, lacked necessary *locus standi* and even on the merits having found to be clearly misconstrued both on facts as well as the law, the writ petition deserved to be dismissed.

19. Mr. Jayanta Mitra, learned senior counsel, appearing on behalf of the respondents no.8 and 9, while supporting the submissions made on behalf of State-respondents preferred only to re-emphasises some of the points which in his view were vital for disposal of the writ petition. They were as follows:-

(i) That notice under Section 4(1), declaration under Section 6 of the LA Act and the entire proceedings thereunder having culminated in the possession of the land being taken over by the SPDC and leased out to the respondent no.9, there was nothing that was left to assail the action. It was submitted that there was an inordinate delay on the part of the petitioner to raise those issues and in land acquisition cases such delay was fatal. There should not be any reopening of a land acquisition matter even in cases of voidable acquisition proceedings.

(ii) That respondent no.9 had incurred an expenditure of about Rs.3083 crores out of the envisaged cost of Rs.5705.055 crores. Our attention was drawn to Annexure I to Annexure R6 filed on behalf of the respondent no.9 which is statement of expenditure incurred on various heads by the respondent no.9.

Having thus invested such huge sums of money the circumstance had become irretrievable and that the respondent no.9 was now at a disadvantageous position.

(iii) Next, Mr. Mitra reiterated the submission made on behalf of the State that the petitioner does not deserve any consideration as he has not approached the Court honestly having withheld the fact that the issues raised in the present writ petition have since been decided by the NEAA in an appeal filed by the ACT of which the petitioner is the President. The petitioner having not come with clean hands, particularly in a PIL, the writ petition deserved to be dismissed on this ground alone.

(iv) It has further been submitted that the proposal for Environmental Clearance was duly appraised by the Expert Appraisal Committee (in short "EAC") of the River Valley and Hydroelectric Projects and recommended for according Environmental Clearance based on the report of State Chief Wildlife Warden regarding impact on wild life construction work and the MoEF letter dated 04-08-2006. While granting the Forest Clearance the proximity of Khanchendzonga

National Park was also duly considered by the Forest Advisory Committee. Recommendation for such clearance was made on the finding that none of the Project components fall in the Core Zone of Khanchendzonga Biosphere Reserve, i.e., Khanchendzonga National Park (although a small fraction of underground Head Race Tunnel (HRT) passed through the outer ridge of the Buffer Zone of the Khanchendzonga Biosphere Reserve). It was submitted that based on the above recommendations and on its examination in detail by the Central Empowered Committee, the Hon'ble Supreme Court was pleased to clear the proposal in pursuance of which MoEF granted the Forest Clearance vide letter dated 02-11-2007, as discussed above, and the Project construction works commenced only thereafter. It is further the submission of Mr. Mitra that the Project work is being closely monitored by the MDMC requiring Six Monthly Progress Report as to the compliance of the prescribed terms and conditions of the clearances. It was further submitted that the MDMC consisting of Members who are experts in their own field, in their report dated 09-03-2010, expressed their satisfaction of the various activities being

implemented under EMP dated 08/09-03-2010 (Annexure R15). Such being the case the allegations of non-compliance of the conditions of the Clearances as alleged by the petitioner are clearly belied.

(v) Notice under Section 4(1) dated 24-12-2008 (Annexure 9) upon which the petitioner relies would not be of any help to him as it pertains to only 3.8170 hectares and not the entire area. Even out of the 3.8170 hectares, possession over 1.3190 hectares has already been taken by the respondents and the process for the balance 2.4980 hectares is due to be completed shortly.

(vi) Since petitioner in his rejoinder has clearly narrowed down the scope of the writ petition from questioning the merits of the Environmental Clearances only to the implementation of the terms and conditions stipulated in the Clearances, it was only to be seen as to whether those were being strictly observed, the rest being rendered redundant. Referring to the case of ***Indian Council for Enviro-Legal Action*** vs. ***Union of India & Ors.*** : ***(1996) 5 SCC 281*** it was submitted that the primary effort of the Court while dealing with the environmental related issues, is to

see that the environment agencies, whether it be the State or any other authority, take effective steps for environmental laws. In the present case, as has been clearly illustrated and confirmed by the MDMC, every aspect of the conditions of the EMP are being complied with and in the event of any non-compliance being found, the respondent no.9 would certainly ensure its compliance.

It was, therefore, submitted that writ petition deserved to be dismissed both on the question of *bona fides* and in its merits.

20. Mr. Karma Thinlay Namgyal, learned Central Government Counsel, appearing on behalf of the respondent no.6, MoEF, made the following submissions:-

(i) That the writ petition ought to be dismissed the petitioner having not disclosed of the appeal filed by the ACT of which the petitioner is the President, on the very issues that are in *lis* in the present writ petition and of the fact that the said appeal had been dismissed, upholding the Environmental Clearance dated 04-08-2006 vide the Order of the NEAA dated 05-07-2007.

(ii) On the merits of the case pertaining to the matters relevant to respondent no.6, it was submitted that necessary Environment Clearance and Forest Clearance under the Environment (Protection) Act, 1986 and the Forest (Conservation) Act, 1980, in respect of the Project in question had been accorded by letters dated 04-08-2006 and 02-11-2007 being Annexure R2 and R3 respectively. It was submitted that prior approval of the use of 83.0405 hectares of Forest Land for non-forest purposes was accorded after following the laid down procedure. It was submitted that the Forest Land involved in the Project measures 83.0405 hectares (68.3130 hectares surface forest area and 14.72775 hectares underground forest area) and private land measuring about 112.84444 hectares (106.336 hectares surface land and 6.5108 hectares for underground structure). It was further submitted that respondents no.8 or 9 has not acquired any Forest Land but has only got the permission to divert 83.0405 hectares Forest Land (Khasmal) in the North District of Sikkim for the Project in terms of the proposal received from the Secretary, Forest, respondent no.3.

(iii) The controversy of the sentence "out of which 80.288 ha, is a forest land, Forest Clearance is yet to be obtained" appearing in paragraph 3 of the letter Annexure 19 of the MoEF granting Environmental Clearance has been clarified by Mr. Karma Thinlay. As per him the Forest (Conservation) Act, 1980, provide for conversation of forest and for matters connected therewith or ancillary or incidental thereto while the Environment (Protection) Act, 1986, provides for protection and improvement of environment. That there is a procedural difference in processing clearances under the two statutes, i.e., Forest Clearance under the Forest (Conservation) Act, 1980, and Environmental Clearance under the Environment (Protection) Act, 1986. The two are to be considered distinctly although they fall under the jurisdiction of the respondent no.6 and require separate clearances. It has, therefore, been submitted that the sentence does not indicate that no Forest Clearance has been obtained by the respondents. It was clarified that the mandatory environment and Forest Clearances under the related laws for the Project were accorded by letters dated

04-08-2006 and 02-11-2007 respectively. It was further submitted that as per the proposal received by the respondent no.6 none of the Project components fall in the Core Zone of Khanchendzonga Biosphere Reserve which includes within it the Khanchendzonga National Park, except for a small part of its underground HRT passing through the outer ridge of the Buffer Zone of Khanchendzonga Biosphere Reserve at a distance of 1 km. from the Khanchendzonga National Park. That no part of the Khanchendzonga National Park or the Core Zone of Khanchendzonga Biosphere Reserve has been reported to have been diverted. The learned Central Government Counsel submits that all requirements and conditions under the Clearances and the EMP are being complied with by the respondent no.6. This fact has been confirmed by the MDMC in its report already referred to above. The MoEF has been intermittently monitoring the Project to ensure and to assess compliance of the conditions of the Clearances accorded by it. In the above circumstances, it was submitted that there being no case made out in the writ petition, it deserved to be dismissed.

21. Upon hearing the parties, we find that the principle issues emerging therefrom that require to be addressed are –

(i) whether the petitioner has been guilty of suppression of material facts and if so, whether the petitioner is entitled to the reliefs sought for in the writ petition;

(ii) whether land acquisition proceedings have been held in accordance with the law and whether the petitioner is guilty of delay and laches in questioning the validity of such proceedings at this stage and also as to whether the petitioner has the necessary *locus standi* to question the acquisition proceedings; and

(iii) whether the respondents, more particularly the respondent no.9, have commenced with and is carrying on with the Project in violation of the Forest (Conservation) Act, 1980, and Environment (Protection) Act, 1986, and whether the conditions prescribed under those clearances are being complied with or not.

22. We may deal with the above points in *seriatim* as under:-

(i) **Whether the petitioner has been guilty of suppression of material facts and if so, whether the petitioner is entitled to the reliefs sought for in the writ petition.**

a) On consideration of the averments contained in the writ petition, the counter-affidavits, the rejoinder and the oral submissions placed by the parties, we find that an organisation called the "ACT" had filed an appeal before the NEAA under Section 11(1) of the National Environmental Appellate Authority Act, 1997, against the grant of Environmental Clearance to the Project by MoEF through its letter dated 04-08-2010 (Annexure 19 to the writ petition) in which the entire issues raised in the present writ petition other than the issue on the land acquisition, had been raised and the NEAA by a detailed Order dated 05-07-2007 dismissed the appeal. We may reproduce below the relevant portions of the Order:-

> "6.1 The Learned Counsels, Shri Ritwick Dutta and Shri Rahul Chaudhary, for the Appellant have argued that the EIA Report prepared by Project Proponent (Respondent No.4) is inadequate and faulty and it is against the provisions of the EIA Notification, 1994 for the following reasons:
>
> (i) No proper geological investigation was taken up for one-year period prior to finalization of EIA Report. The Site Clearance permission was granted on 03.08.2005 by MoEF. The Winter and Summer samplings of geological survey were taken in February 2005 and May

2005 respectively based on which the EIA Report was prepared and forwarded to MoEF along with the application forr Environment Clearance on 19.06.2006 well before completion of one year

(ii) No Environmental Risk Assessment such as Dam Break Analysis, Impact of Seismicity, Impact Study of Reduced Flow etc, was included in the EIA Report

(iii) Six Projects including the present project have been envisioned on Teesta River in Sikkim but no cumulative study of the impact of all these Projects has been carried out. The EIA Report of this project has been done in isolation. The real environmental impact of the project is not reflected in the Report

(iv) The issue of Muck disposal has not been dealt with properly in the Report.

(v) It has not addressed the question of aquatic ecology.

(vi) The impact of the project on villages such as Theng lying in the Buffer Zone of Biosphere Reserve and location of proposed dam site in the Buffer Zone-II of Kanchenjunga Biosphere Reserve have not been dealt with. Nor has the report dealt with the impact of the project on Wildlife in the main corridor from Theng and Toong to Pakal and Rahi chu of the Project area.

(vii) The EIA Report has not assessed the impact of the project on the indigenous tribal population, their displacement from their natural habitat and consequential political, social, cultural and ethnic repercussions;

(viii) The EIA Report has not only exaggerated the positive impact of the project but also inadequately highlighted the potential negative impact of the project on the Health of the local population such as increased incidence of new diseases etc.

6.3 An examination of affidavit, counter affidavit and rejoinder to the counter affidavit filed by the concerned parties point out that the EIA Report has made a detailed examination of the geological conditions of the Project area and the related aspects. A perusal of EIA Report and EMP reveals that EIA Report throws evidence to proper

assessment of Environmental Impact of the Project. The various Environment Programmes such as Muck Management Plan, Forest and Wild Life Conservation Plans, Fish Management Plan etc., prove the point of view, of the Respondent that comprehensive analysis of the impact of the project on the local environment has been done in EIA Report. Necessary attention has been paid to preservation of aquatic ecology of the River System by assuring minimum flow of water in the system. This Authority notes that the Expert Committee on River Valley Projects of MoEF has examined the report on Carrying Capacity Study on Teesta River System and recommended the Project for approval of Respondent – 1. All these analyses and precautionary programmes confirm the comprehensive coverage of EIA Report and protective nature of EMP. This Authority does not, therefore, find any force in the arguments of the Appellant that EIA Report prepared by Respondent-4 is faulty and inadequate. The prayer of the Appellant that a revised EIA Report be ordered to be prepared is not acceptable. The first question is therefore answered in negative.

7. The other issue taken up for consideration is whether the Public Hearing conducted by the Respondent No.3 is faulty and in contravention of the provisions of relevant notification.

7.3 .....

(v) The claims and counter claims of both the sides on the nature of the proceedings of the Public Hearing have been examined by this Authority with reference to the relevant records made available to this Authority. The Authority also viewed the DVDs of the Public Hearing proceedings but did not find any evidence in the proceedings, which threatened, hindered or obstructed or prevented the participating public from expressing their views on the project. The Appellant has not placed any material to prove that the Public Hearing conducted by the Respondent-3 was a controlled one, denying opportunities to the people of the area for free and fearless participation in the Public Hearing.

7.4 The above discussion with reference to various provisions of the EIA Notification 1994, on conduct of Public Hearing would clearly show that none of the points raised by the Appellant is supported by the statutory provisions. The only

point where the Appellant has successfully highlighted is delay and difficulty faced by Shri Tseten Lepcha is getting certain documents. This Authority does not therefore uphold the contention of the Appellant that the Public Hearing conducted by Respondent -3 is faulty and in contravention of provisions of the relevant Notification. The second question is also answered in negative.

8. In addition to the issues discussed above, the Authority would like to examine whether the Project Proponent has drawn up a comprehensive Environment Management Programme for neutralizing negative aspects of the impact created by the project on the local environment. The Authority notes that Respondent - 4 has drawn up detailed programmes to mitigate the hardship created in land use, environment, water resources and its quality, terrestrial flora and fauna, aquatic ecology, noise and air pollution on environment, a comprehensive health delivery system etc. The details of these management measures have been cited by Respondent- 4 in para 5 dealing with the scope of the EIA Report. The Project Proponent has prepared a detailed EMP in order to neutralize the possible negative effects of the Project on the environment of the affected area. The Authority also finds that the Respondent – 4 has drawn up a specific Environmental Monitoring Programme on various aspects of the Environment not only during the project construction phase but also during the project operation phase. The total cost earmarked for implementation of various components of Environment Management Plan is about Rs. 1420 million. Thus, the Authority finds that the Project Proponent has formulated a comprehensive EMP so as to conserve and protect the local environment of the area. The Authority is, therefore, satisfied that the Project Proponent has taken sufficient steps to protect and conserve the environment of the project area.

9. As regards the Rehabilitation and Relief programmes for the people affected by the Project we find that 156 families have been partially affected by the project and none of them would be displaced. Even though only small part of the Public is affected by the project, the Project Proponent has provided suitable R & R package for the purpose of their rehabilitation. We do not find any force in the argument of the Appellant that the construction of project would unsettle the tribal population from their natural habitat and that it would cause political, social and ethnic problems in the area.

> 10. The Authority therefore concludes that the contentions of the Appellant on EIA Report, Public Hearing etc. cannot be accepted. Further, the comprehensive EMP and Rehabilitation measures proposed in the Management Plans and R & R Package strengthen the arguments of the Respondents. This Authority has therefore decided to reject the prayers of the Appellant. The Appeal is accordingly disallowed." **[emphasis supplied]**

b) On perusal of the Order of the NEAA (Annexure R-1 to the counter-affidavit of the respondents no.8 and 9), we find that apart from all the environmental issues, the concern of the petitioner with regard to the Khanchendzonga National Park forming part of the Khanchendzonga Biosphere Reserve was also dealt with by the NEAA. It had been noted that the Environmental Impact Assessment (in short "EIA") which deals with the entire gamut of the environmental issues, had been considered and the observations and requirements indicated therein addressed completely in the EMP prepared by the respondent no.9. It had also been noted by the NEAA that an elaborate Public Hearing had been conducted on 08-06-2006 by Sikkim Pollution Control Board, a body comprised of various State Authorities and all stake holders, and found the hearing to have been conducted in a free and fair manner without any threat, hindrance or obstruction preventing the

participating public from expressing their views on the subject. It, therefore, can be stated without any doubt that issues with regard to the environment connected with EIA had indeed been heard, considered and disposed of by the NEAA. In the present writ petition the petitioner has come up with the very same issues without disclosing the proceedings before NEAA. We, therefore, find that the petitioner has withheld this vital information which, in our view, would be sufficient reason for this Court not to exercise its discretion in favour of the petitioner. The well-known adage "he, who seeks relief in equity must come with clean hands" applies with greater force to a petitioner who approaches the Court in a PIL.

In the case of ***K. R. Srinivas*** vs. ***R. M. Premchand & Ors.*** : ***(1994) 6 SCC 620*** it has been held that "a writ petitioner who comes to the Court for relief in public interest must come not only with clean hands, like any other writ petitioner, but must further come with a clean heart, clean mind and a clean objective".

c) There is another aspect of the matter on this question. The petitioner Shri Athup Lepcha has remained silent of the fact that he is a President of ACT. This becomes quite obvious from the signature appearing in the representations dated 29-06-2009 and 10-07-2009 in which the petitioner has signed as the President of the ACT. It is no doubt true that in paragraph 1 of the writ petition, the petitioner has stated that he is a Member of the forum called ACT, but the attempt at denying his association in the appeal that we find in the rejoinders filed to the counter-affidavit of the State-respondents, respondent no.6 and respondents no.8 & 9, greatly diminishes his standing and credibility before this Court. We may refer to the following identical averments in all the three rejoinders:-

> "(iv) The parties in the two cases are different viz in the instant case the petitioner is "Shri Athup Lepcha" of Passingdong village and "Shri Dawa Lepcha" of Lindong village, North Sikkim was the appellant in the appeal before the NEAA, New Delhi."

d) The statements have been affirmed in the affidavit as true to the best of knowledge of the petitioner. In the above facts and circumstances, we are constrained to conclude that the petitioner has not

come with clean hands and is guilty of suppression of material facts falling within the mischief of the expression *suppressio veri, expressio falsi*.

e) It was submitted on behalf of the petitioner that in a PIL the traditional concept of *locus standi* requires to be discarded in order to dispense with justice to those who are unable to approach the Court due to their poverty, illiteracy, helplessness or disability or are socially or economically in a disadvantaged position and that any public spirited person bringing actions pro bono publico should be allowed to agitate their cause. In support of this submission reliance having placed, *inter alia*, in the case of ***S. P. Gupta & Ors.*** vs. ***President of India & Ors.*** : ***AIR 1982 SC 149***. We are in agreement to this proposition placed by the learned counsel. However, it may be noted in that very case the Apex Court has hastened to caution as follows:-

> **"23.** But we must be careful to see that the member of the public, who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective. Andre Rabie has warned that "political pressure groups who could not achieve their aims through the administrative process" and we might add, through the political

> process, "may try to use the courts to further their aims." These are some of the dangers in public interest litigation which the court has to be careful to avoid. ....."

f) This warning has been repeatedly stated by the Apex Court in a catena of decisions thereafter including the case of ***The Janata Dal*** vs. ***S. H. Chawdhary & Ors.*** : ***AIR 1993 SC 892*** in paragraphs 91, 96-106, 107, 108 and 109 which we need not reproduce but would be sufficient to state that the Hon'ble Supreme Court in this case by referring to a number of earlier decisions warned against misuse of PIL by persons who masquerade as pro bono litigants. It has been held in ***Raunaq International Ltd.*** vs. ***IVR Construction Ltd. & Ors.*** : ***(1999) 1 SCC 492*** that "when a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good". Although this decision is with regard to a dispute in the tender process of a contract work, the principle would equally apply in the present case also. The other decisions cited by the learned counsel lay down the brought contours of a

PIL with which we are in full agreement in the context of facts and circumstances obtaining therein. In so far as the present case is concerned, we have clearly set out the reasons why the standing of the petitioner stands diminished in his preferring the present writ petition.

g) Before coming to the other aspects, we may also note that the Order of the NEAA was neither challenged before nor is it a subject matter of challenge in the present case. Under the circumstances, the Order of the NEAA assumes finality and binding upon the petitioner.

(ii) **Whether land acquisition proceedings have been held in accordance with the law and whether the petitioner is guilty of delay and laches in questioning the validity of such proceedings at this stage and also as to whether the petitioner has the necessary *locus standi* to question the acquisition proceedings.**

a) The validity of the land acquisition as we have seen has been questioned on several aspects. By drawing our attention to Annexure 6A being the declaration under Section 6 of the LA Act, the learned counsel on behalf of the petitioner submitted that

from the schedule of the notification, large tracts of Forest Land has been acquired for the Project, which in law was not permissible as no Forest Land could be acquired under the LA Act or under the Forest (Conservation) Act, 1980. This submission, in our view, is quite fallacious from what appears from the records. We find that the Forest Land had not been acquired but rather clearance had been sought for under the Forest (Conservation) Act, 1980, for its use for non-forest activities. Reference in this regard may be made to the letter dated 02-11-2007 issued by the MoEF whereby it has been conveyed to the Principal Secretary (Forests), Government of Sikkim, the respondent no.3, that "after consideration of the proposal and compliance of various conditions by the State Government, the Central Government hereby conveys its approval under Section 2 of the Forest (Conservation) Act, 1980 for the diversion of 83.0405 ha forest land (68.3130 ha surface forest area and 14.7275 ha underground forest area) for construction of 1200 MW Teesta Stage-III Hydro Electric Project in favour of M/s. Teesta Urja Limited in North District of Sikkim, subject to the fulfillment of the following conditions". This is clearly in compliance with Section

2 of the Forest (Conservation) Act, 1980, which prohibits the State Government from passing an order for use of any Forest Land or any portion thereof for any non-forest purposes only if it is without the approval of the Central Government. In the present case, quite obviously the approval has been accorded, of course under certain terms and conditions. The argument, therefore, clearly appears to be misconstrued and is accordingly rejected.

b) Secondly, it was submitted that the land was not acquired for a public purpose but for a private company funded such company, namely, TUL, respondent no.9, and that the acquisition was bad for non-compliance of Part VII of the LA Act. While considering this point, even assuming that TUL is a private company, we find that under the Agreement dated 18-07-2005 (Annexure 1 to the writ petition) entered into between the State Government and TUL, the State Government was obliged to acquire land for TUL in respect of which the learned Advocate General had referred to Clauses 3.3. (a) and 3.4 of the Agreement which reads as under:-

"3.3 Acquisition and transfer of land.

(a) The Government shall acquire in association with SPDC, at the request and the expense of the Company and in accordance with the provisions of Land Acquisition Act under the State Government and other applicable laws, such private lands within the State of Sikkim as may be required by the Company for construction, operation and maintenance of the Project (Acquired Land) and transfer such Acquired Land in favour of the Company for implementing the Project.

.....

3.4 Lease of Land for Permanent Works

Upon the request of the Company and subject to the provisions of laws in force, the Government/SPDC shall, on such terms and conditions and rates prescribed by the Government from time to time provide for, on a long terms lease, the Government land required for Permanent Works, as may be necessary for the construction, operation and maintenance of the Project except the Forest Land."

c) Section 43 of the LA Act provides that Sections 39 to 42, both inclusive, shall not apply to the acquisition of land where under any Agreement with such company the Secretary of the State Government is bound to provide land. The case being fully covered by the said provisions in view of the obligation of the State in the Agreement, the point raised on behalf of the petitioner cannot be sustained.

d) Apart from the above, the acquired land was only leased out to the TUL in consideration of payment of Rs.10,000/- on annual lease rent and, therefore, naturally the ownership would remain with the SPDC, a Government undertaking. We also find that the Agreement is on the basis of BOOT having a termed of 35 years at the end of which period the land would be reverted back to the State Government. In this regard, we may refer to Clauses 2.2.1 and 2.2.3 of the Agreement dated 18-07-2005 which reads as under:-

> **"2.2 Agreement Period**
> 2.2.1 This Agreement shall remain in force for a period of 35 (Thirty Five) years from the Commercial Operation Date of the Project unless terminated earlier in accordance with the provisions of the Agreement.
>
> .....
>
> 2.2.3 In the event this Agreement is not extended in terms of Clause 2.2.2, the Permanent Works, as defined in Clause 1.2.38, along with the land on which the Permanent Works are created, irrespective of the land ownership, shall stand transferred to the Government at the end of the Agreement period."

e) We may in this regard refer to the decision of the Hon'ble Supreme Court in ***Nand Kishore Gupta (supra)*** in the following passages:-

> "31. We must, at this stage, take into account the argument that the whole compensation is coming

wholly from the Company and not from the Government or from YEIDA. The appellants invited our attention to Clause 4.1(d) of the Concession Agreement. On that basis, it was argued that the Company has paid the compensation cost and, therefore, the acquisition is clearly covered under Part VII of the Act, and there may be no public purpose if the acquisition is made for the Company and it is the Company who has to shell out the whole compensation. Now, this argument is clearly incorrect. Even if we accept for the sake of argument that all this compensation is coming from the Company, we must firstly bear it in mind that the Company gets no proprietary or ownership rights over the Project assets. Now, if it is presumed that the compensation is coming from the Company, then it will have to be held that the whole assets would go to the Company. At least that is envisaged in Part VII of the Act. Here, that is not the case. The assets are to revert back to the acquiring body or, as the case may be, the Government. Even the lands which are utilized for the construction of the Expressway are to go back to the Government barely after 36 years i.e. after the Company has utilized its rights to recover the toll on the Expressway. Secondly, it must be borne in mind that the Concession Agreement has been executed in February, 2003, whereas the acquisition process started somewhere in the month of September, 2007. When the Concession Agreement was executed, the cost factor was not known. The acquiring body was only to make available the land to the concessionaire to implement the Project. There would be number of difficulties arising, as for example, it would be clearly not contemplated that the land would be made available without any value or that there would no scheme for the State Government for recovering the expenses that it would incur in obtaining the land. The learned Counsel appearing for the State as also for the Company and YEIDA argued that in order to overcome and iron out such difficulties, the Agreement provides that the land would be leased on a premium equivalent to the acquisition cost. This argument proceeds on the basis of Clause 4.3 C of the Concession Agreement. It is to be noted then that the premium of the land was not going to be just the acquisition cost, but also the lease rent of Rs. 100/- per hectare. Therefore, the State Government was to earn Rs. 100/- per hectare for the total acquired land, which was about 25 million square meters over and above the compensation to be decided. The mention of the compensation amount in addition to the lease money of Rs. 100/- per hectare would clearly provide that the whole compensation was

> not going to be paid by the Company alone. This is apart from the fact that through this agreement, only the extent of the compensation payable by the Company to YEIDA was decided. However, once all the amounts went to the coffers of YEIDA, it would lose its independent character as a premium. When it goes into the coffers of YEIDA, it is the YEIDA who would make the payments of the estimated compensation and thereby it would be as if the compensation is paid not by the Company, but by YEIDA. The respondents have relied on the law laid down in Pratibha Nema's Case [cited supra], more particularly, paragraphs 24 and 25 therein. The respondents also argued relying upon the decision in Naihati Municipality and Ors. v. Chinmoyee Mukherjee and Ors. MANU/SC/0102/1997 : 1996 (10) SCC 632. The respondents argued that the law laid down in Pratibha Nema's Case (cited supra) emanates from the judgment in Naihati Municipality and Ors. v. Chinmoyee Mukherjee and Ors. (cited supra).
>
> 36. The respondents then fall back upon the nature of the transaction, saying that since the whole transaction is on the BOT basis, the Government has merely chosen a third party agency to implement the Project instead of taking up itself the task of building, designing, financing or running the Project. It was pointed out that in such contracts, the assets did not go to the private enterprise which was chosen by the Government. On the other hand, the assets revert to the Government and, therefore, the BOT Project can never be akin to the acquisition of land for a Company under Part VII of the Act, where the land and the assets vest and belong to the Company."
>
> **[emphasis supplied]**

The facts and circumstances in the case is in substance *pari materia* to the case before us and, therefore, we find that there is no merit in the point raised on behalf of the petitioner and accordingly we reject the same.

f) The other aspect of the matter is that the company TUL, as we have found, is a joint sector

company with the State Government having an equity participating of 26%. Reference in this regard may be made to Clause 4.9.1 in the Agreement dated 18-06-2005 (Annexure 1 to the writ petition) which is reproduced below:-

> "4.9.1 Subscription of Equity by the Government
> The Company shall allocate 26% (Twenty Six percent) of the Company's equity share to Government by way of execution of an equity subscription agreement between the Company and Government, which shall be executed within a period 6(six) months from the date of signing of the Agreement.
>
> Upon execution of such an equity subscription agreement, Athena as defined in the Definitions Clause 1.2.5 shall, on request from the Government without the requirement of sovereign guarantees, arrange the funding for equity participation of Government in the Project at the mutual agreed terms.
>
> The process from such sale of Free Power and the dividends in respect of Government's equity in the Project, whether in part or full at the discretion of the Government, would be utilized for repayment of the funding arranged by Athena for financing the equity participation of the Government, and Government shall execute all the necessary agreements as desired by the providers of such funding.
> However, if the Government arranges its own equity, then Government shall be allowed to do so, provided that such arrangement shall not be detrimental to the Company's interest and the equity subscriptions shall be made pro-rata with the other equity participants."

g) By a letter dated 15-05-2008 (Annexure R2 to the counter-affidavit of the State-respondents) the respondent no.5, the Principal Chief Engineer-cum-

Secretary, Energy and Power Department, Government of Sikkim, informed the Managing Director, TUL that the Government of Sikkim shall be arranging its own equity of Rs.296.00 crores in exercise of the option provided in paragraph 3 of Clause 4.9.1, referred to above. Therefore, funds provided for payment of compensation of the land and other expenditure incurred by the company for development of the Project would include the Government's participation of 26% being pro-rata to its equity holding. It cannot, therefore, be said that there is no involvement of expenditure from the public fund towards the acquisition of the land for the Project.

h) In the case of ***Pratibha Nema & Ors.*** vs. ***State of M.P. & Ors.*** : ***(2003) 10 SCC 626*** the Apex Court took notice of "an important and crucial proviso to Section 6 which has a bearing on the question whether acquisition is for a public purpose or for a company. The second proviso lays down that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, wholly or partly, out of public revenues or

some fund controlled or managed by local authority".

In paragraph 9, it has further been held as follows:-

> **"9.** ..... Explanation 2 then makes it clear that where the compensation to be awarded is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues. Thus, a provision for payment of compensation, wholly or partly, out of public revenues or some fund controlled or managed by a local authority is *sine qua non* for making a declaration to the effect that a particular land is needed for a public purpose. Even if the public purpose is behind the acquisition for a company, it shall not be deemed to be an acquisition for a public purpose unless at least part of the compensation is payable out of public revenues which includes the fund of a local authority or the funds of a corporation owned or controlled by the State. However, it was laid down in *Somavanti (AIR 1963 SC 151) case* that the notification under Section 6(1) need not explicitly set out the fact that the Government had decided to pay a part of the expenses of the acquisition or even to state that the Government is prepared to make a part of contribution to the case of acquisition. It was further clarified that the absence of a provision in the budget in respect of the cost of acquisition, whole or part, cannot affect the validity of the declaration. The majority Judges of the Constitution Bench also clarified that a contribution to be made by the State need not be substantial and even the token contribution of Rs 100 which was made in that case satisfied the requirements of the proviso to Section 6(1). The contribution of a small fraction of the total probable cost of the acquisition does not necessarily vitiate the declaration on the ground of colourable exercise of power, according to the ruling in the said case. Following *Somawanti*, the same approach was adopted in *Jage Ram* v. *State of Haryana* [(1971) 1 SCC 671]. The question, whether the contribution of a nominal amount from the public exchequer would meet the requirements of the proviso to Section 6, had again came up for consideration in *Manubhai Jehtalal Patel* v. *State of Gujarat* [(1983) 4 SCC 553]. D. A. Desai, J. after referring to Somwanti's, speaking for the three Judge Bench observed thus: (SCC p.555, para 4)
>
> "It is not correct to determine the validity of acquisition keeping in view the

> amount of contribution but the motivation for making the contribution would help in determining the bona fides of acquisition. Further in *Malimabu case [(1978) 2 SCC 373]* contribution of Re 1 from the State revenue was held adequate to hold that acquisition was for public purpose with State fund. Therefore, the contribution of Re 1 from public exchequer cannot be dubbed as illusory so as to invalidate the acquisition."
> **[emphasis supplied]**

i) There are large number of other cases referred in this case dealing with the same question which we may not advert to. The law laid down in the cases of ***Pandit Jhandu Lal & Ors.*** vs. ***The State of Punjab & Anr.*** : ***1961 SC 343*** and ***Valjibhai Muljibhai Soneji & Anr.*** vs. ***State of Bombay & Ors.*** : ***AIR 1963 SC 1890*** cited on behalf of the petitioner are well-settled but clearly inapplicable in the facts of the present case. We find that the case of ***Pandit Jhandu Lal (Supra)*** rather supports the case of ***Pratibha Nema (supra)***.

j) The land in question has been acquired for the purpose of developing a Hydroelectric Project of 1200 MW which would immensely benefit the State and its people by generation of revenue by sale of energy. Therefore, there can be no denying of the fact that the Project is for a public purpose. It is a well-settled position of law that the question whether setting up a

Project is in public purpose or not is essentially a question that has to be decided by the Government being a socio-economic question and that, so long as it is not established that the acquisition is being sought for some collateral purpose, the declaration of the Government that it is made for public purpose is not open to challenge. It is clear from Section 6(3) that the declaration made under Section 6(1) shall be conclusive evidence that the land is needed for a public purpose, unless it is shown that there was a colourable exercise of power. It is not open to this Court to go behind such declaration and find out whether the purpose for which the land was needed was a public purpose or not. We may in this regard refer to the case of ***Jage Ram & Ors.*** vs. ***State of Haryana & Ors. : (1971) 1 SCC 671***, more particularly paragraph 8 reproduced below:-

> "8. There is no denying the fact that starting of a new industry is in public interest. It is stated in the affidavit filed on behalf of the State Government that the new State of Haryana was lacking in industries and consequently it was become difficult to tackle the problem of unemployment. There is also no denying the fact that the industrialization of an area is in public interest. That apart, the question whether the starting of an industry is in public interest or not is essentially a question that has to be decided by the Government. That is a socio-economic question. This Court is not in a position to go into that question. So long as it is not established that the

> acquisition is sought to be made for some collateral purpose, the declaration of the Government it is made for a public purpose is not open to challenge. Section 6(3) says that the declaration of the Government that the acquisition made is for public purpose shall be conclusive evidence that the land is needed for a public purpose. Unless it is shown that there was a colourable exercise of power, it is not open to this Court to go behind that declaration and find out whether in a particular case the purpose for which the land was needed was a public purpose or not: see *Somawanti* v. *State of Punjab [AIR 1963 SC 151]* and *Raja Anand Brahma Shah* v. *State of U.P. [AIR 1967 SC 1081]* On the facts of this case there can be hardly any doubt that the purpose for which the land was acquired is a public purpose." **[emphasis supplied]**

In the case of ***Smt. Somawanti & Ors.*** vs. ***State of Punjab & Ors.*** : ***AIR 1963 SC 151*** a Constitution Bench of the Hon'ble Supreme Court in paragraph 28 has held as follows:-

> "(28) The Government has to be satisfied about both the elements contained in the expression "needed for a public purpose or company". Where it is so satisfied, it is entitled to make a declaration. Once such a declaration is made sub-Section (3) invests it with conclusiveness. ....."

In the light of the above position of law and the facts, the submission that the entire fund for the acquisition of land was provided by a private company and not for a public purpose cannot be sustained.

k) Another contention raised by the petitioner against the land acquisition proceedings is that in the

garb of application of Section 17(1) of the LA Act, the Government was evading the requirements provided under Section 5A that permit objections to be raised against the acquisition and, that there was no urgency for the State Government to invoke the provision of Section 17 of the LA Act. In our view, this contention does not appear to be sound both in law and in facts. It is a settled position of law that in exercise of its right of "eminent domain" the State can acquire land in public interest and, the finding as to whether the object of the acquisition of land is for public purpose or not is a matter for the State to decide on the basis of the materials placed before it and, to decide as to whether, having regard to the facts and circumstances, such acquisition is urgent or not. Section 17 of the Act confers special powers to the Government which are exercisable in cases of emergency. Sub-section (4) of Section 17 provides that in those cases which fall under sub-Section (1) or sub-Section (2), the appropriate Government may direct that the provisions of 5A of the Act shall not apply and make a declaration under Section 6 any time after the publication of the notification under sub-Section (1) of Section 4. In the present case, the

object of acquiring the land was for the development of 1200 MW Teesta Stage-III Power Project. In all the notifications issued under Section 4(1) and declarations under Section 6 of the LA Act, we find the expressions "whereas the Governor is satisfied that land is needed for a public purpose for the development of 1200 MW Teesta State-III, Hydro Electric Power Project ..... and whereas there is urgency to acquire the land to take over possession the Governor is further pleased to direct invoking of Section 17(1) of LA Act of 1984". This, in our view, is sufficient reason and indicative of the application of mind by the authorities in invoking the emergency provision.

It is well-settled that the question of urgency is a matter for the subjective satisfaction of the proper Government and it is not open to the Courts to examine the propriety and the correctness of the satisfaction on objective appraisal of facts. The opinion can be challenged in a Court of Law only if it can be shown that the Government never applied its mind to the matter or that its action was *mala fide*. It is quite obvious that the State Government intended to develop the Project early keeping in view the

revenue generation required to meet the various welfare measures for the people. Therefore, it is seen that the State Government had considered acquiring the land for the time bound Project on an urgent basis leading it to invoke the provision of Section 17 of the LA Act. This Court does not find any infirmity in the process and we do not intend to sit in judgment over the decision of the Government and, therefore, withhold ourselves from examining as to the wisdom of it having resorted to such provisions of the LA Act.

l) Next on the question of delay in challenging the land acquisition, it is trite that challenge to a land acquisition is required to be made at the appropriate stage of the proceeding. In the present case, we find that although urgency clause provided under Section 17(1) of the LA Act had been applied notices under Section 4, declaration under Sections 6, 9 and 11 have been issued vide various notifications culminating in the possession being taken over by the User Agency, i.e., SPDC, respondent no.7. We find that the land owners who are persons interested as defined under Section 3(b) of the LA Act, have not objected to the acquisition of their land. Once

possession is taken over, the land stands vested in the Government and nothing more survives for its challenge except to the extent of apportionment of the compensation amongst various claimants. It is thus too late in the day for the petitioner now to raise such objections. We find substance in the argument of Mr. Jayanta Mitra, learned senior counsel, that in acquisition cases such delay is fatal. The decision of the Apex Court in the case of ***State of Rajasthan & Ors.*** vs. ***D. R. Laxmi & Ors.*** : ***(1996) 6 SCC 445*** was referred to and reliance was placed specifically to paragraphs 1, 8, 9 and 10 the relevant portions of which are reproduced below:-

> **"1.** This appeal by special leave arises from the Division Bench judgment of the High Court of Rajasthan made on 2-9-1985 in WP No. 602 of 1978. The admitted facts are that the notification under Section 4(1) of the Land Acquisition Act, 1894 (1 of 1894) (for short, "the Act") was published in the State Gazette on 23-3-1977 acquiring 31.28 acres of land for defence purpose. Enquiry under Section 5-A was dispensed with in exercise of the power under Section 17(4) of the Act and declaration under Section 6 was published on 28-4-1976. Possession was taken on 19-5-1977. The award was passed under Section 11 on 21-3-1978. The reference under Section 18 was sought and made in March 1978 to Civil Court for enhancement of the compensation. In September 1978, the respondent filed writ petition in the High Court seeking to quash the notification under Section 4(1) and the declaration under Section 6.
> .....
>
> **9.** Recently, another Bench of this Court in *Municipal Corpn. of Grater Bombay* v. *Industrial Development & Investment Co. (P) Ltd.* re-

examined the entire case law and had held that once the land was vested in the State, the Court was not justified in interfering with the notification published under appropriate provisions of the Act. Delay in challenging the notification was fatal and writ petition entails with dismissal on grounds of laches. It is thus, well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loathe to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the constitution to quash the notification under Section 4(1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. ..... The question whether violation of the mandatory provisions renders the result of the action as void or voidable has been succinctly considered in *Administrative Law* by H.W.R. Wade (7th Edn.) at pp. 342-43 thus:

> "The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plantiffs's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another. A common case where an order, however void, becomes valid is where a statutory time-limit expires after which its validity cannot be questioned. The statute does not say that the void order shall be valid; but by cutting off legal remedies it produces that result."

10. The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question

of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances. It is seen that the acquisition has become final and not only possession had already been taken but reference was also sought for; the award of the Court under Section 26 enhancing the compensation was also accepted. The order of the appellate court had also become final. Under those circumstances, the acquisition proceedings having become final and the compensation determined also having become final, the High Court was highly unjustified in interfering with and in quashing the notification under Section 4(1) and declaration under Section 6." **[emphasis supplied]**

m) The principle laid down in the above decision was also followed in the case of ***Swaika Properties (P) Ltd. & Anr.*** vs. ***State of Rajasthan & Ors.*** : ***(2008) 4 SCC 695*** in which it has been laid down as follows:-

"16. This Court has repeatedly held that a writ petition challenging the notification for acquisition of land, if filed after the possession having been taken, is not maintainable. In *Municipal Corpn. of Greater Bombay* v. I*ndustrial Development Investment Co. (P) Ltd.* where K. Ramaswamy, J. speaking for a Bench consisting of His Lordship and S.B. Majmudar, J. held: (SCC p.520, para 29)

"29. It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the Constitution to quash the notification under Section 4(1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the

award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third-party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

In the concurring judgment, S.B. Majmudar, J. held as under: (*Industrial Development Investment case*, SCC pp.522-23, para 35)

> "*35.* ..... Such a belated writ petition, therefore, was rightly rejected by the learned Single Judge on the ground of gross delay and laches. The respondent-writ petitioners can be said to have waived their objections to the acquisition on the ground of extinction of public purpose by their own inaction, lethargy and indolent conduct. The Division Bench of the High Court had taken the view that because of their inaction no vested rights of third parties are created. That finding is obviously incorrect for the simple reason that because of the indolent conduct of the writ petitioners land got acquired, award was passed, compensation was handed over to various claimants including the landlord. Reference applications came to be filed for larger compensation by claimants including writ petitioners themselves. The acquired land got vested in the State Government and the Municipal Corporation free from all encumbrances as enjoined by Section 16 of the Land Acquisition Act. Thus right to get more compensation got vested in diverse claimants by passing of the award, as well as vested right was created in favour of the Bombay Municipal Corporation by virtue of the vesting of the land in the State Government for being handed over to the Corporation. All these events could not be wished away by observing that no third party rights were created by them. The writ petition came to be filed after all these events had taken place. Such a writ petition was clearly stillborn due to gross delay and laches."

17. Similarly, in *State of Rajasthan* v. *D. R. Laxmi* following the decision of this Court in

Municipal Corpn. of Greater Bombay it was held : (*D. R. Laxmi case*, SCC p.452, para 9)

> "*9.* ..... When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third-party rights were created in the case, is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

18. To the similar effect is the judgment of this Court in *Municipal Council, Ahmednagar* v. *Shah Hyder Beig* wherein this Court, following the decision of this Court in *C. Padma* v. *Dy. Secy. to the Govt. of T.N.* held: (*Shah Hyder case*, SCC p.55, para 17)

> "*17.* In any event, after the award is passed no writ petition can be filed challenging the acquisition notice or against any proceeding thereunder. This has been the consistent view taken by this Court and in one of the recent cases (*C. Padma* v. *Dy. Secy. to the Govt. of T.N.*)....."
>
> **[emphasis supplied]**

Apart from the above decisions, reference also may be made to paragraph 27 of the decision in the case ***Nand Kishore Gupta's (Supra)*** referred to above.

n) It was further submitted by Mr. Mitra that considering the magnitude of the work and the colossal expenditure involved in the Project, the question of equity would require serious consideration. Notice under Section 4(1) and declaration under

Sections 6 and 9 of the LA Act were made on 30-03-2007, 27-08-2007, 13-11-2007, 05-03-2007, 22-05-2007, 20-06-2008, 25-09-2008 and 24-12-2008 and that except for a small portion comprising of 2.4980 hectares, possession of rest of the land has already been taken over, but the writ petition was filed only on 08-03-2010. During the interregnum the progress of the work on the Project has reached an advanced stage and is expected to achieve commercial production of power by August, 2011 as envisaged in the detailed Project report approved by the Central Electricity Authority. It was stated that the respondent no.9 has spent Rs.3083 crores out of the envisaged cost of Rs.5705.055 crores with all necessary statutory clearances having been obtained for development of the Project and that the financial closure was achieved in September, 2007, entailing tie up of Rs.4500 crores as a debt amount towards the Project cost from different financial institutions and banks. That all topographical surveys, transverse surveys, cross sectional surveys, corridor surveys, geographical surveys mapping, sub-surface drilling etc. for all the Project components from Diversion Dam to Power House Site, approach roads and muck

retaining structures, etc. have already been completed and the construction is in full swing and 50% of the tunneling already achieved. It has further been stated that more than 4000 persons are directly employed in the construction of the Project and many are getting benefited indirectly. That 65% of the underground excavation work has been completed, River Diversion for construction of the Dam has been accomplished on 15-01-2007, the Hydro Mechanical Work awarded and the imported steel plates from Germany have already been received at the Project site. Apart from this, Rs.27,58,11,301 has been spent for the implementation of the EMP approved by the MoEF. The work on the construction of roads for the Project area have already been completed. Much have been achieved in complying with the EMP requirement, namely, Green Belt Development, Bio-diversity Conservation, Wildlife Management, creation of Ambient Air Quality, Compensatory Afforestation in CAMPA funds, CAT Plan etc. In addition, it is submitted that Bhavishya Bharat Foundation, an NGO in the Project area, is monitoring the social development activities which includes medical profiling of public from Project affected villages and nearby

areas, setting up a full-fledged Environment Laboratory at the Dam site. Reference was made to the Six Monthly Progress Report submitted in December 2009, filed as Annexure R6 in which the details of the works undertaken thus far and the expenditure incurred by the respondent no.9 in the development and execution of the Project is found reflected. It was submitted that any delay in the execution or commissioning of the Project would result in huge financial losses not only to the respondent no.9 but also to the State of Sikkim and its people at large and that the respondents no.8 and 9 and the State of Sikkim are now in a disadvantageous position and irretrievably altered.

o) We find sufficient force in the submission of Mr. Mitra and do not find any reason to disagree with his contention. In the case of ***Ramana Dayaram Shetty*** vs. ***International Airport Authority of India & ors.*** : ***(1979) 3 SCC 489*** in which we find that the Apex Court while deciding on a matter of tender although found that the tender process was violative of Article 14 and discriminatory, the successful bidder having failed to satisfy the prescribed condition of eligibility,

yet the Court refused to set aside the tender process as the petitioner had approached the Court belatedly. We may refer to the relevant portion of paragraph 35 of the decision which reads as under:-

> **"35.** Now, on this view we should have ordinarily set aside the decision of respondent 1 accepting the tender of respondents 4 and the contract resulting from such acceptance but in view of the peculiar facts and circumstances of the present case, we do not think it would be a sound exercise of discretion on our part to upset that decision and void the contract. ..... Moreover, the writ petition was filed by the appellant more than five months after the acceptance of the tender of the respondents 4 and during this period, respondents 4 incurred considerable expenditure aggregating to about Rs.1,25,000 in making arrangements for putting up the restaurant and the snack bars and in fact set up the snack bars and started running the same. It would now be most inequitous to set aside the contracts of respondents 4 at the instance of the appellant. The position would have been different if the appellant had filed the writ petition immediately after the acceptance of the tender of respondents 4 but the appellant allowed a period of over five months to elapse during which respondents 4 altered their position. We are, therefore, of the view that this is not a fit case in which we should interfere and grant relief to the appellant in the exercise of our discretion under Article 226 of the Constitution." **[emphasis supplied]**

In the present case also having regard to the facts and circumstances, it would be iniquitous to interfere in the land acquisition proceedings and the Project work, even assuming that it was in violation of the laws, at the instance of the petitioner who appears to be grossly negligent and quite somnolent in preferring the present writ petition.

p) We also find that the petitioner lacks the necessary *locus standi* to question the land acquisition proceedings as he is neither the land owner nor a person interested in terms of Section 3(b) of the LA Act. This is apart from what we have already observed in paragraphs 22(i) (a), (b) and (c) above on this question in the context of his *bona fides* in raising the other questions relating to the alleged non-compliance of the environment laws.

(iii) **Whether the respondents, more particularly the respondent no.9, have commenced with and is carrying on with the Project in violation of the Forest (Conservation) Act, 1980, and Environment (Protection) Act, 1986, and whether the conditions prescribed under those clearances are bring complied with or not.**

a) While pressing the contention that the work on the Project was started by the respondent no.9 even before obtaining the necessary Clearance under the Forest (Conservation) Act, 1980, and the Environment (Protection) Act, 1986, the learned counsel drew our attention to the third paragraph of the Environmental Clearance issued vide letter dated 04-08-2006 being Annexure 19 to the writ petition with specific

reference to the sentence "out of which 40.288 ha, is a forest land, Forest Clearance is yet to be obtained". As per the learned counsel, this was a clear evidence that the Forest Clearance had not yet been obtained and that the mandatory conditions of the Environmental Clearance had also not been complied with. It was submitted with reference to letter dated 02-11-2007, being Annexure R3 to the counter-affidavit of the respondent no.6, that the letter dated 12-10-2007 of the MoEF was only a recommendation for Forest Clearance 'in principle' only and, that the final approval would be accorded only on fulfillment of the terms and conditions prescribed therein. As per the learned counsel, those conditions had also not been fulfilled. We have carefully gone through the letter dated 04-08-2006 (Annexure R2) granting Environmental Clearance and letter dated 02-11-2007 (Annexure R3) both issued by the MoEF to the Principle Secretary (Forests), the respondent no.3 and, we find that the letter dated 04-08-2006 is one by which the Environmental Clearance was granted under the Environment (Protection) Act, 1986, which becomes evident from paragraph 4 on the said letter which is reproduced below:-

"4. The Environmental Management Plan submitted by M/s Teesta Urja Limited has been examined. The Ministry of Environment and Forests hereby accords environmental clearance as per the provisions of Environmental Impact Assessment Notification, 1994, subject to strict compliance of the terms and conditions as follows:-" **[emphasis supplied]**

b) On the other hand, letter dated 02-11-2007 (Annexure R3) is a Final Forest Clearance accorded under Section 2 of the Forest (Conservation) Act, 1980, relevant portion of which reads as under:-

"....

To,

The Principal Secretary (Forests)
Government of Sikkim
Gangtok, Sikkim

Sub: **Diversion of 83.0405 ha of forest land (68.3130 ha surface forest area and 14.7275 ha underground forest area) for construction of 1200 MW Teesta State-III Hydro Electric Project by M/s Teesta Urja Limited in North District of Sikkim**

Sir,

I am directed to refer to your Letter no. 1096(1070)/FCA/FEWMD dated 13.12.2006 on the above mentioned subject, wherein prior approval of the Central Government for the diversion of **83.04005 ha of forest land** (68.3130 ha surface forest area and 14.7275 ha underground forest area) for construction of 1200 MW Teesta Stage-III Hydro Electric Project by M/s Teesta Urja Limited in North District of Sikkim, was sought, in accordance with Section 2 of the Forest (Conservation) Act, 1980. The said proposal has been examined by the Forest Advisory Committee constituted by the Central Government under Section 3 of the aforesaid Act.

2. **After careful consideration of the proposal of the State Government of Sikkim and on the basis of the recommendations of the Forest Advisory Committee, the Central Government granted in principle approval to the said proposal vide letter of even no dated 12-Oct 2007, subject to certain conditions.** The compliance of these conditions was

submitted by Nodal Officer cum Chief Conservator of Forests, Sikkim, vide letters No.786(1070) dated 18.10.2007 and 801(1070) dated 24.10.2007. **After consideration of the proposal and compliance of various conditions by the State Government, the Central Government hereby conveys its approval under Section 2 of the Forest (Conservation) Act, 1980 for the diversion of 83.0405 ha forest land (68.3130 ha surface forest area and 14.7275 ha underground forest area)** for construction of 1200 MW Teesta Stage-III Hydro Electric Project in favour of M/s. Teesta Urja Limited in North District of Sikkim, subject to the fulfillment of the following conditions.

....."

c) It appears that the petitioner has failed to appreciate these letters in its proper perspective. As submitted by Mr. Karma Thinlay Namgyal, learned Central Government Counsel, the letter dated 04-08-2006 being in relation to the Environmental Clearance, it was indicated therein that the Forest Clearance was yet to be obtained as the procedure for obtaining the two Clearances are quite distinct being under two different statutes, i.e., the Forest (Conservation) Act, 1980, for Forest Clearance and the Environment (Protection) Act, 1986, for Environmental Clearance. We have already seen that the Forest Clearance was accorded by letter dated 02-11-2007 paragraph 2 of which as extracted above will clearly indicate that the terms and conditions stipulated for the "in principle approval" for diversion of the specified area of Forest Land having been complied with, the final approval

under Section 2 of the Forest (Conservation) Act, 1980 was being thereby accorded. We have noted that the clearances were granted by the MoEF only after those were considered by the Central Empowered Committee and the Hon'ble Supreme Court as revealed from the submission of the learned Advocate General set out hereinbefore in paragraph 18(xii) and sub-paragraphs thereunder. The clearances having culminated in the directions of the Hon'ble Suprme Court, nothing further remains to be examined on this aspect by this Court as venturing to do so would tantamount to reviewing the orders of the Hon'ble Supreme Court. Thus, the submission that requisite clearances under the relevant statutes had not been obtained before commencing with the Project stands belied.

d) The next contention that while carrying on with the work the terms and conditions prescribed for the clearances have not been complied by TUL, do not appear to be correct. We find that the respondent no.9 had submitted an Environment Management Plan which was necessary for obtaining Environmental Clearance under the Environmental (Protection) Act,

1986. A Multi-Disciplinary Monitoring Committee for monitoring and evaluation of works being carried out by the TUL is also found to have been constituted by the MoEF. In its report dated 24-06-2009 submitted after their site visit on 09-03-2010, the Multi-Disciplinary Monitoring Committee has observed that the Project Developers had made encouraging attempts to follow up with the terms and conditions laid down in the Environmental Clearance of the Project and that Committee Members expressed their satisfaction with the various activities being implemented under EMP. We also find that respondent no.9 is required to give Six Monthly Progress Reports on the status of the EMP to the MoEF the respondent no.6, which clearly goes to show that the Project work is being closely monitored by the authorities in order to ensure that all the conditions prescribed in the clearances are being complied with. It has been categorically stated on behalf of the MoEF, respondent no.6, in their affidavit that such monitoring is being carried out intermittently by it for assessment of compliance of the conditions of Environmental Clearance as well as Forest Clearance.

e) In the case of ***Indian Council for Enviro-Legal Action (supra)*** it was observed that the primary effort of the Court, while dealing with the environmental-related issues, is to see that the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws and that effective orders be passed so as to ensure that there can be protection of environment along with development and that it becomes necessary for the court dealing with such issues to know about the local conditions which are better known to the High Courts and, therefore, the High Courts have to shoulder greater responsibilities in tackling such issues and assume the responsibility of seeing to the enforcement of the laws and examine the complaints made by the local inhabitants about the infringement of the laws and spreading of pollution or degradation.

f) From the materials available on the records, we find that the various conditions of the clearances under the Forest (Conservation) Act, 1980, and the Environment (Protection) Act, 1986, are being implemented to the satisfaction of the MoEF,

respondent no.6, which is the appropriate authority having the requisite expertise to deal with the matter.

g) The leaned counsel for the petitioner referred to the case of ***Narmada Bachao Andolan*** vs. ***Union of India & Ors.*** : ***(2000) 10 SCC 664*** to press home the point that the Hon'ble Supreme Court had intervened in the matter after 25 years of the Project having commenced. This is no doubt true, but the intervention of the Hon'ble Supreme Court was only with regard to the compliance of the relief and rehabilitation of the displaced persons which had been found to have been violated by the Project developers and, not to consider the merit of the entire Project. In fact in paragraph 61 of the judgment, the majority view was that there would be a positive impact of ecology as a result of the Project and that the Sardar Sarovar Project would be making positive contribution in the preservation and control of the ecology in several ways. In paragraph 124 of the same judgment, the majority also held that the Dam is neither a nuclear establishment nor a polluting industry and its construction undoubtedly would result in the change of environment which could not be

presumed to be a disaster ecologically. For convenience the relevant passages may be reproduced below:-

> **"48.** When such projects are undertaken and hundreds of crores of public money is spent, individual or organisations in the garb of PIL cannot be permitted to challenge the policy decision taken after a lapse of time. It is against the national interest and contrary to the established principles of law that decisions to undertake developmental projects are permitted to be challenged after a number of years during which period public money has been spent in the execution of the project.
>
> **49.** The petitioner has been agitating against the construction of the dam since 1986, before environmental clearance was given and construction started. It has, over the years, chosen different paths to oppose the dam. At its instance a Five-Member Group was constituted, but its report could not result in the stoppage of construction pari passu with relief and rehabilitation measures. Having failed in its attempt to stall the project the petitioner has resorted to court proceedings by filing this writ petition long after the environmental clearance was given and construction started. The pleas relating to height of the dam and the extent of submergence, environment studies and clearance, hydrology, seismicity and other issues, except implementation of relief and rehabilitation, cannot be permitted to be raised at this belated stage.
>
> **50.** This Court has entertained this petition with a view to satisfy itself that there is proper implementation of the relief and rehabilitation measurers at least to the extent they have been ordered by the Tribunal's Award. In short, it was only the concern of this Court for the protection of the fundamental rights of the oustees under Article 21 of the Constitution of India which led to the entertaining of this petition. It is the relief and rehabilitation measures that this Court is really concerned with and the petition in regard to the other issues raised is highly belated. Though it is, therefore, not necessary to do so, we however presently propose to deal with some of the other issues raised.
>
> .....

> **124.** In the present case we are not concerned with the polluting industry which is being established. What is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the Sardar Sarovar will result in an ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that construction of a large dam is not cost-effective or leads to ecological or environmental degradation. On the contrary there has been ecological upgradation with the construction of large dams. What is the impact on environment with the construction of a dam is well known in India and, therefore, the decision in *A. P. Pollution Control Board case* [(1999) 2 SCC 718] will have no application in the present case."
>
> **[emphasis supplied]**

In the case before us, as would be evident from paragraph 9 of the Order of the NEAA, there are only 156 families who have been partially affected and none of them would be displaced and necessary relief and rehabilitation package for them are being implemented in meticulous detail to their satisfaction.

h) The learned counsel invited our attention to the report of the Department of Mines, Minerals and Geology, Government of Sikkim filed as Annexure PIII to the rejoinder to the counter-affidavit of respondents no.8 and 9 indicating damages caused by the construction of Hydel Project and several newspaper reports to that effect. The learned counsel also

submitted that the diversion of the Protected Forest Land has resulted in environmental pollution adversely effecting the growth of Cardamom, the main source of the income of the people and that the Project has resulted in causing dust and pollution of water causing destruction of the adjoining forest, environment and ecology of the area depriving the people of the right to life guaranteed under Article 21 of the Constitution of India. In the written argument, reference has been made to a newsletter published by the respondent no.3, Forest Department, Government of Sikkim, wherein it has been stated, inter alia, that the State of Sikkim is ecologically sensitive and fragile. Our attention was drawn to Annexures 21, 22, 25 and 26 to show that the Project had resulted in considerable destruction of the environment and ecology of the area as a result of the Project work. These indeed appear to indicate that there are some adverse effect due to the ongoing work of the Project, but this is at the initial stage of the Project. The materials placed before us are either newspaper reports or scientific opinions but, as held in the case of ***A. P. Pollution Control Board*** vs. ***Prof. M. V. Nayudu (RETD.) & Ors.*** : ***(1999) 2 SCC 718***, the difficulty faced by

environmental courts in dealing with highly technological or scientific data appears to be a global phenomenon. This has been a subject matter of international deliberations leading to great changes in environmental concept during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992 leading to the emergence of the term "precautionary principle" and the concept of "burden of proof in environmental matters. It was thus held in paragraphs 37, 38 and 39 as under:-

> **"37.** It is to be noticed that while the inadequacies of science have led to the "precautionary principle", the said "precautionary principle" in its turn, has led to the special principle of *burden of proof* in environmental cases where burden as to the absence of injurious effect of the actions proposed — is placed on those who want to change the status quo [*Wynne, Uncertainty and Environmental Learning,* 2 Global Envtl. Change 111 (1992) at p. 123]. This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less polluted state should not carry the burden of proof and the party who wants to alter it, must bear this burden. [See James M. Olson: *"Shifting the Burden of Proof"*, 20 Envtl. Law, p.891 at p.898 (1990).] [Quoted in Vol. 22 (1998) Harv. Env. Law Review p. 509 at 519, 550].
>
> **38.** The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. (See Report of Dr Sreenivasa Rao Pemmaraju, Special

Rapporteur, International Law Commission, dated 3-4-1998, para 61).

39. It is also explained that if the environmental risks being run by regulatory inaction are in some way *"uncertain* but *non-negligible"*, then regulatory action is justified. This will lead to the question as to what is the "non-negligible risk". In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a "reasonable ecological or medical concern". That is the required standard of proof. ....." **[emphasis supplied]**

i) When we apply the above principle of law in the present case, we find that the petitioner has failed to discharge the burden of proof, the onus of which lies upon him. As already observed, the Project is in its construction phase and for the precise reason of neutralising such adverse impact, the conditions for strict compliance have been stipulated in the statutory clearances already alluded to above and the EMP approved by the MoEF. We also have noticed that a MDMC has been constituted under the direction of the MoEF which has been intermittently monitoring the compliance of the conditions and the EMP requiring the respondent no.9 to submit Six Monthly Progress Reports to the MoEF.

j) In the case of ***K. M. Chinnappa*** vs. ***Union of India & Ors.*** : ***AIR 2003 SC 724*** it has been observed as follows :-

> **"40.** It cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. The balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far more useful for the people, difficulty of a small number of people has to be by-passed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardship.
>
> .....
>
> **45.** Sustainable development is essentially a policy and strategy for continued economic and social development without detriment to the environment and natural resources on the quality of which continued activity and further development depend. Therefore, while thinking of the developmental measures the needs of the present and the ability of the future to meet its own needs and requirements have to be kept in view. While thinking of the present, the future should not be forgotten. We owe a duty to future generations and for a bright today, bleak tomorrow cannot be countenanced. We must learn from our experiences of past to make both the present and the future brighter. We learn from our experiences, mistakes from the past, so that they can be rectified for a better present and the future. It cannot be lost sight of that while today is yesterday's tomorrow, it is tomorrow's yesterday."
>
> **[emphasis supplied]**

No doubt, the concern and anxiety expressed by the petitioner is laudable but, in our view, in the facts and circumstances alluded to by us, we find that the concern is quite unfounded.

k) Having addressed to the primary issues agitated in the writ petition, we may deal with some other aspects that have been raised before us on behalf of the petitioner. As already noted, the learned counsel on behalf of the petitioner sought to raise as preliminary objection on the question relating to restriction imposed on people entering into the North District of Sikkim. While pressing the submission, the learned counsel drew our attention to notification no.665/PS dated 27-09-1954 being Annexure 13 to the writ petition by which entry of traders/agents into Dzongu area was strictly banned. Reference was also made to Annexure 11 being Proclamation of the Maharaja of Sikkim dated 30-08-1956, most specifically to the following part thereof:-

> "3. AND WHEREAS, thirdly, His Highness deems fit that the interests of the indigenous and backward people in the North Sikkim area require, as hitherto, to be duly safeguarded.
>
> HIS HIGHNESS is pleased to order that the rules relating to the settlement and/or the carrying on of any occupation in such areas (i.e., North of the line formed by the Dick Chhu from the Chola, down the Tista to Ranghap Chhu, up the Ranghap Chhu till it meets the 27.25 minutes latitude and thence along it to the Western border of Sikkim) by outsiders (non-indigenous) only on a permit issued by the Sikkim Darbar shall continue to hold force."

I) It was most passionately argued that the aforesaid laws being pre-merger laws duly protected under clause (f) of Article 371F of the Constitution, continues to be laws in enforce and that since the questioned Project falls within the restricted area specified in those laws, permitting it to be taken up was in clear violation of those laws and, therefore, illegal. We, no doubt, accept that the laws are laws in force in terms of clause (f) of Article 371F of the Constitution, but we find it difficult to accept that permitting the Project to come up in the area are in violation of those laws. Notification no.665/PS dated 27-09-1954 only restricts the traders/agents into Dzongu area which appears to have been issued for protection of the inhabitants of that area from being exploited by the traders/agents. The respondent no.9 which is a joint venture company with the State Government of Sikkim cannot be termed as traders/agents from the very nature of their work being development of a Hydroelectric Project. Secondly, the Proclamation dated 30-08-1956 does not create an absolute embargo in entering the North District of Sikkim but does so only to the extent that outsiders would not be allowed to enter the District

without permits issued by the State Government. In the present case, such permission can be reasonably inferred in view of the status of the respondent no.9 as a joint venture company with the State Government and the nature and magnitude of the Project. We, therefore, reject the contentions as being untenable.

m) It was next contended that by the Registration of Companies (Amendment) Act Sikkim, 2007, which came to into effect on 25-09-2009, Section 2 of the Registration of Companies Act Sikkim, 1961, has been amended by insertion of sub-Section (e) thereto whereby it has become mandatory for any company registered under the Companies Act, 1956, to enlist under the Registration of Companies Act Sikkim, 1961, for the purpose of registration/entry as a company under that Act. It was submitted that the respondent no.9, a company registered under Companies Act, 1956, had not been enlisted as required under the aforesaid provision making its operation in the State of Sikkim illegal. This submission, in our view, has no substance in as much as the Act only requires enlisting under the

Registration of Companies Act Sikkim, 1961, in order to be identified as a company under it. No time limit has been prescribed therein and no consequence provided in the event of a company not enlisting. From the Agreement dated 18-05-2005 (Annexure 1), it can be seen that the respondent no.9 company was incorporated much before the enactment of the Registration of Companies (Amendment) Act Sikkim, 2007.

Notwithstanding such fact, we find from letter dated 16-06-2010 (Annexure P-VIII to the rejoinder to the counter-affidavit of respondents no.8 and 9) that the respondent no.9 has applied for enlistment under the Registration of Companies Act Sikkim, 1961, and is under process. This being in due compliance of the law, the contention stands hereby rejected.

23. The parameters of powers of the Courts in matters relating to issues of environment and ecology are quite complex and sometimes perplexing. This has found expression in the case of ***A. P. Pollution Control Board (supra)*** wherein the Hon'ble Supreme Court has observed that "while environmental aspects concern 'life', human rights aspects' concern 'liberty'. In the context of emerging

jurisprudence relating to environmental matters, - as is the case in matters relating to human rights, - it is the duty of the Supreme Court to render justice by taking all aspects into consideration. However, in such cases sometimes the Supreme Court has been finding sufficient difficulty in providing adequate solutions to meet the requirements of public interest environmental protection, culmination of pollution and sustained development." No doubt, right to clean environment and preservation of ecology has since been traced to right to life provided under Article 21 of the Constitution, but while exercising the powers under Article 32 or 226 of the Constitution, the Courts have interfered only when cases of violation of the laws and the guidelines prescribed thereunder were clearly made out. Whether to set up a Project or not is a question that lies within the domain of the Government and would be justiciable only if there are glaring instances of violation of the rights conferred upon the citizens under the Constitution and the various laws giving effect to such rights and, as to whether or not relevant aspects have been taken into consideration while arriving at such decision without being influenced by extraneous considerations or *mala fides*.

24. In the case of ***Shri Sachidanand Pandey & Anr.*** vs. ***The State of West Bengal & Ors.*** : ***AIR 1987 SC 1109***, it has been held as under:-

> **"4.** ..... Obviously, if the Government is alive to the various considerations requiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for this Court to interfere in the absence of mala fides. On the other hand, if relevant considerations are not borne in mind and irrelevant considerations influence the decision, the Court may interfere in order to prevent a likelihood of prejudice to the public. Whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Article 48-A of the Constitution, Directive Principle which enjoins that "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country," and Art. 51A(g) which proclaims it to be the fundamental duty of every citizen of India" to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures." When the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority. The least that the Court may do is to examine whether appropriate consideration are borne in mind and irrelevancies excluded. In appropriate cases, the Court may go further, but how much further must depend on the circumstances of the case. The Court may always give necessary directions. However the Court will not attempt to nicely balance relevant considerations. When the question involves the nice balancing of relevant considerations, the Court may feel justified in resigning itself to acceptance of the decision of the concerned authority. ....." **[emphasis supplied]**

25. In the case of ***Dahuna Taluka Environment Protection Group & Anr.*** vs. ***Bombay Suburban***

Electricity Supply Company Ltd. & Ors. : ***(1991) 2 SCC 539***, it has been held that:-

> **"2.** The limitations, or more appropriately, the self-imposed restrictions of a court in considering such an issue as this have been set out by the Court in *Rural Litigation & Entitlement Kendra* v. *State of U.P. [(1987) 1 SCR 637]* and *Sachidanand Pandey* v. State of W.B. *[(1987) 2 SCC 295].* The observations in those decisions need not be reiterated here. It is sufficient to observe that it is primarily for the governments concerned to consider the importance of public projects for the betterment of the conditions of living of the people on the one hand and the necessity for preservation of social and ecological balances, avoidance of deforestation and maintenance of purity of the atmosphere and water free from pollution on the other in the light of various factual, technical and other aspects that may be brought to its notice by various bodies of laymen, experts and public workers and strike a just balance between these two conflicting objectives. The court's role is restricted to examine whether the Government has taken into account all relevant aspects and has neither ignored or overlooked any material considerations nor been influenced by extraneous or immaterial considerations in arriving at its final decision." **[emphasis supplied]**

26. In the case of ***Rural Litigation and Entitlement Kendra & Ors.*** vs. ***State of U.P. & Ors.*** : ***AIR 1987 SC 359***, while deciding on a dispute relating to mining operation being carried out in the Mussoorie Hill range in the then State of U.P. (now Uttarakhand), it has been held as follows:-

> **"17.** The limestone quarries in this area are estimated to satisfy roughly three per cent of the over the operation and strike a balance between preservation and utilisation that would indeed be a matter for an expert body to examine and on the basis of appropriate advice, Government should

take a policy decision and firmly implement the same." **[emphasis supplied]**

27. We are conscious of the fact that as observed earlier, the Courts in many such cases have stepped in and have interfered with the Projects, but those were cases where there were either glaring instances of violation of the laws or the conditions under which those were permitted or, where the Governments were found to have not considered the relevant aspects and that the decisions were taken on extraneous considerations or where *mala fides* were found writ large.

28. Under the facts and circumstances discussed above, we shall deal with the issues set out in paragraph 21 as under:-

(i) **whether the petitioner has been guilty of suppression of material facts and if so, whether the petitioner is entitled to the reliefs sought for in the writ petition;**

(a) The Environmental Clearance dated 02-11-2007 (Annenxure 19 to the writ petition) had been challenged on the very grounds, as in the present case before the NEAA by the ACT, a forum of which the petitioner is the President, and the NEAA considering all aspects of the matter, had dismissed the appeal thereby

upholding the Environmental Clearance. In the writ petition, the petitioner has neither disclosed of the appeal having filed before the NEAA and of it having been dismissed nor of the fact that he is the President of ACT and, therefore, guilty of suppressio veri, expressio falsi clearly disentitling him of the discretionary and equitable reliefs being sought for by him.

(ii) **whether land acquisition proceedings have been held in accordance with the law and whether the petitioner is guilty of delay and laches in questioning the validity of such proceedings at this stage and also as to whether the petitioner has the necessary *locus standi* to question the acquisition proceedings; and**

(a) The private land required for the Project appears to have been acquired validly in due compliance of the provisions of the Land Acquisition Act, 1894 and that the Forest Land have been put to use only after obtaining the necessary clearances under the Forest (Conservation) Act, 1980 and the Forest (Protection) Act, 1986.

(b) That the petitioner is guilty of delay and laches in challenging the land acquisition of the entire process of the acquisition had been completed in the year 2007-08 and possession of the land

taken over leaving no further scope for assailing the acquisition. We also find that the work on the Project has progressed to an advanced stage at an expenditure of thousands of crores of rupees to meet the deadline of commissioning the Project for commercial production by 2011-12 thereby rendering the position of the respondent no.9 and the State-respondents irretrievably altered. At such a juncture, it will be iniquitous for this Court to intervene in the matter.

(c) The petitioner neither being one of the land owners whose land was acquired for the Project nor a "person interested" as defined under Section 3(b) of the Land Acquisition Act, 1894, lacks the necessary *locus standi* to prefer the writ petition. The inadequacy in his *locus standi* is also compounded by his *bona fides* being gravely suspect for the reason of our conclusion at (i) (a) above.

(iii) **whether the respondents, more particularly the respondent no.9, have commenced with and is carrying on with the Project in violation of the Forest**

(Conservation) Act, 1980, and Environment (Protection) Act, 1986, and whether the conditions prescribed under those clearances are being complied with or not.

(a) While deciding to start the Project in question the Government appears to have taken into account all relevant aspects and do not appear to have ignored nor overlooked any material consideration nor influenced by extraneous or irrelevant considerations in arriving at its final decision.

(b) Records clearly reveal that all requisite actions, namely, the Environment Impact Assessment (EIA), Environmental Clearance under the Environment (Protection) Act, 1986, Forest Clearance under the Forest (Conservation) Act, 1980, drawing up a detailed Environment Management Plan (EMP), etc., have been taken which, we find are being strictly implemented under the close supervision and monitoring of the MoEF through the Multi-Disciplinary Monitoring Committee.

(c) The merit of the clearances recommended by the MoEF have been examined by the Central Empowered Committee (CEC), a body constituted under the Orders of the Hon'ble Supreme Court which, had finally been accepted and cleared by the Hon'ble Supreme Court and, therefore, binding on all including this Court.

29. In the result, the writ petition hereby stands dismissed.

30. No order as to costs.

(S. P. Wangdi)
Judge
14-10-2010

(P. D. Dinakaran)
Chief Justice
14-10-2010

Index : Yes/No

Internet : Yes/No

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