

## **THE HIGH COURT OF ORISSA : CUTTACK**

**W.P.(C) Nos. 9384 of 2012, 30369 of 2011, 3926 of 2010 &  
W.A. No.321 of 2011**

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In the matter of an applications under Articles 226 & 227 of the  
Constitution of India & Article-4 of the Orissa High Court Order,  
1948.

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**(In W.P.(C) No.9384 of 2012)**

Charidesa Krusak Surakhya Sangha  
and another

..... Petitioners

-Versus-

State of Orissa and others

..... Opp. Parties

For Petitioners : M/s. Jayant Das, Sr. Advocate  
S.N.Sarkar, B.K.Jena

For Opp. Parties : Mr. Ashok Mohanty, Advocate General  
(For O.P.Nos.1, 3, 4 and 5)

Mr. S.D.Das, Asst. Solicitor General  
(For O.P. No.2)

M/s.Pinaki Mishra, Sr. Advocate  
Milan Kanungo, Sr. Advocate  
and Mr.S.Das (For O.P. No.6)

**(In W.P.(C) No.30369 of 2011)**

M/s. K.V.K. Nilachal Power Pvt. Ltd.

..... Petitioner

-Versus-

State of Orissa and others

..... Opp. Parties

For Petitioner : Mr.Pinaki Mishra, Sr. Advocate  
M/s. Milan Kanungo, Sr. Advocate  
and Mr.S.Das

For Opp. Parties : Mr. Ashok Mohanty, Advocate General

(For O.P.Nos.1 to 5)  
 Mr. J.Pattnaik, Sr. Advocate  
 M/s. B.Mohanty, P.K.Pattnaik,  
 A.Pattnaik, S.Pattnaik, R.P.Ray & V.S.  
 Rayaguru  
 (For O.P. No.6)

Mr.T.Barik (For O.P. No.7)

M/s. Sachidanda Sahoo & P.R.Bhuyan  
 (For O.P. No.8)

**(In W.P.(C) No.3926 of 2010)**

M/s. K.V.K. Nilachal Power Pvt. Ltd. .... Petitioner

-Versus-

State of Orissa and others ..... Opp. Parties

For Petitioner : Mr.Pinaki Mishra, Sr. Advocate  
 M/s. S.K.Padhi (Sr. Advocate), M.Padhi,  
 A.Das & B.Panigrahi

For Opp. Parties : Mr. Ashok Mohanty, Advocate General  
 (For O.P.Nos.1 to 5)

**(In W.A. No.321 of 2011)**

Basudev Behera and others ..... Petitioners

-Versus-

Joint Commissioner, Consolidation &  
 Settlement, Orissa & others ..... Opp. Parties

For Petitioners : Mr. Trilochan Barik

For Opp. Parties : Mr. Ashok Mohanty, Advocate General  
 (For O.P.Nos.1 & 2)

Mr.Pinaki Mishra, Sr. Advocate  
 M/s. S.K.Padhi (Sr. Advocate), M.Padhi,  
 A.Das & B.Panigrahi  
 (For O.P. No.3)

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**P R E S E N T:**

**THE HON'BLE MR. JUSTICE INDRAJIT MAHANTY.**  
**&**  
**THE HON'BLE MR. JUSTICE BISWANATH MAHAPATRA.**

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Date of hearing: 02.04.2014

Date of judgment: 16.05.2014

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**I. Mahanty, J.** The present batch of writ applications has come to be filed by the petitioner Charidesa Krusak Surakhya Sangha and several land losers seeking to challenge the validity of the acquisition of land made by the Industrial Development Corporation of Odisha (hereinafter referred to as the 'IDCO') for the purpose of setting up a thermal power plant by M/s. KVK Nilachal Pvt. Ltd. (hereinafter referred to as the 'KVK').

**2.** At the commencement of hearing, we requested the learned counsel for the respective parties in this batch of cases to make out categories on the issues raised and to bunch the various cases in each such category. Accordingly, on the consent of the learned counsel representing the various parties, four categories were made. This judgment relates to the cases under Category-IV as noted hereinbelow:

<b>Category-IV</b>	Challenge to lack of permissions and clearances for construction of the project, lack of forest clearance, lack of wildlife clearance.
14.	W.P.(C) No.9384 of 2012
15.	W.A. No.321 of 2011
16.	W.P.(C) No.30369 of 2011
17.	W.P.(C) No.3926 of 2010

3. For the convenience of adjudication, we have proceeded to deal with the aforesaid cases category-wise and, accordingly, the present judgment is confined to the issues raised in Category-IV i.e. challenge to lack of permissions and clearances for construction of the project, lack of forest clearance, lack of wildlife clearance.

4. Since in the connected judgment delivered today in W.P.(C) Nos.6715 of 2011 along with batch of writ applications, the factual background of challenge has been noted in detail therein, for the sake of brevity, the same is not being repeated herein.

5. We will now record the submissions of the parties and their respective objections.

**Category-IV - Challenge to lack of permissions and clearances for construction of the project, lack of forest clearance, lack of wildlife clearance.**

6. Mr. Jayant Das, learned Senior Advocate on behalf of the petitioners submitted that, part of the land over which the thermal power plant of KVK is to be come up is, classified as “forest land” and such land is covered under Section 2 of the Forest Conservation Act, 1980 as determined by the Hon’ble Supreme Court in the case of **T.N.Godavarman Thirumulkpad v. Union of India** (1997) 2 SCC 267 and such forest land cannot be put to in a “non-forest activity”, without a clearance in terms of Section 2 of the Forest Conservation

Act, 1980 and any non forest use of the land, would require prior approval of the Central Government in terms of Section 2 of the Forest Conservation Act 1980 and since KVK do not possess any such prior approval, they should be enjoined from carrying out any non-forest activity thereon. In this respect, it is further alleged that KVK have already commenced construction activity without the necessary approval under the Forest Conservation Act, 1980 and once there is a mixture of forest land and non-forest land, any activity on non-forest land also requires a prior clearance from the Government of India under Section 2 of the Forest Conservation Act. For this purpose, reliance is also placed on a guideline issued by the Ministry of Environment and Forest (in short 'MOEF') dated 21 March, 2011 relevant portion of which is quoted hereinbelow.

“4.4. Project involving Forest as well as Non-forest Lands.

Some project 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 of 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 approval of the Central Government for release of forest land under the Act has been given.”

7. On behalf of the petitioner, it is further contended that the Kapilash Wild Life Sanctuary which was notified on 02.04.2011 is very close to the site of the thermal power plant being constructed by the KVK. Placing reliance on the judgment dated 04.12.2006 of the Hon'ble Supreme Court in the case of **Goa Foundation V. Union of India**, passed in W.P.(C) No.460 of 2004 to the following effect:

“Even in cases where environmental clearance was obtained before declaration of sanctuary and the activities fall within 10Kms of the sanctuary boundary, clearance of the National Wildlife Board (NWB) had to be mandatorily obtained”

8. It is therefore contended that even though KVK admittedly had obtained an environment clearance under the environment Protection Act on 18.02.2009, in terms of the direction of the Hon'ble Apex Court, since the site of the KVK thermal plant is within 10 Kms. of the sanctuary boundary, without obtaining the clearance of the National Wild Life Board, the KVK ought not to be allowed to proceed with the construction. In this respect reliance is placed on the following judgments in the cases of

1. **T.N.Godavarman v. Union of India**, (1997) 2 SCC 267;
2. **Goa Foundation v. Union of India** dated 04.12.2006 passed in W.P.(C) No.460 of 2004;
3. **Vellore Citisen Welfare Forum v. Union of India**, (1996) 5 SCC 647;
4. **AP Pollution Control Board v. M.V.Naidu**, (1992) 2 SCC 718;
5. **M.C.Mehta v. Union of India** (2002) 4 SCC 356;
6. **M.C.Mehta v. Union of India** (1998) 9 SCC 589;
7. **Centre for PIL v. Union of India** (2012) 3 SCC 1.

It is to be noted that other learned counsel appearing for various parties adopted similar arguments as advanced by Mr. J. Das, learned Senior Advocate appearing for the petitioner-Charidesa Krusak Surakhya Sangha.

9. Insofar as Forest and Environmental issues are concerned, the learned Advocate General submitted that no construction over the forest lands will be allowed till forest clearance is received from the MOEF under Section 2 of the FC Act, 1980. Insofar as the boundary of the Kapilash Wildlife Sanctuary is concerned, a memo is filed by the learned Additional Standing Counsel on behalf of the State enclosing a copy of the minutes of the 3<sup>rd</sup> meeting of the State Board for Wildlife held on 11.02.2014. While in the said meeting various issues relating to several other projects were considered, insofar the project of KVK and Wildlife clearance are concerned, the same have been noted at para-8 of the minutes, which is quoted hereunder:

**“8. Wildlife clearance proposal for establishment of Thermal Power Plant by M/s. KVK Nilachal Power Pvt. Ltd. in Kandarei GP, Athagarh tahsil, at Cuttack district:**

- Chief Wildlife Warden appraised that M/s KVK Nilachal Power Pvt. Ltd. intends to set up a 1050 MW Thermal Power Project in Kandarei, Tahsil-Athagarh, Dist. Cuttack. The Environmental Clearance to the project has been granted vide Letter No.J-13011/51/2008-IA.II (T) dated 18.02.2009 by the Ministry of Environment and Forest, Government of India. Upon grant of EC and other necessary

clearances and approvals from authorities as are required for the project, construction activities were undertaken by the Company. Subsequently, Kapilash Wildlife Sanctuary was notified vide Government of Odisha, Forest and Environment Department Notification No.5937/F & E dated 02.04.2011. Consequent upon notification of Kapilash Wildlife Sanctuary, the project site located within jurisdiction of Athagarh Forest Division comes at a distance of 3.5 km from Sanctuary Boundary. The Project Proponent has applied for obtaining clearance from the National Board for Wildlife as per Government of India, Ministry of Environment and Forest, letter F. No.6-10/11WL dt.19.12.12 and submitted the Wildlife Conservation Plan vide letter dt.30.12.11 through the DFO, Athagarh. Acting on a PIL WP© No.9384/2012, the Hon'ble High Court of Odisha has ordered status-quo. The construction activities of the Company has come to a halt as per the order dated 18.05.2012 of Hon'ble High Court, Odisha. Further, vide order dated 25.6.2012, Hon'ble High Court Odisha have given direction to Standing Committee of National Board for Wildlife for the purpose of disposing of the application of the company, to secure the relevant/ necessary records from the concerned Deptt. Of the State Govt. as well as Central Govt. and take a decision on the application of the applicant company & dispose of the same as expeditiously as possible, preferably within a period of 3 weeks and submit a report.

Principal CCF (Wildlife) & Chief Wildlife Warden, Odisha has inspected the site and recommended the proposal with following conditions:

- The Laterite quarries lying in the project area and in area surrounding the project area shall be developed and maintained by the project proponent in form of water bodies. At least 15 such water bodies shall be developed and ma



Barajora Nala in its natural form should be maintained as far as possible. If diverted with due permission from Water Resources Deptt., the diverted nala inside project area shall follow proper gradients and soil conservation measures. Further, on both side of the diverted nala green belt shall be maintained.

- Enrichment Plantation of elephant-friendly fodder species in Baniabandha R.F. and Gobra R.F. (at least over 50 ha) in north-west of proposed Darpani Right Canal of Rengali shall be taken up where elephant movement is noticed at present. Further, in south-east of the said Canal, Canal Bank Plantation shall be taken up.
- 3 Nos. of underpasses for smooth movement of elephants at suitable locations as per suggestion of the DFO be constructed in collaboration with the Railways observing all the technical formalities.

Government of Odisha have approved the proposal of Chief Wildlife Warden, Odisha for placing before State Board for Wildlife.

Chief Wildlife Warden has observed after field visit on 25.12.2013 that the project would not cause any damage, destruction, exploitation or removal of any wildlife or forest produce or degradation of habitat in the sanctuary. The project also does not involve any elephant corridor or established path which would adversely affect the movement of wild animals and has suggested some additional conditions. Sri S.K. Pattnaik opined that it is estimated that Coal based thermal power plant shall produce 7,416 tons of fly ash and 2160 tons of bottom ash per day which is very huge quantity. The industry is in close proximity to a sanctuary will be detrimental to wildlife and the flow of effluents through Barajore nala to Mahanadi shall also affect aquatic flora and fauna of river system. Similar view was also expressed by Sri S.N. Patra

Member State Board for Wildlife. Hon'ble Forest Minister desired that the issue of disposal of fly-ash in the State has to be given serious thought to prevent health hazard due to pollution caused by fly-ash. Principal Secretary, Forest and Environment Department informed and assured that necessary action has already been taken for utilization of fly ash and more steps utilizing the same in different uses would also be taken to reduce the pollution caused by fly-ash. He further informed that a High Level Committee under the Chairmanship of Chief Secretary, Odisha is monitoring the utilization of fly-ash in the State. Industries are required to make arrangements for utilization of fly ash as per the guidelines of the MoEF. Dr. LAK Singh opined that in the Badajhor nala flows adjoining to the plant site, the flow of water should be maintained and necessary measures to be taken to keep water of the nala pollution free.

After detailed discussion the Board approved and recommended for forwarding the proposal of Thermal Power Plant by M/s KVK Nilachal Power Pvt. Ltd. in Kandarei GP, Athagarh Tahsil, at Cuttack District to Standing Committee of National Board for Wildlife with the conditions suggested by Chief Wildlife Warden, Odisha."

**10.** The conclusion of the State Board for Wildlife based on their field visit on 25.12.2013 clearly stipulates that the project would not cause any damage, destruction, exploitation or removal of any wildlife or forest produce or degradation of habitat in the sanctuary. Further the project also does not involve any elephant corridor or established path which would adversely affect the movement of wild animals and has also suggested some additional conditions and after detailed

discussion, the Board approved and recommended for forwarding the proposal of KVK to the Standing Committee of National Board for Wildlife with the conditions as suggested by the Chief Wildlife Warden.

**11.** Learned Advocate General submitted that insofar as the buffer zone to the Kapilash Wildlife Sanctuary is concerned, the State have made its recommendation to the Union Government and in terms of its recommendation, the location of the petitioners factory does not fall within the “buffer zone” as recommended by the State Government, which obviously awaits the approval thereof by the Union Government.

**Submissions of Union of India**

**12.** Mr. S.D.Das, learned Assistant Solicitor General on behalf of the Union of India confined his argument to the issues raised under Category-IV alone and he submits that while it is a fact that “environment clearance” has been granted to the KVK, he also submits that the proposal for the buffer zone of Kapilash Wildlife Sanctuary has been sent to the MOEF for its consideration but no final decision has been taken thereon and insofar as the recommendation made by the State Board for Wildlife is concerned, the same having been made only on 11.02.2014. Such proposal will be duly considered by the National

Board of Wildlife in due course but till date, no such clearance has been granted.

He further submits that as far as the question of forest land is concerned, the MOEF has filed an affidavit stating that no forest diversion proposal has been received either in the Regional Office in the Ministry of MoEF or by the Ministry itself. He further placed emphasis on the direction issued by the Ministry in its letter dated 21.03.2011 with regard to the revision of Para 4.4 of the guidelines on Forest (Conservation) Act, 1980 regarding projects involving Forest as well as Non-forest Lands to the following effects:

“4.4 Project involving Forest as well as Non-Forest Lands

xxx xxx xxx 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 approval of the Central Government for release of forest land under the Act has been given.”

### **Submissions of KVK**

**13.** Mr. Pinaki Mishra, learned Senior Advocate appearing for the KVK submitted that:

- (a) The Environmental Clearance (“EC”) to the project was granted by the MoEF on 18.02.2009. The EC clearly states that “no ecologically sensitive area is reported within 10 Km area of the project; however there are 5 reserve forests within 5 KM radius”.

- (b) Prior thereto, the letter from the DFO, Athagarh dated 21.07.2008 also states that “The project area does not form part of any National Park, Wildlife Sanctuary or Biosphere Reserve, Bird Sanctuary, Elephant/Tiger Reserve and none of them are present within 10 Km radius of the proposed site.”
- (c) Upon grant of EC and other necessary clearances/approvals from authorities as are required for the project, construction activities were undertaken by the KVK. Undisputedly, till the date of status quo order dated 18.05.2012, an investment of Rs.975 crores had been made by the KVK on the project. Thus the KVK had substantially acted on the EC.
- (d) On 02.04.2011, Kapilash Wildlife Sanctuary was designated as such by a notification published by the State Govt. on 29.04.2011. The notification does not have a retrospective effect as it states “.... the State government do hereby declare that the aforesaid area to be a Sanctuary called the KAPILASH WILDLIFE SANCTUARY with effect from the date of publication of this notification in the Orissa Gazettee.” The project is admittedly at 3.5 km distance from the boundary of the sanctuary as ascertained by the DFO.
- (e) W.P.(C) No.9384/2012 was filed in May, 2012 by CKS Sangha claiming that the KVK should be stopped from constructing the project as the project of the KVK was within 10 km distance from the boundary of Kapilash Wildlife Sanctuary and mandatory wildlife clearance was not obtained.

He submitted that the Petition is based on the followings:-

- (i) Order dated 04.12.2006 passed by the Supreme Court in Goa foundation Case wherein the Court, inter alia, directed MoEF to refer those cases to National Board for Wildlife (for Wildlife Clearance) where ECs had been granted and the project activities were within 10 KM radius of a wildlife Sanctuary/National Parks; and
- (ii) An Office Memo dated 02.12.2009 of MoEF wherein it was clarified that the projects falling within 10 km radius of a National Park/Wildlife Sanctuary were required to obtain Wildlife Clearance.

He submitted that the High Court by an interim order dated 18.05.2012 directed that status quo shall be maintained with respect to 10 Km radius of Kapilash. Hence, the issues raised in the petition are devoid of any merit for the following reasons:-

- (i) Order dated 04.12.2006 passed by the Hon'ble Supreme Court in Goa foundation Case

The Hon'ble Supreme Court in the said order had observed that if State Governments failed to give any proposal then the Court may have to consider passing orders for implementation of the MoEF's decision namely notification of the area within 10 km of the boundaries of sanctuaries and national parks, as eco-sensitive areas. It further directed that all those cases which were falling within 10 km. radius of the existing National Park/Wildlife Sanctuary and

where ECs were issued would also have to obtain clearance from the Standing Committee of the National Board for Wildlife.

Pursuant to the order dated 04.12.2006 of the Hon'ble Supreme Court wherein it was indicated that the Court "may have to consider passing orders of implementation of the MoEF's decision namely notification of the areas within 10 km of the boundaries of sanctuaries and national parks, as eco-sensitive areas", admittedly no orders were passed by the Hon'ble Supreme Court.

The above direction namely "all those cases which were falling within 10 km. radius of the existing National Park/wildlife Sanctuary and where ECs were issued would also have to obtain clearance from the Standing Committee of the National Board for Wildlife" was applicable to cases where a declared National Park/Wildlife Sanctuary was existing on the date of issuance of EC Clearance by the MoEF. In the present case, at the time of grant of EC on 18.02.2009, there was no sanctuary within 10 km radius of the project as Kapilash was notified w.e.f. 29.04.2011. Therefore, the KVK was not required to obtain any Wildlife Clearance from NBWL.

It is submitted that the order passed by the Hon'ble Supreme Court in the case of Goa Foundation (supra) is not applicable to the KVK and the KVK was therefore, not required to obtain any wildlife clearance. Nonetheless, the KVK applied for Wildlife Clearance as a

matter of abundant caution on 30.12.2011. The said Application is being vigorously pursued by the KVK and is pending at the level of the State Government.

It is further submitted that the Order dated 04.12.2006 passed by the Hon'ble Apex Court and relied on by the petitioner does not prohibit or even indicate that there is a prohibition on carrying on construction pending wildlife clearance, which had already started after grant of EC. The Supreme Court was fully aware of the fact that there are several projects which have been granted EC and are within 10 Km radius of a Wildlife Sanctuary/National Park, yet no orders were passed directing suspension of their activities.

It is submitted that 10 km is not a thumb rule as sought to be argued by the Petitioners. In this regard, the present status of notification of "Eco-sensitive zones" is around various National Parks and Wildlife Sanctuaries. It is clear that the MoEF has been made notifications fixing 2.5 kms, 5 Kms Eco-sensitive zones and in some of the cases, it has fixed 10 km as Eco Sensitive Zone.

**14.** Insofar as the Office Memo dated 02.12.2009 is concerned, ex-facie applies prospectively only to those cases where EC is to be granted after the issuance of Office Memo.

The said Office Memo only provides for a condition to be stipulated in the Environmental clearance. A condition can be



stipulated only in a clearance which has to be granted after 02.12.2009 and therefore, it does not apply to cases where Environmental Clearance has been granted prior to 02.12.2009.

It is further made clear in the said Office Memo that the grant of EC does not necessarily imply that the investment made in the project, if any, based on “environmental clearance” so granted, in anticipation of the clearance from forestry and wildlife angle shall be entirely at the cost and risk of the project proponent and Ministry of Environment & Forests shall not be responsible in this regard in any manner.

**15.** There is no injunction of any sort whatsoever either by the Hon’ble Supreme Court or by MoEF directing suspension of activities by the projects which are within 10 km of a Wildlife Sanctuary/National Park and who have not yet obtained Wildlife Clearance from the National Board. The only direction given by the Hon’ble Supreme Court was to refer the matter to the National Board. The Hon’ble Supreme Court was conscious of the fact that there are projects that are carrying on activities but do not have Wildlife Clearance, still the Hon’ble Supreme Court did not pass any Order for suspension of the activities till the time Wildlife Clearance from NBWL is obtained.

**16.** Reliance is placed on Order dated 21.12.2012 passed by this Court in the case of **Indian Metal & Ferro Alloys Vs. Union of India and Ors.** passed in W.P.(C) No.17693/2012. In the said case, this Court has held that in the Order dated 04.12.2006 passed by the Hon'ble Supreme Court in **Goa Foundation case**, nowhere did the Hon'ble Supreme Court state that the activities of companies who have obtained clearance earlier, shall be stopped, till the decision is taken by NBWL. It is also pertinent to note that the State Govt. has filed an Affidavit dated 26.3.2013 before the Hon'ble Justice MB Shah Commission, Ahmedabad in the case of **M/s. BC Dagara, Sulaipat Iron Ore Mine** stating its position in Para-9 of the affidavit which is as follows:-

“9. That though prior clearance from the Standing Committee of the National Board for Wildlife (NBWL) was mandated for the new projects at the time of obtaining environmental clearance, there is no specific stipulation in any of the above instructions that the ongoing projects which have already obtained environmental clearance would be directed to stop their operations until they receive the clearance from the National Board for Wildlife.”

**17.** Learned counsel for the KVK submitted that the KVK had submitted its application for Wildlife Clearance with the DFO, Athagarh on 30.12.2011 and the same is still pending at the State Govt. level and is yet to be forwarded to the NBWL.

**18.** It is further submitted that the Centrally Empowered Committee (“CEC”) appointed by the Hon’ble Supreme Court has on 20.09.2012, filed a Report/Note in WP(C) No.460/2004 in the case of **Goa Foundation Vs. Union of India**, regarding Safety Zones (Eco-Sensitive Zones) around National Parks and Wildlife Sanctuaries. As per the said report the buffer zone for Kapilash would be 500 meters. The present project is at a distance of 2.5 km which is well outside the proposed Buffer Zone.

The Hon’ble Supreme Court has prima facie accepted the CEC recommendations and modifications as suggested by the Amicus Curiae.

The Govt. of Orissa vide their letter dated 17.11.2012 has conveyed its stand to the MoEF that the CEC report is accepted by the Government in its entirety. In view of the above, project site falls comfortably outside the proposed “eco-sensitive zone” area recommended by the CEC/State Government for the Kapilash Wildlife Sanctuary.

In view of the above submissions, it is submitted that neither the Order of the Hon’ble Supreme Court in the case of Goa Foundation (supra) nor the Office Memorandum of MoEF, dated 02.12.2009 even indicate that the projects cannot carry out activities pending Wildlife Clearance. Thus, the prayer sought for in WP(C)

No.9384/2012 to direct stoppage of construction activities till the KVK obtains Wildlife Clearance is devoid of any merit and ought not be granted.

**19. Forest Land**

Mr. Mishra, learned Senior Advocate on behalf of the KVK submitted as follows:

(a) The Governor of Orissa in exercise of powers under Section 27(1) of Indian Forest Act, 1927 issued a notification dated 27.10.1953, deserving an area of 2088 acres inter alia, in Mouza Rahangol and declaring that the entire area is de-reserved and disforested as there was no valuable forest growth in the area.

(b) A PIL (WP No.9384/2012) was filed claiming that the KVK should be stopped from constructing the project, inter alia, on the ground that the project involves forest land. It is alleged that the KVK had filed proposal for diversion of 74.25 ha of forest land to Principal Chief Conservator of Forest bearing Sl. No.423/2010 dated 04.09.2010. The said diversion proposal was returned for compliance of certain objections. No revised diversion proposal has been submitted.

(c) The KVK had earlier filed a Writ Petition WP(C) No.3926/2010 (part of the present batch of writ petitions) challenging the notice 17.02.2010 issued by the Tahasildar wherein the Tahasildar had alleged that the KVK was using the Private Forest

Kissam land in violation of Section 2 of the Forest Conservation Act, 1980. The said Notice was challenged by the KVK by filing the writ petition on the ground that by virtue of notification dated 27.10.1953 the entire land in Mouza Rahangol was de-reserved and de-forested. The High Court vide Order dated 5.3.2010 stayed the operation of the said notice.

(d) Realizing that the entire forest land in Mouza Rahangol including the land forming part of the KVK's project was dereserved and dis-forested, the KVK obviously was not required to file any diversion proposal u/s 2 of the Forest Conservation Act, 1980. As the classification of the land had not been corrected in line with the 27.10.1953 notification, the KVK filed petitions u/s.15(b) of the Orissa Survey & Settlement Act, 1958 before the Court of Additional Commissioner, Settlement & Consolidation, Cuttack, inter alia, for changing the classification of land privately purchased by it from 'Jungle' to 'sarad' or 'gharbari' in the Hal ROR, on the strength of notification dated 27.10.1953 (RP Case Nos. 22/2011 to 43/2011). The said Petitions were allowed by the Additional Commissioner vide Orders dated 17.3.2011 and the Tahasildar, Athagarh was directed to record the classification of the land as changed from 'jungle' to 'cultivation/homestead' in the Hal ROR. No Appeal has been filed against the said Orders and it had attained finality.

(e) That in spite of the Orders dated 17.3.2011 passed by the Additional Commissioner, the Tahasildar, Athagarh was not disposing of the matter by carrying out the necessary corrections/recording in the Hal ROR, the petitioner was constrained to file a Writ Petition being WP(c) No.16201/2011 seeking appropriate directions to the Tahasildar. This Hon'ble Court disposed of the said Petition vide Order dated 08.06.2011 directing the Tahasildar to dispose of the matter as per the directions contained in the orders dated 17.03.2011 passed by the Additional Commissioner in RP Case Nos.22/2011 to 43/2011. The Tahasildar finally complied with the legal directions and has carried out the necessary corrections/recording in the Hal ROR and the land stands recorded as 'sarad'/'gharabadi'.

(f) It is also important to note that the Tahasildar, Athagarh (State Government) has also filed a Revision Petition u/s 15(a) of the Orissa Survey & Settlement Act, 1958 before the Court of Additional Commissioner, Settlement & Consolidation, Cuttack for change of classification of suit plots under Khata No.82 in village Rahangol from kissam 'jungle', 'chotta jungle', 'laika jungle' to 'sarad' or 'gharbari' in the Hal ROR, on the strength of notification dated 27.10.1953. The said petition is pending. Thus, the stand of the State Government is consistent with the factual position.

(g) The DFO, Athagarh thereafter issued a notice dated 02.11.2011 that the KVK was constructing on forest land. The DFO directed the KVK to stop the leveling and construction work. The said notice has been challenged in WP(c) No.30369/2011. In the said petition, the High Court passed an interim order dated 22.11.2011 that the KVK may carry on leveling work, but no construction work shall be carried out without leave of the Court.

(h) Pursuant to the direction issued by the Court to conduct a joint survey of the land, the same was done by the revenue and forest authorities namely Tahasildar, Forest Range Officer, Revenue Inspector along with Amin. The joint verification report was filed along with affidavit dated 16.07.2012 by the State Government. As per the affidavit filed by the Govt., the following classification of the land (alleged to be forest land) is given:-

- (i) Private Forest Kissam land purchased by the KVK – 50.33 Acres
- (ii) Forest Kissam land under acquisition WP(C) No.17476/09-13.38 Acres

Total Forest Kissam Land – 63.71 Acres

It is recorded in the said verification report that no tree growth exists on the above land and no construction has been carried out on the said land.

(i) As stated in Paras(d) & (e) above, the classification of the above Private Forest Kissam land admeasuring 50.33 acres purchased by the KVK has been changed from private forest to Patit (Homestead) on the basis of notification dated 27.10.1953 by orders dated 17.03.2011 passed in RP Case No.22/2011 to 43/2011 filed by the KVK in the Court of Additional Commissioner, Settlement and Consolidation. It is to be noted that no Appeal has been filed against the said orders.

In respect of 13.38 Acres of forest kissam land acquired by the State, the Court has passed an order of status quo in WP(C) No.17476/2009 with respect to possession of this land, therefore, the said land is not in possession of the petitioner.

**20. Revenue Forest Land**

It appears that the land included in the list of District Level Committee is Ac.28.100 dec. and the land shown in the Joint Verification Report is Ac.30.45 dec (including the above DLC land). It is noted that no forest growth is found on this land no construction had been undertaken on this land. As stated in Para(f) above, the application for changing the classification of this land from forest to non-forest u/s 15(a) of Orissa Survey & Settlement Act, 1958 filed by Tahasildar, Athagarh Divison is pending in the Court of Additional Commissioner, Settlement and Consolidation, Cuttack RP Case



No.3/2012 dated 06.01.2012. The said land is not in possession of the petitioner.

It is submitted that insofar as the private forest land purchased by the KVK is concerned, the classification of the same has been corrected from 'forest' to 'cultivation/homestead'. In so far as the Government land is concerned, which is recorded as forest, the Government has admittedly applied for correction of ROR, however, has now filed an affidavit before this Hon'ble Court that 28.100 acres of land is included in the District Level Committee list.

Although the State relied upon the notification dated 27.10.1953 and have filed RP Case No.6/2012, where no order has yet been passed, if this Hon'ble Court deems fit, the KVK is ready to apply for clearance in respect of the said 30 acres approx. land. The KVK also undertakes not to carry out any construction on the said 30 acres land till the time forest clearance is given.

**21.** The petitioner has relied upon the judgment of the Hon'ble Supreme Court in the case of ***TN Godavarman Thirumulkpad Vs Union of India*** (1997) 2 SCC 267. Specific reliance is placed on the observation of the Hon'ble Supreme Court in Para-4 that the word "forest" as occurring in Section 2 of the Forest Conservation Act, 1980 will not only include "forest" as understood in the dictionary

sense, but also any area recorded as forest in the Government record irrespective of ownership.

It is to be noted that in the case of TN Godavarman (supra), the Hon'ble Supreme Court considering the meaning of the word "forest" occurring in the Forest Conservation Act, 1980. It is clearly stated in Para 4 of the judgment that "The word 'forest' must be understood according to its dictionary meaning. This description covers all statutorily recognized forests, whether designated as reserved, protected or otherwise for the purpose of /section 2(i) of the Forest Conservation Act." In the present case, entire Mouza Rahangol not only ceased to be reserved forest but was also disforested (physically as is confirmed by the Triennial Inspection Report of 1960 and Joint Verification Report of 2012) pursuant to the notification dated 27.10.1953 i.e. much before the enactment and coming into operation of the Forest Conservation Act, 1980. The classification of such land was not corrected in the ROR, which has been subsequently done.

It is also important to note that in the case of **Nature Lovers Movement Vs. State of Kerala and Ors.** (2009) 5 SCC 373, the Hon'ble Supreme Court held that the regularization of land which was once forest by the State Govt., prior to the coming into force of

FC Act, 1980, did not require any approval from the Central Govt. under Section of the Forest Conservation Act, 1980.

**22.** The petitioner has placed reliance on Para 4.4 of the guidelines dated 21.04.2011 on Forest (Conservation) Act, 1980 regarding project involving Forest as well as Non-forest Lands, issued by MoEF. The said Para 4.4 is reproduced hereunder:-

“4.4 Project 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 forest lands required for the projects. Though the provisions of the Act may not have been technically violated by starting 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 approval of the Central Government for release of forest land under the Act has been given.”

It is submitted on behalf of KVK:

- a. Firstly the said guidelines do not have any force of law and, therefore, are not binding on the KVK. There is no provision in either the Forest Conservation Act, 1980 or the Forest Conservation Rules or the Indian Forest Act, 1927 regarding use of non-forest land. To the extent, the guidelines seek to regulate use of non-forest land, a subject which is not even covered under the Act or the Rules, they cannot be unenforceable

under law. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of **Bhim Singhji Vs. Union of India**-AIR 1981 SC 324- (Paras-75 and 76) and AIR 1988 SC 1681-**J R Raghupathy Vs. State of AP** (Para 18-S. No.20 and 21) of the List of judgments given by the KVK.

- b. Secondly, on a bare perusal of the guidelines would reveal that the same does not apply to project being set up by the private parties and its application is only limited to the project set up by state authorities. Further, the language of Guidelines conclusively show that they are not mandatory but are advisory in nature. The underlying idea of not starting the project, if it involves use of forest as well as non-forest land till approval of Central Govt. is obtained for release of forest land is given, is contained in the guidelines itself namely "expenditure incurred on works on non-forest lands may prove to be infructuous if diversion of forest land involved is not approved." Further the guidelines also admit the position that starting of work on non-forest land does not result in violation of the provisions of the Act.

c. Also important to note is the Order dated 10.01.2012 passed by the National Green Tribunal in Application No.32/2011-**Hussain Saleh Mahmad Usmain Bhai Kara Vs. Union of India and Ors.** by which the NGT while taking note of the Para 4.4 of the guidelines permitted the project proponent to go ahead with construction on non-forest land pending clearance u/s.2 of the Forest Conservation Act, 1980 in respect of Forest Land.

Thus, it is submitted that no reliance can be placed on the said Guidelines.

**23.** The KVK also brought the following facts to the notice of the Court:

- (i) The cost of the project is Rs.4,990 Crores and the project was scheduled to be commissioned on or before March, 2013. The KVK has already made a huge investment of Rs.975.27 crores in the project as on the date of status quo Order dated 18.5.2012.
- (ii) The major portion of the project cost i.e. approx. Rs.3,810 crores is being met through loans taken by the KVK from a consortium of Banks and other Public Financial Institutions. In terms of the Loan Agreement executed with

these Banks/Fls, the KVK is required to pay an amount of Rs.22.50 lacs per day as interest. Each day of delay in constructing the project is therefore causing a loss of Rs.22.50 lacs to the KVK on account of interest alone.

- (iii) In the event, the project is not commissioned; the KVK is bound to fail in its time bound obligations to repay the loan amount. In that eventuality, the Banks/Fls will recall the loan of the KVK and take action against the project of the petitioner by declaring the loan account of the KVK as Non-Performing Asset and by taking consequent action under the provisions of SARFAESI Act, 2002.
- (iv) The KVK is regularly paying wages and salaries to its employees everyday without any progress in the work of the project. That the total expenditure being incurred per day by the KVK on the project including interest on loan is Rs.34 lacs. Thus each day of delay in construction is causing colossal and irreparable loss to the KVK, which it will not be able to sustain any further.
- (v) A part of power to be generated from the project of the KVK is contracted to be sold to third parties with whom the KVK has executed binding contract. The delay in commissioning the project and supply of power under the agreement with

these third parties attracts huge penalties in the form of Liquidated Damages. Each day of delay in supplying the power makes the KVK liable to pay a penalty of Rs.16 lacs.

- (vi) That the coal linkage and water linkage to the Project also requires the KVK to commission the project in a time bound manner, failing which the linkage will be cancelled. In the absence of supply of linkage coal, the KVK will not be able to commission and operate the plant.
- (vii) Further the EPC contractors engaged by the KVK for the subject project, is already threatening to impose huge additional cost for delay being caused in construction of the project.
- (viii) The MoU with the Govt. of Orissa for commissioning the power project by the KVK is a time bound one i.e. on or before March, 2013.

That Port Authorities have issued notices to the KVK for lifting imported equipment/materials for the project, failing which they will auction the same.

**24.** In a supplementary note submitted on behalf of KVK, it is submitted that the Govt. of Odisha has forwarded the proposal for declaration of Eco-Sensitive Zone around Kapilash Sanctuary to the MoEF on 12.11.2013. As per the proposal, the width of Eco-

Sensitive Zone around Kapilash ranges between 500 mtrs. To 13.5 Kms. Project of OP No.6 is well outside the proposed zone. This is confirmed in PCCF's report at pg 78. The MoEF in its affidavit filed on 14.2.2014 has confirmed the receipt of the said proposal and has also confirmed that the same is under consideration.

Apart from the above, the Application for Wildlife Clearance of OP No.6 was forwarded by PCCF (Wildlife) vide its report dated 31.12.2013 to Forest & Wildlife Dept., Govt. of Odisha. The PCCF in his report has clearly found that project will not cause any damage, destruction, exploitation or removal of any Wildlife or forest produce or degradation of habitat in the sanctuary. He has further confirmed that since the project does not involve any Elephant Corridor or established path of wild animals, project activities may not affect movements of wild animals. The proposal of PCCF was approved by Forest and Environment Dept., Govt. of Odisha on 10.01.2014 with direction to place the proposal before the State Wildlife Board.

Subsequently, the State Wildlife Board in the meeting held on 21.02.2014 has recommended for forwarding the Wildlife clearance proposal of OP No.6 to the Standing Committee of National Board of Wildlife. (Minutes of Meeting of State Wildlife Board filed by State Govt. vide Memo dated 14.03.2014.



**25.** The petitioners in response to the supplementary note on behalf of KVK submitted as follows:

1(a) The Govt. of Odisha has no doubt forwarded the “proposal”. This confirms that the process of decision making is not completed and no final decision in the matter has been taken by the competent authority under law. The justification of variation of 500 mtrs. To 13.5 Kms. and all other alike matters will be evaluated by the appropriate authority. These facts/matters are not liable to be adjudicated upon in the present proceedings, as the same are beyond the scope of this Writ Application. All that can be noticed is the fact that no final decision as per law has been taken regarding Eco-sensitive Zone around Kapilas ranges and in view of the Govt. of India letter (MoEF) dated 31.7.2013, 10 Kms. will be taken as the Eco-sensitive Zone till the matter is determined otherwise in accordance with law (which process is yet to be completed). Admittedly, the statutory process to arrive at a final decision inter alia as prescribed u/s.5(3) of the Environment Protection Rules, 1986 is yet to be complied with. No final view can be taken at the moment and the time period to elapse for a declaration has also to be complied with.

1(b) The facts stated in paragraph 1(b) of the Supplementary Note submitted on behalf of KVK Nilachal Power Pvt. Ltd. This being

a proposal at the recommendation/proposal stage and the competent authority having not been taken a final decision in accordance with law, there are inherent contradictions, inter alia, relating to elephant movements, whereas the reports says the project does not involve any elephant corridor or established path which would adversely affect the movement of wild animals and has suggested some additional conditions. The records indicate the conditions imposed relating to elephant movements and three nos. of railway underpasses were at least to be built for smooth movement of elephants. The Barajora Nala (perennial natural water channel) is also liable for appropriate protection.

1(c) The matters being in the process of final decision making, it would be not appropriate to make any comments as the same do not fall for adjudication in the present writ application. It is, however, humbly pointed out that the environment clearance has by now elapsed in February, 2014 and the so-called constructions were not being granted and other necessary clearances and approval from authorities as required. Admittedly, forest clearance and wildlife clearance have not been obtained. The so-called construction is limited to (as per order of this Hon'ble Court in WP(C) No.30369/2011), leveling of some patch of land without putting up any construction thereupon.

1(d) The submissions of the KVK Nilachal Power Pvt. Ltd. as at 1(d) are statement of facts. A careful reading of the same affirms that till a final decision is taken up by the competent authority, the eco-sensitive zone would continue to be 10 Kms. In the present case, 10 Kms. Restrictions have been come into existence, it can only be modified by a final notification by a competent authority in accordance with law after complying with notice period etc.

3.0 In response to submissions to paragraph 2 of the aforesaid Supplementary Note, it is humbly submitted that the entire exercise suggested in this paragraph would be transgression of law. In matters of environmental law “precautionary” and “preventive” principle is accepted by the Supreme Court of India in the case of M.C.Mehta onwards. Something not permissible in law cannot be permitted to continue on an undertaking of not claiming any equities. The rest of the submissions are not relevant for the present adjudication.

**26.** In the light of the submissions as noted hereinabove raised by the respective counsels for the parties, the following issues arises for consideration:

- (i) If a project involves forest as well as non-forest land, whether permission can be granted for the project proponent to carry on construction on non-forest land

awaiting clearance on without in any manner impacting the forest land and awaiting its clearance;

- (ii) Whether the location of the KVK's thermal power plant requires wildlife clearance before any construction on the site can be permitted.

Insofar as first the issue is concerned relating to forest land, the learned Assistant Solicitor General representing Union of India has placed reliance on the letter dated 21.03.2011 issued by the Ministry of MoEF and, in particular, Para 4.4 thereof which is reproduced hereunder:

“Para-4.4-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 forest lands required for the projects. Though the provisions of the Act may not have been technically violated by starting 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 approval of the Central Government for release of forest land under the Act has been given.”

**27.** The very self-same letter and Para-4.4 of the guidelines issued by the MoEF was a subject matter of discussion and determination by the National Green Tribunal, New Delhi in M.A. No.32 of 2011-**Hussain Saleh Mahmud Usman Bhai Kara vs.**

**Union of India and Ors.** and by order dated 10.01.2012 came to

hold as follows:

“3. xxx xxx xxx Mr. Panjwani submitted that as and when a project involves use of forest as well as non-forest land, work should not be started on non-forest land till approval of the Central Government for release of forest land is granted. In the case in hand a prayer is made to issue an interim order/ direction restraining Respondent No.3 from making any construction over the non-forest land, till necessary permission is obtained from the Central Government.

4. Respondent No.2 & 3 have entered appearance and have filed a detailed reply in the main case. So far as this MA is concerned, Mr. Ramchandran, learned advocate appearing for Respondent No.3 agreed to make oral submissions. Drawing attention to letter dated 21<sup>st</sup> March, 2011 issued by Assistant Inspection General of Forest to Chief Secretaries/Administrator of all State and Union Territories (Annexure-3), learned counsel submitted that the restrictions imposed in the said guidelines should be confined only to State Govt./ project authorities, and not to projects undertaken by private entrepreneurs.

Elaborating the said submission, Mr. Ramchandran submitted that the restrictions have been imposed to avoid loss likely to be caused to the public exchequer in the event that permission to release the forest land required for the project is refused and consequently the project is abandoned. According to Mr. Ramchandran, the said provision cannot be made applicable to private entrepreneurs who are willing to take a risk at their own cost, thus the balance of convenience tilts in their favour, and it is a fit case where the MA should be dismissed.

5. Perusal of the records reveal that 3.68 ha of forest land out of 300 acres of forest lands, are involved in the aforesaid project. The forest land, it is submitted would be used only for laying pipelines without causing any damage to the existing forest.

6. Mr. Krishnan Venugopal, learned Sr. Counsel, advancing the cause of the Project Proponent submitted that Para 4.4 of the circular issued under

the Forest (Conservation) Act, 1980 is only a guideline and it has neither any statutory force nor can it be said to be binding upon Respondent No.3. Repudiating the submissions advanced by learned counsel for the Applicant it was argued that if any restraining order is issued at this stage, the same would cause irreparable loss to Respondent NO.3 inasmuch as not only the cost of construction would escalate by afflux of time but also there would be delay in completion of the project, thereby causing harassment, irreparable loss and prejudice to the Respondent No.3 which has a prima facie cause in its favour.

7. In course of hearing, however, Mr. Ramchandran, learned counsel for Respondent No.3, fairly submitted that if the said Respondent is permitted to carry on construction over the non-forest land for which EC has already been issued, it shall not claim any equity in as much as the construction undertaken would be purely at its own risk. It is also submitted that alternative steps are being taken not to use the reserve forest land and instead use other land situated in the vicinity for laying down the pipe lines, and as such, if the construction work is stalled Respondent No.3 would suffer insurmountable hardship.

In the case of **Dalpat Kumar & Anr. Vs Prahlad Singh & Ors.** AIR 1993 SC 276, the Supreme Court explained the scope of granting interim protection and observed as follows:

“The phrases ‘prima facie case’, ‘balance of convenience’ and ‘irreparable loss’ are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man’s ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice.”

And thereafter the NGT concluded that the balance of convenience was in favour of the Project Proponent and consequently permitted the Project Proponent to carry on construction in connection with its

thermal power plant, over non-forest land but the same was to be at the risk of the said party and it was further made clear that the Project Proponent shall not claim any equity with regard to the constructions made thereon.

**28.** Apart from the aforesaid facts it appears that from the facts situation that arises in the present batch of cases that the Governor of Orissa in exercise of power under Section 27(1) of Indian Forest Act, 1927 issued a notification dated 27.10.1953, de-reserving an area of 2088 acres in Mouza Rahangol and declaring that the entire area as “de-reserved” and “dis-forested”. M/s KVK had earlier filed a writ petition bearing WP(C) No.3926 of 2010 challenging the notice dated 17.02.2010 issued by the Tahasildar, alleging that the KVK was using private forest kissam land in violation of Section 2 of the Forest Conservation Act, 1980. The said notice was challenged by KVK in further writ petition on the ground that by virtue of notification dated 27.10.1953, the entire land in Mouza Rahangol had been “de-reserved” and “dis-forested”. As classification of the land had not been changed in the ROR in line with 1953 notification, the KVK had filed petition under Section 15(b) of the Orissa Survey & Settlement Act, 1958 for changing the classification of land privately purchased by it from ‘Jungle’ to ‘sarada’ or ‘gharbari’ in the Hal ROR. RP Case Nos.22 of 2011 to 43 of 2011 were allowed by the Additional

Commissioner vide order dated 17.03.2011 and the Tahasildar, Athagarh was directed to record the classification of land as changed from 'jungle' to 'cultivation/homestead'. It is important to take note of the fact that no appeal has been filed against the said order. Although directions had been issued by the Additional Commissioner on 17.03.2011, since the Tahasildar, Athagarh had not acted in the manner as directed by making necessary corrections of the ROR, KVK had filed W.P.(C) No.16201 of 2011 seeking appropriate directions to the Tahasildar and this writ petition has come to be disposed of vide order dated 08.06.2011 directing the Tahasildar to dispose of the matter as per the directions contained in the order dated 17.03.2011 passed by the Additional Commissioner. Finally, the Tahasildar complied with the said direction and necessary corrected Hal ROR pertaining to the private purchase of the land made by KVK was corrected and the said land now stands recorded as 'sarada'/'gharabari'. It is further brought to our notice in course of hearing by learned counsel for the KVK, that similar to the action taken by the KVK for getting appropriate correction of the nature of their land in the ROR, certain land acquired under the L.A. Act for IDCO and to be leased to KVK, though covered by 1953 notification, the necessary record of rights have not yet been corrected. It appears that similar to the action as initiated by the KVK for the land



privately purchased by it for correcting the description of land holding, the Tahasildar, Athagarh also has filed a Revision Petition under Section 15(a) of the Orissa Survey & Settlement Act, 1958 before the Additional Commissioner, Settlement & Consolidation, Cuttack for change of classification of suit plots under Khata No.82 of village Rahangol from kissam 'jungle', 'chotta jungle', 'laika jungle' to 'sarada' and 'gharbari' based on the notification dated 27.10.1953. It appears that the said application by the Tahasildar, Athagarh remains pending for consideration.

**29.** Thereafter, it appears that the DFO, Athagarh issued a further notice on 02.11.2011 to KVK directing stoppage of leveling and construction work, inter alia, once again on the ground that such work was being carried out on "forest land". This notice is the subject matter of challenge by KVK in W.P.(C) No.30369 of 2011, whereas interim orders were passed in favour of the KVK on 22.11.2011, permission was granted to KVK to carry on leveling work but no construction work shall be carried out without leave of the Court.

It appears that this Court issued further directions to the State to conduct joint survey of the land and in process of the said joint survey done by the revenue and forest authorities, namely, the Tahasildar, Forest Range Officer, Revenue Inspector along with

Amin. A report was submitted on 16.07.2012 along with his affidavit which indicates that private forest kissam land purchased by KVK was acres 50.33 and private forest kissam land under acquisition amounted to acres 13.38 and, therefore, it was stated that private forest kissam land totally amounted to 63.71 acres.

What would be important to note from the enquiry report is that on a factual verification of the site, the enquiry report indicates that “no tree exists on the above land and no construction has been carried out on the said land”.

In the light of the aforesaid facts, it appears therefrom that the entire private forest kissam land purchased by the KVK, RORs of which have now been corrected based on the earlier notification issued by the Governor of Orissa dated 27.10.1953 and further that the Tahasildar, Athagarh has also made an application under Section 15(a) of the Orissa Survey & Settlement Act, 1958 for similar conversion of acres 13.38 recorded as forest kissam land though “de-reserved” and “dis-forested” by notification dated 07.10.1953 still awaits disposal. In other words, a total of acres 13.38 pertaining to the acquired land, still remains recorded as “forest kissam”. Apart from the aforesaid private forest land, a further area of land amounting to Ac.28.100 decimals has been recorded as revenue forest land and has been mentioned by the State in its affidavit as

DLC (District Level Committee) land before the Hon'ble Supreme Court in the case of TN Godavarman (supra). Yet the joint verification report observes that "no forest growth is found on this land and no construction has been undertaken on this land". It is further stated on oath by M/s.KVK that neither the forest kissam land acquired amounting to 13.38 acres nor the DLC land amounting to Ac.28.100 decimals has yet been handed over by the State to M/s. KVK.

It is stated on behalf of KVK that as the correction has been made in the ROR of KVK pertaining to private purchase of land, similar applications by the State i.e. Tahasildar, Athagarh remains pending before the Additional Commissioner, Settlement and Consolidation, Cuttack. While the stand taken by the petitioner is that the land has been erroneously recorded as forest land yet, they have given an undertaking before this Court that, the KVK is ready to apply for clearance in respect of the said 30 acres approximate forest land and also further undertake not to carry out any construction activity on the said 30 acres of land till the time forest clearance is obtained and/or the Revision Case filed by the Tahasildar, Athagarh, before the Additional Commissioner, Settlement and Consolidation, Cuttack is disposed of.

**30.** Mr. Pinaki Mishra, learned Senior Advocate appearing for the KVK placed reliance in the case of **Nature Lovers Movement v State of Kerala and others**, (2009) 5 S.C.C. 373.

Considering the fact of the aforesaid case taking into account the fact that much before enactment of Forest Conservation Act 1980, the State Government had taken a policy decision to regularize unauthorized occupation/encroachment of forest land made prior to 01.01.1977 and for implementing such decision, the State Government succeeded in persuading the Central Government to grant approval for diversion of forest land by way of assignment to unauthorized occupants/encroachers and the approval having been granted in accordance with the guidelines framed by the Central Government. The grievance raised against regularization of unauthorized occupation/encroachment was held to be premature in the absence of any decision taken by the State Government in that regard.

**31.** It is also relevant herein to take note of the judgment of the Hon'ble Supreme Court in the case of **J.R. Raghupathy and others v State of Andhra Pradesh**, AIR 1988 S.C. 1681, in which the Hon'ble Supreme Court came to hold that while Article 162 vests executive power of the State and enables the Government to issue administrative instructions to its servants how to act in certain

circumstances, but that would not make such instructions statutory rules the breach of which, is justiciable. The guidelines are merely in the nature of instructions issued by the State Government to regulate the manner in which to formulate proposals for formation of a Revenue Mandal or for location of its Headquarters. It is reiterated therein that the guidelines had no statutory force and are not enforceable in Court of law though for breach of such instructions the public servant may be held liable by the State.

**32.** Apart from the above, a Constitutional Bench of the Hon'ble Apex Court in the case of **Shri Bhim Singhji & others v Union of India and others**, A.I.R. 1981 S.C. 234 has come to hold that guidelines issued by the Government cannot supersede or alter any of the provisions of the acts and rules thereunder. In Conclusion in paragraph-76 of the said judgment Their Lordships of the Constitutional Bench came to conclude that "guidelines cannot alter the priorities laid down in the section. The guidelines are nothing but in the nature of executive instructions and cannot obviously control the plain meaning of the section. Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

On a plain reading of the guideline dated 21.03.2011 of the MoEF clearly state that if work commences on non-forest land in anticipation of the approval of the Central Government for release of forest land required for the project “though the provisions of the Act may not been technically violated by starting work on non-forest land” expenditure incurred may become infructuous if diversion is not approved. Considering the nature of the guidelines since the National Green Tribunal in above referred case **Husain Saleh Mahmad Usma Bhai Kara v Union of India and others** is yet to give its final determination thereon while refraining from expressing any opinion on the same, we record the undertaking of Mr. Pinaki Mishra, learned Senior Advocate on behalf of KVK that they are ready to apply for clearance in respect of 30 acres approximately of purported Government Forest Land and further undertaking not to carry out any construction on the said land till forest clearance is obtained and/or the Revision Case filed by the Tahasildar, Athagarh, before the Additional Commissioner, Settlement and Consolidation, Cuttack is disposed of. We, therefore, dispose of the writ petitions recording the aforesaid undertaking. Accordingly, the first issue is answered in favour of the KVK in terms of the directions issued herein.

**33.** Though the petitioners have placed a great amount emphasis on the judgment of the Hon'ble Supreme Court in the case of **Goa Foundation v. Union of India and others** and insisted that the Hon'ble Supreme Court, had held that even in cases where "environmental clearance" was obtained, before declaration of sanctuary and the activities fall within 10Kms of the sanctuary boundary, clearance of the National Wildlife Board (NWB) had to be mandatorily obtained. Union of India also represented by the learned Assistant Solicitor General relied on the same. Learned counsel for KVK vehemently objected to the same and stated that the order dated 04.12.2006 of the Hon'ble Supreme Court in the case of Goa Foundation (supra) merely indicated that the Hon'ble Supreme Court "may have to consider passing orders of implementation of the MoEF decision namely notification of the areas within 10 kms of the boundaries of sanctuaries and national parks, as eco-sensitive zones. He submitted that admittedly, no subsequent orders have been passed by the Hon'ble Supreme Court giving effect to the said threat. Although various contentions have been advanced by the learned counsel for the respective parties, it has been admitted by the State Government that the project proponent KVK has obtained environment clearance from the MoEF on 18.02.2009. At that time, the Environment Clearance Certificate clearly noted that "no

ecologically sensitive area was reported within 10 Kms area of the project; however there are 5 reserve forests within 5 KMs radius”. But more importantly, the letter of the DFO, Athagarh dated 21.07.2008 contains the following declarations “The project area does not form part of any National Park, Wildlife Sanctuary or Biosphere Reserve, Bird Sanctuary, Elephant/Tiger Reserve and none of them are present within 10 Kms radius of the proposed site”. It is only on 02.04.2011 that the Kapilash Wildlife Sanctuary was designated by way of notification published by the State Govt. on 29.04.2011. The project location is more than 3.5 kms from the boundary of the sanctuary as determined by the DFO.

**34.** Now, the only issue that remains for consideration purported to the “buffer zone”. While Mr. J. Das, learned Senior Advocate appearing for the petitioners has been vehemently arguing that the “buffer zone” must be deemed to be 10 kms., this issue is no longer *res integra*. The selfsame question as to whether any industrial activity can be permitted within 10 kms zone of a reserved forest/national park/ sanctuary came to be considered by the Hon’ble Supreme Court in its judgment dated 21.04.2014. The submission was advanced before the Court that the order dated 04.12.2006 (relied upon by the petitioners) did not finally fixed the “buffer zone” of 10 kms from the boundary of national parks and



wildlife sanctuaries but merely granted a last opportunity to State to submit their recommendations. It was the further argument advanced that till date, no such notification has yet been notified till date. The Hon'ble Supreme Court in the case of **Goa Foundation** (supra) concluded as follows:

“71. In the result, we declare that:-

- (iii) until the order dated 04.08.2006 of this Court is modified by this Court in I.A. No.1000 in T.N. Godavarman Thirumulpad v. Union of India & Ors., there can be no mining activities within one kilometer from the boundaries of National Parks and Sanctuaries in Goa;
- (iv) by the order dated 04.12.2006 in Writ Petition (C) No.460 of 2004 (Goa Foundation v. Union of India), this Court has not prohibited mining activities within 10 kilometers distance from the boundaries of the National Parks or Wildlife Sanctuaries;”

Apart from the above, it would be relevant that in the meantime, the State have also forwarded its recommendation of the “buffer zone” for consideration by the Central Government and in terms of the submission made by the learned Advocate General, the location of the project proponent KVK is beyond the “buffer zone” recommended by the State Government. Therefore, applying the judgment of the Hon’ble Supreme Court in the case of Goa Foundation as referred hereinabove, we are of the considered view that the Hon’ble Supreme Court, has not prohibited any industrial

activity within 10 kms. distance from the boundary of the national park or wildlife sanctuary, but there can be no industrial activity within 1 km. from the boundary of the national parks and sanctuaries in Goa until any further orders were passed by the Hon'ble Supreme Court in this regard. Therefore, we find that whereas the KVK has to approach the appropriate committee since the location is within 10 kms of the boundary of the Kapilash Wildlife Sanctuary, there appears to be no bar in carrying out construction activity, since the distance between the wildlife sanctuary and the location of the thermal power plant is more than 1 km beyond the limits suggested by the State Government in its recommendation made to the Central Government. But the KVK would have to seek necessary approval of the Wildlife Board prior to commencing its operations. Accordingly, the second issue is answered in favour of the KVK in terms of the directions issued herein.

**35.** Therefore, we are of the considered view that there exists no impediment to allow the petitioner-company (KVK) to proceed with construction activities keeping in view of the fact that the huge investment of nearly 1000 (one thousand) crores has already been made and further 4000 (four thousand) crores is required to be further invested, in the interest of not only the project proponent but the State interest insofar as the preferential rights to draw power and

the urgent necessity of power as an infrastructure project for the development of the State and the Union of India, cannot be doubted.

**36.** Insofar as W.A. No.321 of 2011 is concerned, after hearing the learned counsel for the appellant as well as the State, it appears that the appellants claiming to be encroached the Government land, had come to challenge an order dated 6.1.2011 passed by the learned Addl. Commissioner, Settlement and Consolidation, Cuttack in RP Case No.597 of 2010 under Section 15(a) of Orissa Survey and Settlement Act, 1958. This case had been initiated by the Tahasildar, Athagarh for correction of the map and ROR in respect of Khata No.84 of Village Rahangol enhancing the area for acres 4.68 to 34.68 dec. This land was recorded as 'Rakhit-Anabadi' under the State Government and certain persons claiming to be encroachers on the said land had sought to file intervention application in the petition filed by the Tahasildar registering the correction of ROR and map on the claim that they were in the possession of some parts of the case land and/or government land could not be alienated in favour of any company. In the present case, the learned Single Judge while dealing with the issue came to a finding that, enquiry was conducted by the Tahasildar along with the Revenue Supervisor, Revenue Inspector and Amin and it is mentioned in the report that the land is free from encroachment and further that the intervenors had not produced any

material to indicate their occupation or possession or any interest over the case land and accordingly, their objections regarding alienation of the government land in favour of the IDCO were rejected and the order passed by the Addl. Commissioner of Settlement and Consolidation dated 6.1.2011 came to be affirmed.

We find no justifiable ground to interfere with the said order since the learned Single Judge has clearly and categorically come to a conclusion that in the absence of the material in support of the petitioner/appellants' case, assertion of any right, interest and possession over the case land and objection thereof, is wholly misconceived and accordingly, we affirm the order passed by the learned Single Judge.

**37.** In view of the above, the W.P.(C) No.9384 of 2012 & W.A. No.321 of 2011 stand dismissed and W.P.(C) No.30369 of 2011 with the prayer for quashing the notice issued by the DFO, Athagarh vide letter No.8192 dt.02.11.2011 under Annexure-1 which is consequent upon the letter No.4954 dt.30.08.2010 under Annexure-9 and letter No.7773 dt.28.12.2010 under Annexure-10 and further declare that the provisions of Forest Conservation Act would have no application to the lands purchased by the petitioner which is a part of the area notified as de-forested and de-reserved in 1953 Notification dt.27.10.1953 under Annexure-8 being the very basis of correction of

the R.O.Rs under Annexures-7 & 14, is allowed. Further, W.P.(C) No.3926 of 2010 with a prayer for quashing the notice dated 17.02.2010 issued by the Tahasildar, Athagarh under Annexure-2 is also allowed.

The aforesaid batch of writ applications stand disposed of in terms of the directions noted hereinabove.

**B.N.Mahapatra, J.** I agree.

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**I.Mahanty, J.**

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**B.N.Mahapatra, J.**

The Orissa High Court, Cuttack  
16<sup>th</sup> May, 2014-KCP/RKS/PKP/RKM