

JUDICIAL ACTIVISM ON SUSTAINABLE DEVELOPMENT: DAWN OF INDIAN ENVIRONMENTAL JURISPRUDENCE

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Abstract

Concern with the forest took shape with the Forest (Conservation) Act 1980. Until 1927 forest was a national asset and property of the State. The Britishers in 1894 realized the tremendous commercial potentiality of the forest. They formulated a Forest Policy in 1894 where in trade in timber and forest produce was encouraged as a means of earning revenue for the state. This approach was rejected in 1955 Forest Policy. The shift from commercialization to conservation occurred in 1988 Forest Policy. The period from 1894 to 1988, almost a century, is the story of abuse and vendalization of forest. As a result by 1988 the nation was acutely conscious of forest depletion and the resultant climate change, biodiversity change, desertification, fall in ground water level, so on and so forth. Urgent and immediate intervention on war footing was required to protect forest. It was only 1995-1996 the Supreme Court systematically dealt with the issue of deforestation and from 1995 - 2004 has laid down guidelines, looked at a large number of Interlocutory Application and addressed the concerns of each constituent States of the Union of India.

KEYWORDS: *Environment, Sustainable Development, Forest, Tribal, Court, Jurisprudence*

Coining of Sustainable Development and Judicial Activism: The first phase

Honourable Justice Krishna Iyer sowed the seed of sustainable development in India in his famous judgement in *Ratlam Municipality vs. Vardhichand*¹. The Apex Court held that the municipality cannot deny the performance of its statutory duties, under Section 123 of the M.P. Municipalities Act, 1961 to clean and dispose dirt and rubbish from the public areas, owing to budgetary

constraints. In the instant case, a residential area under Ratlam Municipality was anguished by stinky filths in open drains from the nearby alcohol factories and excreta of the nearby slum dwellers. The Apex Court further stated that right to live with dignity and decency is an inseparable facet of human rights and it is the statutory obligation of the municipalities to promote public welfare and health regardless of financial insufficiency. And in this context, the Supreme Court

¹ AIR 1980 SC 1622

stroke the perfect balance between human development and preservation of the decent environment as sustainable development being an integral part of human rights.

A similar view was also taken in another landmark judgement *Dr. B. L. Wadhwa vs. Union of India*², wherein the Supreme Court emphasized that the people of Delhi holds statutory rights to live in a clean and decent environment and Delhi Municipality has the statutory duty to keep the city clean by scavenging all the garbage from different sources irrespective of any budgetary constraints. It implies that right to live in decent environment is our basic human right as enshrined in Universal Declaration of Human Rights 1948 and our fundamental right too under Article 21 of the Indian Constitution. Residing in a civilized society implies right to decent food, water, air, education, environment, shelter, medical care and education.

Thereafter, there were a series of landmark cases wherein the Court upheld the concept of sustainable development in the judgements of each case. In *Vanwasi Sewa Ashram vs. State of Uttar Pradesh*³, the dispute was related to a forest land inhabited by the tribal people of the Mirzapur districts who had converted a considerable part of the forest as cultivable land for their living and

the State Government was of the opinion to set up thermal plant. A series of criminal proceedings and eviction cases were instituted against the tribal people and finally the Court appointed a Board of Commissioners who had to ensure the implementation of the order of the Court and keep proper records wherein Court did justice to both the parties, firstly the tribal people were not dispossessed from the forest area as they were dependent on forest products for ages but at the same time they were not allowed to deplete forest anyhow and on the other hand keeping in mind the need and significance of thermal energy, the Court allowed the construction of thermal plant with minimal disturbances to the tribal people.

In the year 1987, the Supreme Court came up with another landmark judgement which was a revolutionary step for the protection and preservation of the environment and human rights as well. *M.C.Mehta* threw light on the significance of 'no fault liability standards' and a new principle was introduced as 'absolute liability'. The Apex Court held that industries who were handling hazardous substances within their premises in their manufacturing process which poses a potential threat to human beings and environment shall undertake the highest standard of care and precaution that no harm

² AIR 1996 SC 2969

³ AIR1987 SC374

is caused them. And in case of any unfortunate accidents the industries shall undertake the absolute liability of the loss caused and compensate both the human beings and environment as a part of their social cost. In this way, the Supreme Court once again upheld the principle of sustainable development.⁴

In *Narmada Bachao Andolan vs. Union of India*⁵, a writ petition was filed against the construction of dam over River Narmada named as Sardar Sarovar Project. Undoubtedly, the project would displace a large amount of tribal people of that area but if they are relocated with dignity then there would be no violation of their rights. Moreover, the benefits of the construction of dam could not be neglected, there is no such use of nuclear reactor which might pose threat to the ecology. The Apex Court invoked the precautionary principle and principle of sustainable development by ascertaining how far the development could be sustained by mitigating the risks to the ecologically balance naturally.

The Supreme Court in *M.C. Mehta vs. Union of India*⁶, stated that any mining activity will not only comply Mines and Minerals (Regulation and Development) Act but also other environmental statutory enactments

such Environment (Protection) Act, 1986, The Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and Forest (Conservation) Act, 1980 so as to prevent any anticipatory harm to the environment and irreversible consequences. Furthermore, there must be a master plan proposing restoration plans for any environmental degradation. In this case, the Court allowed the mining activities under three conditions firstly, the activities must comply with the strict conditions of sustainable development, secondly, even after the compliance if any ecological degradation or imbalance is caused at Aravalli Range, there would be a complete closure of mining activities, thirdly, no mining activities or pumping of water table should be done within 5 kilometres of Delhi and Haryana border.

The Supreme Court in *Samatha vs. State of Andhra Pradesh*⁷, pointed out that leasing land in possession of tribal people for mining to private industries or non-tribal people is a clear violation of rights of the tribal people under Fifth Schedule of the Constitution. Furthermore, it is the duty of the Gram Sabha to conserve community resources by reiterating the right of self-governance of the tribal people. The Court directed to issue title deed immediately to the tribal people in

⁴ M.C. Mehta vs. Union of India , AIR1987 SC1086

⁵ AIR 2000SC 3751

⁶ AIR 2004 SC 4045

⁷ AIR 1997 SC 3297

possession of the land and directed that mining activities in those areas can be initiated by the Andhra Pradesh State Mineral Development Corporation in co-operation with the tribal community. The Court opined that it is the Constitutional duty of the executive to protect and preserve the social, economic and educational rights of the tribal people.

In *M. C. Mehta vs. Kamal Nath*⁸, the Supreme Court had rested its judgement on the Doctrine of Public Trust and pointed out that there are certain natural resources like air, water and forest cover which holds immense significance to human beings or society as a whole and must be made available to all irrespective of any status, thereby, commercializing these natural resources or subjecting them to any private ownership would be unjustified and improper. In the instant case, the government had leased Motel Company the large river basin of River Beas which was also a protected forest cover and ecologically fertile land for commercial purpose which was held to be a violation of the Doctrine of Public Trust.

In *V. Lakshmipathy and Others vs. State of Karnataka*⁹, without any official conversion of land from residential area to industrial area, the State Government had allowed to

allocate industries in the said residential area with full access to water, electricity, sewage and others. The callous attitude of the Government clearly revealed non-feasance and lack of supervision of the controlling authority leading to betrayal of public interest. The Apex Court clearly outlined that once an area has been earmarked for residential purpose, it has to be used for that purpose only and no further conversion could take place and also ordered that the onus of proof would lie on the concerned authorities to prove that the environmental pollution was within permissible limits.

It is worth noting that the pro-environmental era started from 1987. The pro-environmental stand taken by the Indian judiciary lasted as long as two decades and thereafter there was paradigm shift. The Apex Court now emphasised on the concept of sustainable development to eliminate poverty and improve quality and promote wholeness of human life with due regard to ecological balance. Sustainable development now focused on the vivid extensive development of the ecology as a whole with minimal risk and mitigation plans.

Rising concerns for forest conservation and Judicial Activism: The second phase

⁸ AIR 2000 SC 1997

⁹ AIR 1992 Kant. 57

In the later phase, the growing population of the country demanded more of timber as prominent and immediate crisis. On one hand development was at stake and on other hand conservation of forest cover. Several pertinent questions on account of social, economic and constitutional aspects came up before the courts. Forest depletion was an on-going major concern for all as it not had its immediate effect on the society but also in the near future.¹⁰ To this regard numerous rules were framed under the Indian Forest Act, 1927¹¹ to keep the saw mills, mines, infrastructural projects, dams and other timber encroachments within permissible limits of forest depletion. Again, environment being a subject of concurrent list, almost all the States have legislated their own laws. Too many laws and rules were creating confusion thereby either consolidating or streamlining them or harmonizing them was the need of the hour. The North-Eastern States in India being one of the major reserves of timber called for distinctive attention as they fell under the scope of Schedule VI of the Constitution.

During this phase, two landmark cases ushered a significant change in the environmental jurisprudence in India. The

two cases Godavarman Thirumulpad vs. Union of India¹² and Environmental Awareness Forum vs. State of Jammu and Kashmir¹³ together highlighted the raising concern for preservation and conservation of the forest cover. The Supreme Court accordingly extended this case to the whole of Indian and issued notice to all the secretaries of the States who were entrusted with forest and environment conservation duties to appear in the case, however, the repeated attempts of the Supreme Court failed to achieve its purpose and finally strict order was directed to the secretaries of the seven North Eastern States along with Kerela, Sikkim and Maharashtra to appear before the Apex Court.

In Environmental Awareness Forum vs. State of Jammu and Kashmir¹⁴, Bekay Katha Pvt. Ltd. were engaged in the production of 'katha' which was a product of Khair tree. Prior the Court had exempted the feeling of trees for minor forest products and 'katha' being a minor forest product fell under this category. However, Additional Secretary of forest department pointed out that 'katha' being a minor forest product is manufactured from the woods of Khair tree which has also been categorized as timber therefore, the

¹⁰ A "Jungle" is unplanned, uncontrolled and unregulated growth of trees, shrubs, creepers, undergrowth etc hosting a vast biodiversity. A "Forest" is a planned, organized, controlled growth of trees, plants etc.

¹¹ Indian Forest Act, 1927

¹² (1996) 9 S.C.R 982

¹³ AIR 1999 SC 1495

¹⁴ *ibid*

Court order identifying ‘katha’ as a minor forest product does not apply here. The Supreme Court was too satisfied with the prima facie evidence and asked the managing director of the Bekay Katha Pvt. Ltd. to show cause why there has been a deliberate disobedience of the court’s order and why no criminal proceedings should be initiated against them. In addition to this, the Apex Court ordered the Jammu and Kashmir State Government to reallocate the licensed band sawmills to the specified sawmill zones and submit a report thereby within six weeks and proceed with the demolition of the illegally set up unlicensed band sawmills. Moreover, the State Government must submit the affidavit stating the details of the movement of the quantity of timber outside the State boundaries within six weeks. The movement of timber would only be allowed outside the State boundaries for Railways, DGS and D and Defence purposes.

The Apex Court realized that there has been a misinterpretation of the term “forest” in a number of cases which needs to be interpreted immediately to avoid further misconception. The Court in *Narmada Bachao Andolan vs. Union of India*¹⁵ widened scope of the term “forest” by including not only its dictionary meaning but

also all statutorily recorded land as forest cover in any government records irrespective of its ownership. The Court further stated that the provisions of Forest (Conservation) Act, 1980 would apply to all those recorded forest cover land and directed all the State Governments to immediately stop all such on-going activities in forest apart from those plans which have been approved by the Central Government. The order laid special emphasis to the State Government of all the North Eastern States, Tamil Nadu, Himachal Pradesh, Uttar Pradesh and Jammu and Kashmir even if such on-going projects have received the approval of the State Government or High Court or any other competent authority.¹⁶

In *WWF-India vs. Union of India*¹⁷, the applicant pleaded for the permission for creating Asiatic Lion sanctuaries at Kuna as their second home, first being Gir National Forest, as they were at a verge of extinction. The appellant also assured fencing of the area and re-allocation of the villagers. The Court granting the permission reminded the Directive Principles of State Policy under Article 48A to protect and improve the environment and safeguard forests and wildlife, the Entry 17B of Seventh Schedule of the Constitution dedicated for protection

¹⁵ AIR 2000 SC 3751

¹⁶ T. N. Godavarman Thirumulpad vs. Union of India, (1996) 9 S.C.R 982

¹⁷ WP 337 of 1995- This case concern the settlement of rights in National Parks and Sanctuaries.....

of wild animals and birds and our fundamental duty under Article 51A to improve natural environment and have compassion for living creatures. Furthermore, the Court ordered to ensure the prey ratio as the species do have equal rights to survive on earth, thus best standards must be ensured. Interpreting the sustainable development in this case the Court asked the environmentalists to identify the endangered flora and fauna and take immediate steps for their conservation by implementing recovery programmes. It was also highlighted by the Court the need of new legislation dedicated to the protection and preservation of the endangered species, both flora and fauna, before they become extinct.

In the year 1995, T.N. Godavarman, popularly known as the Green-Man of India, filed a writ petition in Supreme Court in order to bring into the notice of the Court the illegal felling of trees in the Nilgiri hilly regions and the justification of the use of timber for commercial purpose with due regard to the sustainable development. Godavarman being an environmentalist, his main concern was the conservation of forest land and maintain the ecological balance. This case had attracted a lot of critics due to the intervention of the judiciary into administrative matters. However, this case

brought a revolution in the history of environmental jurisprudence and once again the Court reiterated the concepts of sustainable development, polluter's pay principles and precautionary principle. The Court made it loud and clear that the scope of judiciary would extend to all areas wherever the State would fail to perform its liabilities. This case widened the scope of Section 2, particularly the definition of forest land under Forest Conservation Act, 1980 followed by a hearing of full length National Forest Policy.¹⁸

The Apex Court constituted a High Power Committee (HPC) for ensuring the committed implementation of the orders. The Apex Court subsequently focused on the timber industries as well as tribal people who were dependent on forest products and thereby concluded that it is neither desirable nor feasible to stay the timber industries or interfere with the tribal rights. However, proper limits can be imposed so that there is no excess depletion. Additional requirements can be adopted such as demarcating industrial zones or reallocating the tribal people can be adopted to ensure non-depletion of the ecological balance. Furthermore, all the timber industries would require the permission of Ministry of Environment and Forest (MoEF) before

¹⁸ T. N. Godavarman Thirumulpad vs. Union of India, (1996) 9 S.C.R 982

starting its operation. All unlicensed timber industries were directed to stop operating with an immediate effect and no State Government or Union Territory shall give permit of operation to such industries without the prior approval of the Central Empowered Committee. In addition to this, the Court directed the MoEF to draft guidelines regarding the disposal of timber and wood finished products as well within three months dated from May 2001. Another noteworthy point of the order of the Court was banning of movement and transportation of timber outside the North Eastern State boundaries without prior approval of the HPC or MoEF so as to control the illegal trading of timber and its products. The HPC or MoEF shall issue printed water marked transit passes only for granting the permission. Besides these the order also included provisions for felling of tress at both forest areas as well as non-forest areas including plantations. The MoEF was entrusted with the obligation to ensure and approve within one month the guidelines and rules framed by all the State Governments regarding felling and plantation of trees which was to be submitted by them within three months from the date of order. The rules and guidelines must expressly include the manner of felling of trees, its disposal, regeneration as well as penalties. The Court order clearly stated that

the felling of trees shall be done only in accordance to the Central Government approved State Government guidelines and until then no feeling of trees must occur. However, it must be assured that there are no budgetary constraints in regenerating the trees proportionate to the number of feeling of trees in the same area.¹⁹

Godavarman case, prevalently titled as the Forest Case in India, was not only confined to environmental issues but also extended its ambit to administrative issues. The Court realized that there is an urgent to control the illegal felling of tress especially in the North Eastern States. Thereby, the Court interpreted the expressions – “Reviewing Authority” and “Reporting Authority” to identify the competent person who could prepare the Confidential Report. The Chief Secretaries of the States were directed to identify those areas where illegal feeling of trees takes place and initiate criminal proceedings against those who were responsible for it including any officer who is found guilty having such knowledge. The forest department, defence, coast guards and the civil administration must work in coordination to prevent further illegal felling and movement of trees and instances of poaching. The Officers of forest department must be entrusted with additional powers to meet the threat of poaching under the Indian

¹⁹ *ibid*

Forest Act, 1927. In addition to this, all officers of forest department and administration must undergo five days orientation training every three years to acquire knowledge on ecology with regard to its economic and social sustainability. Moreover, the forest and the administrative departments shall at the beginning of the year publish a proposed report on use of natural resources in that year and finally submit a report at the end of the year stating the actual use of the natural resources and reasons if there has been any deviation from the report proposed. The proposed report, Protected Area Management Plans and working plans must be made available to public access once they get approved.²⁰

Godavarman case and Judicial Activism: A critical appraisal

The critics pointed out that the Godavarman case had outreached its boundaries of judicial activism. In this case, the Supreme Court, being the guardian of the Constitution, had significantly violated the principle of separation of power by usurping to itself the legislative as well as executive functions of

the State.²¹ It had exercised the legislative function by banning the felling and transportation of timber and the executive functions by implementing its own orders and interpretations.²² Instead of giving more stringent guidelines to the state and national bureaucracies for aligning their goals for better forest management, the Apex Court circumvented their authority and attempted to micromanage the country's entire forest management. In short, the Apex Court had restricted the responsibilities and independency of the bureaucracies.²³ Not only this, the court too had extended the assumption of its powers beyond the reasonable time frame. As per the Indian Constitution, the writ of mandamus neither has creative effects nor can be compelled against duties which have not been previously defined.²⁴ And in this case, the Court not only kept the case open for implementing its own powers but also practised 'continuing mandamus', which our Constitution does not warrant, to cloak itself for the continuance of the usurped law making functions and administration of the policies.²⁵

²⁰ *ibid*

²¹ Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 S.C.C. 441, 688; the Constitutional Obligation of the Judiciary Hon'ble Mr. J.S. Verma, Chief Justice of India, (1997) 7 S.C.C. (Jour) 1.

²² Armin Rozencranz, Edward Boenig, and Brinda Dutta, The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in

Managing India's Forests, 37 ELR 10032, <http://www.eli.org> Access Date: 16.6.2021

²³ Divan, as cited in Armin Rozencranz & Michael Jackson, The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power, 28 Colum. J. Envtl. L. 121 (2003).

²⁴ Mansukhlal Vithaldas Chauhan v State of Gujarat, (1997) 7 S.C.C. 622

²⁵ Armin Rozencranz, Edward Boenig, and Brinda Dutta, The Godavarman Case: The Indian Supreme

Another noteworthy critic of the case noted that the contribution of the tribal people in the protection and conservation of the forest were completely overlooked in this case. Many instances have shown the active participation of the tribal people in the conservation of the forest and their dedicated vigilance to protect the forest against the illegal users. The Forest Policy of 1988 contains the worth of the relationship between the tribal people and forest directing the State authorities to involve the tribal people in the management, protection, development, regeneration and conservation of the forest thereby making sure that the tribal people living around the forest areas gets gainful employment for their living related thereto and in return they should be allowed to use the forest for their subsistence without depleting the forest cover and maintaining the ecological balance as per the principles of sustainability. It would be very unfair to expect from the tribal people to engage themselves into other trade or business apart from those based on forest products as they are particularly skilled in these activities rather having other additional training. Moreover, for ages they have been dependant on forest for their subsistence and now relocating them was an improper

approach. Neither the Supreme Court nor the State Government paid any heed to this regard. Eventually after Godavarman case, by the end 2004, the nation accounted for deaths of 50 civilians which were casually linked with terrorism associated by the tribal people due to the steady deterioration of their living and lifestyle.²⁶

However, the Godavarman Case had far reaching implications in the National Forest Policies of India. It had opened the Pandora's Box which attempted to regulate and reform the timber industries, forest dwellers, mining activities and illegal forest ventures across the whole nation. The Court in this case assuming the powers of a policy maker and an administrator of law besides being the interpreter of law ceased the illegal timber trade nationwide.²⁷ The Court even excluded the jurisdiction of the lower Courts in this matter to micromanage these proceedings. The Apex Court banned all the timber industries along with other mining operations or sawmills related to forest with an immediate effect which had not received the prior approval of the Central Government. Furthermore, all such industries were asked to reallocate themselves in the specified industrial zones for proper monitoring. The

Court's Breach of Constitutional Boundaries in Managing India's Forests, 37 ELR 10032, <http://www.eli.org> Access Date: 16.6.2021

²⁶ Armin Rozen Cranz, Edward Boenig, and Brinda Dutta, The Godavarman Case: The Indian Supreme

Court's Breach of Constitutional Boundaries in Managing India's Forests, 37 ELR 10032, <http://www.eli.org> Access Date: 16.6.2021

²⁷ *ibid*

Apex Court since 1996 had received as many as 800 interim applications across the country related to forest protection, illegal timber transport, unfair timber pricing, forest revenues and unlicensed forest based industries. To regularize these and reform the forest related issues, the Court had to assume the character of a director to save the environment and maintain the ecological balance with due regard to the sustainable development which was at stake due to mismanagement between the State Governments and Central Government and selfish human needs. However, this was not an easy task for the Supreme Court, so eventually, the Supreme Court had to entrust the MoEF with certain significant duties.²⁸ One of such significant direction was to supervise that the ecological balance is maintained by ensuring compensatory afforestation so that the average percentage of the forest cover remains stable. As the State agencies failed to submit the reports within the stipulated time the MoEF was at a liberty to apply any policy related to commercial use of forest and forest products and expand the forest cover at the same time.

²⁸ *ibid*