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

APPEAL NO.71 OF 2012

In the matter of :

M/s. Lithoferro
A partnership firm
represented by its Partners

1a. Shri Rajiv Neugi
S/o Late Meghashyam K
Mapusa, Goa.

1b. Shri Kaustubh Sawakar
S/o Late Vinayak Sawkar,
Mapusa, Goa.

.....Appellants

Versus

1. MINISTRY OF ENVIRONMENT AND FORESTS
Through its Secretary,
Room NO. 751, Paryavaran Bhawan,
CGO Complex, Lodhi road,
New Delhi-110 003.

.....Respondents

Counsel for Appellants :

Mr. Dhruv Mehta, Sr. Advocate with Mr. Yashraj Singh Deora, Advocate.

Counsel for Respondents :

Ms. Neelam Rathore, Advocate, along with Mr. Vikramjeet and Ms. Syed Amber, Advocates for Respondent.

With

APPEAL NO.72 OF 2012

In the matter of :

M/s. Sociedade Timblo Irmaos Ltd.
Represented by Sociedade de Fomento Ind. Pvt. Ltd.

.....Appellant

Versus

1. MINISTRY OF ENVIRONMENT AND FORESTS
   Through its Director,
   Room NO. 751, Paryavaran Bhawan,
   CGO Complex, Lodhi Road,
   New Delhi-110 003.

.....Respondent

Counsel for Appellant :

Mr. Dhruv Mehta, Sr. Advocate with Mr. Yashraj Singh Deora, Advocate.

Counsel for Respondent :

Ms. Neelam Rathore, Advocate, along with Mr. Vikramjeet and Ms. Syed Amber, Advocates for Respondent.

And

APPEAL NO.74 OF 2012

In the matter of :

M/s. Hardesh Ores Pvt. Ltd.
Having registered Office at
Vila Flores da Silva,
Erasmo Carvalho Street,
Margao, Goa.
Represented by its Directed Mr. V.P. Raikar

.....Appellant

Versus

1. MINISTRY OF ENVIRONMENT AND FORESTS
   Through its Secretary,
   Room NO. 751, Paryavaran Bhawan,
   CGO Complex, Lodhi road,
   New Delhi-110 003.

.....Respondent

Counsel for Appellant :

Mr. Dhruv Mehta, Sr. Advocate with Mr. Yashraj Singh Deora, Advocate.

Counsel for Respondent :

Ms. Neelam Rathore, Advocate, along with Mr. Vikramjeet and Ms. Syed Amber, Advocates for Respondent.

JUDGMENT

PRESENT :

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

Dated : May 09, 2013

JUSTICE SWATANTER KUMAR, (CHAIRPERSON)

1. The Legislature has vested the Central Government with the power to issue directions, in writing, to any person, officer or authority, in exercise of its powers and in performance of its functions under the provisions of Section 5 of the Environmental (Protection) Act, 1986 (for short 'the Act'). Section 5 has two distinct and significant features. Firstly, it opens with a 'non-obstante' clause to give an overriding effect to such directions but

such directions have to be subject to the provisions of the Act. Secondly, in explanation to Section 5, the scope of the power to issue directions has been described by use of inclusive language. It extends to issuance of directions even for closure, prohibition or regulation of any industry, operation or process. It further goes to the extent of issuing directions with regard to the stoppage or regulation of the supply of electricity or water or any other services. This wide power has been vested in the Central Government with the object to protect and enhance the environmental equality and the Act was enacted with the purpose of providing for the uncovered gaps that existed in the area of major environmental hazards. The Legislature enacted a general legislation on environmental protection which *inter alia* provided with the power to issue such directions.

2. Section 6 of the Act empowers the Central Government, by notification in the official gazette, to make rules in respect of all or any of the matters referred in Section 3, which in turn empowers the Central Government to take measures to protect and improve the environment. Section 6, thus, gives restricted powers to the Central Government. This deficiency, however, is made up for under the provisions of Section 25 of the Act where the Central Government, may by notification in the official gazette, make rules for carrying out the purposes of the Act. In other words, Section 5 and 25 both, give specific and general powers to the Central Government to make rules. In exercise of the power under section 25 of the Act, the Central Government framed the Environment

(Protection) Rules, 1986 (for short 'the Rules) which were notified on 19th November, 1986. How the powers of Section 5 of the Act are to be exercised was elucidated by enacting the Rules, particularly Rules 4 and 5 of the Rules. The said provisions read as under: -

> **"4. Directions**
>
> (1) Any direction issued under section 5 shall be in writing.
>
> (2) The direction shall specify the nature of action to be taken and the time within which it shall be complied with by the person, officer or the authority to whom such direction is given.
>
> (3) (a) The person, officer or authority to whom any direction is sought to be issued shall be served with a copy of the proposed direction and shall be given an opportunity of not less than fifteen days from the date of service of a notice to file with an officer designated in this behalf the objections, if any, to the issue of the proposed direction.
>
> (b) Where the proposed direction is for the stoppage or regulation of electricity or water or any other service affecting the carrying on any industry, operation or process and is sought to be issued to an officer or an authority, a copy of the proposed direction shall also be endorsed to the occupier of the industry, operation or process, as the case may be and objections, if any, filed by the occupier with an officer designated in this behalf shall be dealt with in accordance with the procedures under sub-rules (3a) and (4) of this rule:
>
> Provided that no opportunity of being heard shall be given to the occupier if he had already been heard earlier and the proposed direction referred to in sub-rule
>
> (3b) above for the stoppage or regulation of electricity or water or any other service was the resultant decision of the Central Government after such earlier hearing.
>
> (4) The Central Government shall within a period of 45 days from the date of receipt of the objections, if

any or from the date up to which an opportunity is given to the person, officer or authority to file objections whichever is earlier, after considering the objections, if any, received from the person, officer or authority sought to be directed and for reasons to be recorded in writing, confirm, modify or decide not to issue the proposed direction.

(5) In case where the Central Government is of the opinion that in view of the likelihood of a grave injury to the environment it is not expedient to provide an opportunity to file objections against the proposed direction, it may, for reasons to be recorded in writing, issue directions without providing such an opportunity.

(6) Every notice or direction required to be issued under this rule shall be deemed to be duly served

(a) where the person to be served is a company, if the document is addressed in the name of the company at its registered office or at its principal office or place of business and is either-

(i) sent by registered post, or

(ii) delivered at its registered office or at the principal office or place of business;

(b) where the person to be served is an officer serving Government, if the document is addressed to the person and a copy thereof is endorsed to this Head of the Department and also to the Secretary to the Government, as the case may be, in-charge of the Department in which for the time being the business relating to the Department in which the officer is employed is transacted and is either-

(i) sent by registered post, or

(ii) given or tendered to him;

(c) in any other case, if the document is addressed to the person to be served and-

(i) is given or tendered to him, or

(ii) if such person cannot be found, is affixed on some conspicuous part of his last known place of residence or business or is given or tendered to some adult member of his family or is affixed

on some conspicuous part of the land or building, if any, to which it relates, or

(iii) is sent by registered post to that person;

Explanation.-For the purpose of this sub-rule,-

(a) "company" means anybody corporate and includes a firm or other association of individuals;

(b) "a servant" is not a member of the family.

5. Prohibitions and restrictions on the location of industries and the carrying on processes and operations in different areas

(1) The Central government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas-

(i) Standards for quality of environment in its various aspects laid down for an area.

(ii) The maximum allowable limits of concentration of various environmental pollutants (including noise) or an area.

(iii) The likely emission or discharge of environmental pollutants from an industry, process or operation proposed to be prohibited or restricted.

(iv) The topographic and climatic features of an area.

(v) The biological diversity of the area which, in the opinion of the Central Government needs to be preserved.

(vi) Environmentally compatible land use.

(vii) Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.

(viii) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary,

National Park, game reserve or closed area notified as such under the Wild Life (Protection) Act, 1972 or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any international conference association or other body.

(ix) Proximity to human settlements.

(x) Any other factor as may be considered by the Central Government to be relevant to the protection of the environment in an area.

(2) While prohibiting or restricting the location of industries and carrying on of processes and operations in an area, the Central Government shall follow the procedure hereinafter laid down.

(3) (a) Whenever it appears to the Central Government that it is expedient to impose prohibition or restrictions on the locations Of an industry or the carrying on of processes and operations in an area, it may by notification in the Official Gazette and in such other manner as the Central government may deem necessary from time to time, give notice of its intention to do so.

(b) Every notification under clause (a) shall give a brief description of the area, the industries, operations, processes in that area about which such notification pertains and also specify the reasons for the imposition of prohibition or restrictions on the locations of the industries and carrying on of process or operations in that area.

(c) Any person interested in filing an objection against the imposition of prohibition or restrictions on carrying on of processes or operations as notified under clause (a) may do so in writing to the Central Government within sixty days from the date of publication of the notification in the Official Gazette.

(d) The Central Government shall within a period of one hundred and twenty days from the date of publication of the notification in the Official Gazette consider all the objections received against such notification and may [within one hundred and [eighty] days from such day of publication] impose

prohibition or restrictions on location of such industries and the carrying on of any process or operation in an area.

[(4) Notwithstanding, anything contained in sub-rule (3), whenever it appears to the Central Government that it is in public interest to do so, it may dispense with the requirement of notice under clause (a) of sub-rule (3).]"

3. A bare reading of the above provisions makes it clear that Rule 4 and Rule 5 deals with the manner in which the power under Section 5 shall be exercised as well as the procedure that the Central Government is expected to adopt during such exercise. From the reading of the above provisions it is clear that Rule 4 deals with the general directions that may be issued by the Central Government and such proposed directions have to state the nature of the action to be taken and the time within which such direction should be complied with. That direction has to be served upon the concerned person, officer or authority as per the procedure prescribed. In terms of Rule 4 sub clause 3(b) where the proposed direction is for stoppage or regulation of electricity, water or any other service affecting the carrying on of any industry, operation or process, then a copy of the said proposed direction shall be endorsed to the occupier of the industry who shall have the right to file the objection, if any, which then shall be dealt with as per the procedure prescribed under sub-rules 3(a) and (4) of Rule 4. However, an exception to the compliance of principles of natural justice has been made in the proviso to Rules 2 and 3(b), which state that no opportunity of being heard shall be given to the person, if he had already been heard earlier and the proposed

direction referred to in clause 3(b) of Rule 4 for the stoppage or regulation of electricity, water or any other services was the resultant decision of the Central Government after earlier hearing and a direction so issued upon its service shall be binding upon that person, officer or authority in terms of the Rules. On the other hand, Rule 5 appears to restrict its application to the location of industries and carrying on of processes and operations in different areas. Sub-rule (1) of Rule 5 spells out the factors which have to be taken into consideration while prohibiting or restricting the location of an industry or carrying on of its processes or operations in different areas. Rule 4 has its limited operation with regard to the stoppage or regulation of water, electricity or any other services, while Rule 5(2) lays emphasis upon prohibiting or restricting the location of the industries and carrying on of processes or operations in an area and the procedure that the Central Government is required to follow in such cases. The scheme of different sub-rule of Rule 5 is to provide an opportunity to the affected person to file his objections/replies within the stipulated time. Sub-rule 4 of Rule 5 in a given situation but specifically excludes the application of the principle of *audi alteram partem* in a specifically given situation. It empowers the Central Government to pass an order without complying with the procedure contained in sub-Rule (3), i.e. issuance of notice, right to file objections/reply and to decide the matter thereafter within the stipulated time, but such power could only be exercised upon recording of satisfaction that it is in 'public interest' to do so.

4. Whether one reads sub-rules 2 and 3(a) conjunctively or disjunctively the power of the Central Government to issue directions appears to apply and regulate the following:

a. It is expedient to impose prohibition or restriction on the location of an industry.
b. It is expedient to impose prohibition or restriction on carrying on of process; and
c. It is expedient to impose prohibition or restriction on operation in an area.

5. All the above three are directions of serious consequences and prejudicially affect the rights of a person. The Legislature obviously was aware of the consequences of such serious nature but still opted to specifically provide for the exclusion of the principles of natural justice, though, only when, it was in 'public interest' to do so.

6. The Central Government, in exercise of the powers vested in it under Section 5 of the Act, issued an order directing that the environmental clearance recorded in respect of each of the 139 cases be kept in abeyance with immediate effect and until further orders, pending detailed scrutiny of each of these cases. The relevant extract of the said order reads as follows: -

> "6. AND WHEREAS, in action by the State Government authorities on the earlier communication of MoEF on the issues of violations of environmental norms/statutory requirements by mining units in Goa purportedly followed by the aforesaid administrative order dated 10th September, 2012 thereby suddenly suspending all

mining operations in the State, necessitates MoEF to scrutinize/examine the details of each of the mining case and take appropriate decision thereon following due procedure.

7. AND WHREAS, while the aforesaid order dated 10th September, 2012 of the State Government of Goa does not mention any specific number of mining cases, the Justice Shah Commission, in its Report, has mentioned various shortcoming in respect of 139 mining cases (List enclosed) in Goa which, in view of aforesaid discussion mandate immediate action in public interest in light of Rule 4(5) and Rule 5(4) of the Environment (Protection) Rules, 1986 as amended from time to time.

8. NOW, THEREFORE, pending detailed scrutiny of each of these 139 cases, including that of yours, and taking an appropriate decision thereon in each case, after following due procedure, it is hereby directed under Section 5 of the Environment (Protection) Act, 1986 that the Environment Clearance accorded in respect of each of these 139 cases by MoEF be kept in abeyance with immediate effect and until further orders. It is further directed that the project proponent concerned for each of the aforesaid 139 cases shall submit the necessary documents to MoEF so as to verify the legality of the environment clearance granted under which the mine has been operating. These documents may be forwarded to the Director, Ministry of Environment & Forests, R.No. 751, Paryavaran Bhawan, CGO Complex, New Delhi-110003, supported by relevant documentations, within 15 days of issue of these Directions. Lastly, it may be noted that violation of a direction u/s 5 of the Environment (Protection) Act, 1986 shall attract penal action u/s 15 of the Environment (Protection) Act, 1986.

9. This issue with the approval of the Competent Authority.

Director"

7. Aggrieved from the issuance of the above directions, the three private stakeholders, namely, M/s. Lithoferro, Sociedade Timblo de Irmaos Ltd. and Hardesh Ores Pvt. Ltd. have preferred the appeals

being Appeal Nos. 74/2012, 72/2012 and 71/2012 respectively challenging the legality and correctness of the said order. The challenge to the above order *inter alia* but primarily is on the following grounds: -

1. The impugned order is violative of the principles of natural justice and cannot be saved even with the aid of proviso to Rule 4(4) and Rule 5(4).
2. The order suffers from the vice of arbitrariness as it was not based on 'public interest' but was a follow-up action to the intent of the Minister of Environment that was declared by her in the Press Conference held on 12th September, 2012 at Goa. Thus, the impugned order is bad in law and is liable to be quashed even on the ground of legal malice.
3. No reasons have been recorded while passing the impugned order. Whatever reasons have been stated, they are not germane to the facts of the case and to the object of exercise of the prescribed statutory power. The order suffers from patent perversity and illegalities and cannot stand the scrutiny of law.

8. Now, we must notice the factual matrix that has given rise to the above contentions.

FACTS :

9. Since a common question of law and fact arises in all the above appeals, it is not necessary for us to refer to the facts of each

appeal. Suffices it would be to refer to the facts of Appeal No. 71 of 2012, i.e. M/s. Lithoferro v. MoEF.

10. The appellant in this appeal holds rights of mining lease to an iron ore mine known as 'CALSANICHOMATO DE OILOMOL IRON ORE MINE' wherein TC No. 89/1952, located in Villages of Advalpal and Tivim in Bicholim and Berdes Taluka, North Goa, District Goa. These rights, according to the appellant were granted by the erstwhile Portugal regime as title concession on 7th November, 1952 which was thereafter transmitted to the appellant by title of transmission dated 31st August, 1959. These grants are stated to be permanent grants conferring proprietary rights upon them. However, on coming into force of the Goa, Daman and Diu Mining Concessions (Abolition and Declaration as 'Mining Lease') Act, 1987 (for short 'the Abolition Act'), the concessions were abolished and were deemed to be mining leases granted under the Mines and Minerals (Development and Regulation) Act, 1957. The correctness of this State action leading to abolition of such rights was challenged unsuccessfully by the parties, including the appellant, before the Bombay High Court by filing a writ. The writ was dismissed on 20th June, 1997. Being aggrieved from the judgment of the High Court, the appellants had preferred a Special Leave Petition before the Supreme Court, which is pending and a limited interim order was passed in favour of the appellants. Upon complying with the directions of the Hon'ble Supreme Court and the interim order, the appellants filed an application under the Abolition Act and the Mineral Concessions Rules, 1960 for renewal

of the lease. The Central Government accorded its approval vide order dated 24th July, 1989. The State Government renewed the lease in accordance with law for a period of ten years. The appellant again applied for renewal for 20 years on 24th October, 2006. According to the appellant, the lease has been deemed to have been extended in terms of the Mineral Concession Rules, 1960.

11. It is specifically pleaded case of the appellant that the said mine is not affected by any forest, either Government or private. They claim to have carried out the mining operation since the year 1959 till recently, with a break, however for some years prior to 2008 due to economic and other reasons. The approval letter which the appellant claims to have received for mining from the Indian Bureau of Mines, the period is valid upto 2027. In the meanwhile, the Environmental Impact Assessment notification dated 14th September, 2006 was issued and the lease of the appellant was to come up for renewal. The appellant applied for renewal under the said notification and was granted the Environmental Clearance (EC) on 4th May, 2007. The appellant states that he had submitted exhaustive details about the working of the mine, the impact on the environment and it was only after following the stringent prescribed procedure that the environmental clearance was granted to the appellants after holding the screening, scrutiny, public hearing and appraisals. The appellant also obtained periodical renewal of license to operate under The Air (Prevention and Control of Pollution) Act, 1981 and The Water (Prevention and Control of

Pollution) Act, 1974. They were obtained on 20th March, 2008 and 25th July, 2008 respectively and are in force. Thus, the appellant has all the requisite licenses, permits and NOCs for carrying out the mining activity in the said area. The appellant claims to have employed about 300 persons, directly and indirectly, and such persons and their families are dependent upon the mining operation for their livelihood. As parts of its corporate social responsibility, the appellant has carried out extensive projects for the benefit of the local community and has spent huge amounts for the social needs and aspirations of the local community in the year 2011-12.

12. In the memorandum of appeal it has been stated by the appellant specifically that the Central Government had appointed a Commission under the Chairmanship of Justice M.B. Shah (Retired Judge of the Supreme Court of India) under the Commission of Inquiry Act, 1952 vide notification dated 22nd November, 2010 to examine illegal and unjustified mining activities going on in the States of Orissa, Andhra Pradesh and Karnataka, as a number of complaints in that regard had been received by the Central Government. Though, the State of Goa had not complained about the mining activities but in the investigation carried out by Justice Shah Commission and in the report submitted by it on 15th March, 2012 irregularity and unscrupulous operations with respect to the mining activities in the State of Goa, that was also tabled before the Parliament on 7th September, 2012 along with the Action Taken Report of the Ministry of Mines, Government of India. The said report has neither been debated nor been accepted by the

Parliament as of now. Against the report of Justice M.B. Shah Commission, the issue raised by the appellant is that they were never granted any hearing in terms of Sections 8(b) and 8(c) of the Commission of Inquiry Act, 1962 and as such the same was *non est* in view of the judgment of the Hon'ble Supreme Court in the case of *State of Bihar v. L.K. Advani and Ors.* (2003) 8 SCC 361. Once the report prepared by Justice M.B. Shah Commission was tabled before the Parliament, the State of Goa vide its order dated 10th September, 2012 suspended all the mining operations with effect from 11th September, 2012. The District Magistrate of North Goa and South Goa also issued orders in relation to prohibiting the movement and transportation of iron ore vide their order dated 11th and 12th September, 2012 respectively. These orders have been challenged by the appellant and the appeal is pending before the High Court.

13. The appellant claims that it had been submitting six monthly reports in terms of the Environmental Impact Assessment Notification dated 14th September, 2006 to the competent authorities and they do not show any impermissible activity or illegal mining by the appellant. Even an inspection of the premises was conducted on 7th September, 2012 by the representatives of the regional office of the Ministry of Environment and Forests (MoEF).

14. The MoEF issued a show cause notice to the appellant on 11th September, 2012 only on the sole ground that the appellant was allegedly carrying out 'dumping mines'. No other violation was found or stated in the said show cause notice. The show cause

notice further called upon the appellant to show as to why the environmental clearance granted to the appellant be not revoked and the direction for closure be not issued. The appellants also raised the issue that there was no concept of 'dumping mines' inasmuch as there was no element of excavation or mining of ores from the dumps. In fact, the appellant was obliged to stack the dumps/overburden separately in terms of Rules 16 and 33 of the MCDR, 1988. The appellant responded to this show cause notice vide its reply dated 25th September, 2012 pointing out that not even dumping handling leave alone dumping mining taken place at the mining site of the appellant. The State of Goa had already suspended the handling of sub-grade ore pending policy formulation by the State vide its notice dated 27th September, 2011 and as such the show cause notice was without any basis. The appellant also stated the other factors as afore-noticed.

15. According to the appellant no final order and in fact any order has been passed in furtherance to the said show cause notice dated 11th September, 2012 till date.

16. According to the appellant after passing of the order of suspension of mining and other prohibitory orders by the State of Goa on 10th September, 2012 and 11th September, 2012, the Minister for Environment & Forests, Ms. Jayanthi Natarajan, had visited the State of Goa sometime on 12th September, 2012 held a Press Conference in which she declared that 'she suspends the ECs of 93 mines in the State. The order will be sent by a separately constituted Committee of my Ministry and the matter will be

probed.' This was extensively covered by the print media in the State of Goa. Thus, according to the appellant based on the statement of the Minister and without any application of mind and for that matter without any reasons to support their decision, the respondents have issued the order dated 14th September, 2012 in a most arbitrary manner and is opposed to all canons of natural justice, equity and fair play. According to the appellant, the order has been passed without providing them with an opportunity of hearing, therefore the order passed *enmasse.* Once the proceedings had been initiated by issuance of the show cause dated 11th September, 2012 by the respondents, there was no justification in law or otherwise to pass the impugned order. The said order is in gross violation of the principles of natural justice, is *ab initio* void and *nonest* and even suffers from non-application of mind. Thus, they pray that the said order be quashed and/or set aside.

Discussion on Law :-

17. The entire gamut of the submissions made on behalf of the appellants is with regard to the non-adherence of the principles of natural justice and non-recording of reasons in the impugned order. Thus, it is necessary for us to examine the basic principles of natural justice. A five-member Bench of the National Green Tribunal had the occasion to discuss this aspect in a recent judgment in the case of *M/s. Sesa Goa Ltd. and Anr. v. State of Goa and Ors.*, Application No. 49 of 2012, where the Court held as under: -

"14. A Constitution Bench of the Supreme Court in the case *of Swadeshi Cotton Mills vs. Union of India* (1981) 1 SCC 664 stated that:

> "The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self-evident and unarguable truth". In course of time, Judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice". Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But two fundamental maxims of natural justice have now become deeply and indelibly ingrained in the common consciousness of mankind, as pre-eminently necessary to ensure that the law is applied impartially, objectively and fairly. Described in the form of Latin tags these twin principles are: (i) *audi alteram partem and (ii) nemo judex in re sua*"

15. The above two *maxims* have attained a definite meaning, connotation in law and their contents as well as implications are Page 16 of 52 well-established and firmly understood. These, nevertheless are not statutory rules. Each one of these rules leads to charges with exigencies of different situations. They do not apply in the same manner to situations which are not alike. They are not immutable but flexible. These rules can be adapted and modified by statutes, statutory rules and also by constitution of a Tribunal which is to decide a particular matter and the rules by which such Tribunal is governed. In England the law in this regard is not different from the law in India. In *Norwest Holst Ltd. vs. Secretary of State for Trade (1978)* 3 All England Reports 280, Ormond LJ observed: "the House of Lords and this Court have repeatedly emphasized that the ordinary principles of natural justice must be kept flexible and must

be adapted to the circumstances prevailing in any particular case."

16. In the case of *Union of India v. Tulsiram Patel* (1985) 3 SCC 398, another Constitution Bench of the Supreme Court stated:

> "that the question whether requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, Page 17 of 52 the constitution of the Tribunal and the rules under which it functions."

17. It must be noticed that the aim of rules of natural justice is to secure justice, or to put it negatively, to prevent miscarriage of justice. Despite the fact that such rules do not have any statutory character, their adherence is even more important for the compliance of the statutory rules. The violation of the principles of natural justice has the effect of vitiating the action, be it administrative or quasi-judicial, in so far as it affects the rights of a third party. Flexibility in the process of natural justice is an inbuilt feature of this doctrine. Absolute rigidity may not further the cause of justice and therefore adoption of flexibility is important for applying these principles.

18. A Court or a Tribunal has to examine whether the principles of natural justice have been violated or not as a primary consideration, whenever and wherever such an argument is raised. Test of prejudice is an additional aspect. Normally, violation of principles of natural justice, like non-grant of hearing, would vitiate the action unless the theory of 'useless formality' is pressed into service and is shown to have a complete applicability to the facts of Page 18 of 52 the case. We may notice that this theory, though has been accepted by the Courts, but is rarely applied.

19. In the case of *Canara Bank v. A.K. Awasthi* (2005) 6 SCC 321, the Supreme Court compared natural justice to common sense justice. It emphasized on the compliance with the principles of natural justice when a quasi-judicial body embarks upon determination of disputes between the parties or when an administrative action

involving civil consequences is in issue. The Court held:

> "9. The expressions "natural justice" and "legal justice" do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.
>
> 10. The adherence to principles of natural justice as recognised by all civilised States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as *audi alteram partem* rule. It says that no one should be condemned unheard. Notice is the first limb of this Page 19 of 52 principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated

case of *Cooper v. Wandsworth Board of Works* the principle was thus stated: (ER p. 420)

> "Even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' "Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond."

11. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

12. What is meant by the term "principles of natural justice" is not easy to determine. Lord Summer (then Page 20 of 52 Hamilton, L.J.) in R. v. Local Govt. Board3 (KB at p. 199) described the phrase as sadly lacking in precision. In General Council of Medical Education & Registration of U.K. v. Spackman Lord Wright observed that it was not desirable to attempt "to force it into any Procrustean bed" and mentioned that one essential requirement was that the Tribunal should be impartial and have no personal interest in the controversy, and further that it should give "a full and fair opportunity" to every party of being heard."

18. The *audi alteram partem* rule is intended to inject justice into law. It cannot be applied to defeat the ends of justice or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation.' It is a rule of vital

importance in the field of administrative law and it must not be jettisoned, save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. The Court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that 'natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances. The aim is to secure justice or to prevent miscarriage. Where the statute is silent about the observance of principles of natural justice, then such statutory silence is taken to imply compliance with the principles of natural justice. The implication of natural justice being presumptive in nature may be excluded by express words of the statute or by necessary intendment. The real conflict is between the public interest and the private interest. Not only, therefore, can the principles of natural justice be modified but in exceptional cases they could even be excluded. There are well-defined exceptions to the *nemo judex in causa sua* as also to *audi alteram partem* rule. There are certain well recognized exceptions to the *audi alteram partem* rule established by judicial decisions and they are summarized by S.A. de Smith in Judicial Review of Administrative Action, 2nd ed., at pages 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair play in administrative action. The word 'exception' is really a misnomer

because in these exclusionary cases, the *audi alteram partem* rule is held inapplicable not by way of an exception to "fair play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the *audi alteram partem* rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralyzing the administrative process or the need for promptitude or the urgency of the situation so demands.

19. Where a statutory provision either specifically or by inevitable implication excludes the application of the rules of natural justice, then the court cannot ignore the mandate of the legislature. Whether or not the application of the principles of natural justice in a given case has been excluded, wholly or in part, in the exercise of statutory power, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of exercise of that power. A statute conferring power can, by express language, exclude the application of principles of natural justice. It is neither unknown nor unacceptable. If the legislation and the necessity of a situation can exclude the principles of natural justice, including the *audi alteram partem* rule, a fortiori so can a provision of the Constitution, for a Constitutional provision has a far greater and all-pervading sanctity than a statutory provision (Refer : *Maneka Gandhi v. Union of India and Anr.* (1978) 1 SCC 248).

20. Normally, the test that is adopted by the Courts while dealing with the exclusion is that exclusion of application of *audi alteram partem* rule to cases where nothing unfair can be inferred by not affording an opportunity to present and meet a case. Now, it is true that since the right of prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of Borth-y-Gest, from 'fair play in action', it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion. Thus, it is seen from the decision in *Maneka Gandhi* (supra) that there are certain exceptional circumstances and situations whereunder the application of the rule of *audi alteram partem* is not attracted. *A.K Kraipak and Ors Etc. v Union of India and Ors. (1969) 2 SCC 262*, *Union of India v Col. J.N Sinha (1970) 2 SCC 458,*

21. The above stated principles clearly show that the principles of natural justice can also be subject to exceptions. These exceptions would depend upon the language of the provision, the circumstances and facts of a given case. Compliance to the principles of natural justice is general rule and non-observance, even on the strength of a statutory provision is exception. There are cases where the courts have declined to issue writ for compliance to the principles of natural justice even in absence of an excluding provision where it would have made no difference or the facts,

would indisputably lead to that conclusion alone. But in the case in hand, both proviso to Rule 4(3)(b) and Rule 5(4) provide for specific exclusion of the principles of natural justice. Of course, the limitations stated in those provisions have to be strictly adhered to. If the authority concerned desires to rely upon the exclusion clause under Rule 4, then it must be certain that the affected party has already been heard earlier and the proposed direction was the resultant decision of the Central Government after such earlier hearing. While if the authority wishes to exclude applicability of principles of natural justice with reference to the provisions of Rule 5(4), then it must record its satisfaction that the public interest so demands such exclusion. Adherence to these principles would be necessary as otherwise it would be difficult for the Tribunal to hold that recourse to exclusion clause to the principles of natural justice was not proper and would call for no interference. The above provision clearly indicate the specific intention of the Legislature to exclude the applicability of the doctrine of *audi alteram partem* while the Central Government issues directions under Section 5 of the Act read in conjunction with Rules 4 and 5 of the Rules. Still this has to be kept in mind that these exclusion clauses are an exception to the general rule of grant of time, opportunity and hearing to the applicant in terms of the scheme of these very rules. To put it simply, the Central Government is vested with the power of issuing directions *de hors*, compliance to the principles of natural justice but in strict compliance to the conditions stated in the Rules.

Meaning of the expression 'Public interest' appearing in Rule 5(4) of the Rules:

22. As we have already noticed above, sub-rule 4 of Rule 5 is an exception to the rule of *audi alteram partem*, as contemplated under sub-rule 3 of the said rule. The Central Government is vested with the power to dispense with the requirement of serving a notice in accordance with the scheme of Rule 3(a) to 3(d) of Rule 5 requiring a person to whom direction is sought to be passed to file objections to the proposed prohibition or restriction in relation to carrying on of an industrial or commercial activity. This power is not omnipotent but is a power which is of limited application. This can be pressed into service by the Central Government only when it is in public interest to do so. In other words, dispensation of compliance to the principles of natural justice can be taken recourse to only when the public interest so demands, and the Central Government is expected to form an opinion that such is the requirement of public interest. Ordinarily, compliance to the rules of natural justice, as envisaged in Rule 3, is mandatory and cannot be overlooked. Thus, we must understand what the expression 'public interest' means and how it applies.

23. The Act had been enacted with the purpose of providing greater protection to the environment by legislating a comprehensive law, and to implement the decisions that were taken at the United Nations Conference on Human Environment held at Stockholm in June, 1972. The legislature, in its wisdom and keeping in mind the need for effectuating a general legislation on

environmental protection enacted this law, which *inter alia* should ensure co-ordination of activities of various agencies, creation of authorities for protection and regulation of human environment, providing safeguards from hazardous substances and punishment to those who endanger human environment, safety and health. This being the object and reasons for enactment of the general legislation on environment, the expression 'public interest' has to be read and considered in the light of the same. It is a settled canon of interpretation of statutes that a provision or an expression should be interpreted while keeping in mind the entire legislation, its objects and the public purpose that is sought to be achieved by enforcement of such enactment. As already noticed, Section 5 of the Act empowers the Central Government to issue directions and has an overriding effect. The purpose obviously is to enable the Central Government to perform its functions and exercise its powers in an effective manner and in accordance with the provisions of the Act. The Act has a sole purpose to achieve i.e. to provide environmental safety and restrain persons from polluting the environment and causing detriment to the health of the society. It is in this context that now we must understand the general meaning that the courts have given to the expression 'public interest'.

24. 'Public Interest' cannot be treated as a restrictive or rigid term. The Supreme Court of India in the case of *State of Bihar v. Kameshwar Singh AIR 1952 SC 252* held as under:

> "The expression 'public interest' is not capable of precise definition and has not a rigid meaning and

> is elastic and takes its colours from the statute in which it occurs, the concept varying with the time and state for society and its needs. Thus what is 'Public interest' today may not be so considered a decade later."

Black's Law Dictionary, 9th ed. explains the expression 'public interest' as the general welfare of the public that warrants recommendation and direction; something in which the public as a whole has a stake or an interest that justifies Government regulation.

25. A judgment of the Bombay High Court, while dealing with the question of public interest, has in general jurisprudence not only described what public interest is but also how it outweighs the private interest. *In R.R. Tripathi v. Union of India and Others, (2009) 3, BLR 3053*, the Court was concerned with the power of the Government to grant extension of or relaxation in extension of the period of service in favour of the senior police officers and the Court, while expressing the view that such power could only be exercised for valid reasons and in public interest, held as under:

> "26. The expression 'public interest' is well known connotation in service jurisprudence. The Business Dictionary defines 'public interest' as:
> welfare of the general public (in contrast to the selfish interest of a person, group, or firm) in which the whole society has a stake and which warrants recognition, promotion, and protection by the government and its agencies. Despite the vagueness of the term, public interest is claimed generally by governments in matters of state secrecy and confidentiality. It is approximated by comparing expected gains and potential costs or losses associated with a decision, policy, program, or project.
>
> 27. In common parlance, public interest means the general welfare of the public that warrants recognition and protection. It is a matter in which

the public as a whole has the stake and interest. A Government Resolution must justify that besides its own job necessity, Government has formed a *bona fide* opinion that the extension is in public interest as well.

28. In the case of Onkar Lal Bajaj etc. v. Union of India and Anr 2002[SUPP]5SCR605, the Supreme Court explained the terms 'public interest' or 'probity in governance' as follows:

35. The expressions 'public interest' or 'probity in governance' cannot be put in a State jacket. 'Public interest' takes into its fold several factors. There cannot be any hard and fast rule to determine what is public interest. The circumstances in each case would determine whether Government action was taken is in public interest or was taken to uphold probity in governance.

36. The role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision making was motivated on the consideration of probity. The Government has to rise above the nexus of vested interests and nepotism and eschew window dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions. Therefore, the principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate.

29. In the case of *Meerut Development Authority v. Association of Management Studies and Anr. (2009) 6 SCC 171*, the Supreme Court held as under:

> "67. The expression "public interest" if it is employed in a given statute is to be understood and interpreted in the light of the entire scheme, purpose and object of the enactment but in the absence of the same it cannot be

pressed into service to confer any right upon a person who otherwise does not possess any such right in law. In what manner has this Court to arrive at any conclusion that MDA's decision in calling for fresh tender from the interested persons for making the land available for residential use is not in public interest ? Repeated attempts were made before us to say that providing the land in question for educational use will be more appropriate and subserve public interest than making it available for residential use. Public interest floats in a vast, deep ocean of ideas, and "imagined experiences". It would seem to us wise for the courts not to venture into this unchartered minefield. We are not exercising our will. We cannot impose our own values on society. Any such effort would mean to make value judgments.

68. The impugned judgment illustrates "the danger of judges wrongly though unconsciously substituting their own views for the views of the decision maker who alone is charged and authorised by law to exercise discretion". With respect, we find that the High Court virtually converted the judicial review proceedings into an inquisitorial one. The way proceedings went on before the High Court suggest as if the High Court was virtually making an inquiry into the conduct and affairs of MDA in a case where the Court was merely concerned with the decision making process of MDA in not accepting the offer/tender of AMS in respect of the disputed plot on the ground that the offer so made was less than that of the reserved price fixed by MDA."

30. The need is for balancing the public interest against the interest of an individual i.e. the member of the service to whom the extension is sought to be given and this has to be balanced by the Government with reference to the record based opinion and settled canons of administrative jurisprudence. The public interest must be construed in relation to its true context and with reference to the facts of a given case. It is so because this expression is capable of being given a very different meaning in different contexts. The public interest may have a restricted meaning and scope in relation to service jurisprudence while in relation to a public interest litigation or discharge of

obligations by the State towards public it may have a different meaning."

26. With the development of law, public interest has attained a new dimension. In exercise of certain powers by the Government, this principle is of paramount consideration. The doctrine of legitimate expectation and promissory *estoppel* cannot be pressed into service by a citizen where the public interest justifies action of the State. Where the public interest will be harmed, individual rights must give way to rights of the society at large. Public interest must take precedence over individual interest as it is an expression which takes in its ambit the concept of responsibility and fair governance. Public interest, therefore, has to be considered and applied on the basis of the facts and circumstances of a given case. It must be examined with reference to both specific statutory provisions and the scheme of the Act.

27. Public interest in the present case has to be read in conjunction with environmental protection. Environmental protection must attain paramount consideration and other private interests including other minor interests must give in. In the case of *Monek Ispat and Union of India and Ors. 2012(7) SCC 50,* the Supreme Court took the view that rivers, forests, minerals and such other resources constitute the natural wealth of the nation. These resources are not to be frittered away by any generation. However, one generation owes a duty to all succeeding generations to preserve, protect and develop the natural resources in the best possible way. It is the right of the next generation and in the interest of mankind to protect and preserve the environment. The

Central Government has under its control the regulation of mines and development of minerals. Thus, legally it casts a special duty on the Central Government to take necessary steps for conservation and development of minerals in India. Section 17 of the Mines and Minerals (Regulation and Development) Act, 1957 authorises the Central Government itself to undertake prospecting or mining operations under any area not already held under any prospecting licence or mining lease. This is sufficiently indicative of the fact that protection of mines and minerals is the obligation of the State as well as to ensure environmental protection. On humanitarian grounds, and also as per the intent of the statute, it is the balance between public and private interests that the authorities are expected to maintain. Illegal mining is bound to affect the environmental and ecological balance. Thus, wherever public interest so demands, Government must stop and prevent such illegal mining which would have devastating effects on the environment of that area.

28. The word environment is a broad spectrum which brings within its horizon atmospheric and ecological balance, enjoyment of life including right to live with human dignity and encompasses within itself protection and conservation of natural resources and free water without which life cannot be enjoyed

29. Promoting and protecting environment, maintenance of environment – both man-made and natural environment - is of paramount importance. Article 21 of the Constitution guarantees right to life as a fundamental right. Therefore, there is a

Constitutional imperative on the State Governments and the municipalities not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment [*Virender Gaur v. State of Haryana 1995(2) SCC 577]*.

30. At this stage, we may also notice the observations of the Supreme Court in the case of *M.C. Mehta v. Union of India (2001) 4 SCC 577*.

> "While referring to the judgment of the Calcutta High Court, the Court noticed as under:
>
> > "While it is true that in a developing country there shall have to be developments, but that development shall have to be in closest possible harmony with the environment, as otherwise there would be development but no environment, which would result in total devastation, though, however, may not be felt in *praesenti* but at some future point of time, but then it would be too late in the day, however, to control and improve the environment. Nature will not tolerate us after a certain degree of its destruction and it will in any event, have its toll on the lives of the people : Can the present-day society afford to have such a state and allow the nature to have its toll in future - the answer shall have to be in the negative : The present day society has a responsibility towards the posterity for their proper growth and development so as to allow the posterity to breathe normally and live in a cleaner environment and have a consequent fuller development : Time has now come therefore, to check and control the degradation of the environment and since the Law Courts also have a duty towards the society for its proper growth and further development and more so by reason of definite legislations in regard thereto as noted hereinafter, it is a plain exercise of the judicial power to see that there is no such degradation of the society and

there ought not to be any hesitation in regard thereto."

31. It is also a well-accepted fact that the mining operation is hazardous in nature. It impairs the ecology and people's right to natural resources. The entire process of setting up of mining operations requires utmost good faith and honesty on the part of the intending entrepreneurs.

32. There is a close relationship between public interest on the one hand and sustainable development on the other. It is demonstrably clear from the above discussion that the expression 'public interest' used by the legislature in Rule 5(4) has to have a direct nexus to the environmental protection. The direction which is sought to be issued in exercise of the powers conferred under this Rule has to be for the protection of environment as well as the greater and urgent need to protect the environment for the good of the public at large by dispensing with the principles of natural justice.

Discussion on merits

33. Before we examine the other contentions, we must deal with the factual matrix of the case and contentions related thereto. There is no doubt that the appellant had obtained permissions from various authorities and had also obtained the environmental clearance from the Ministry of Environment and Forests (MoEF). It is also undisputed that the show cause notice dated 11th September, 2012 had been served upon the appellant raising the sole complaint in relation to 'dump mine'. To this, the appellant submitted a reply on 25th September, 2012. No final order with

reference to the said show cause notice has yet been passed by any competent authority. The authorities, before issuing the show cause notice dated 11th September, 2012, had inspected the mining lease of the appellant. It was stated that the two conditions mentioned in the notice had been violated and they related to the following:

> "(i) No change in mining technology and scope of working shall be made without prior approval of the Ministry of Environment & Forests, and
>
> (ii) No change in the calendar plan including excavation, quantum of mineral, iron ore and waste shall be made."

34. For violation of the above, it was proposed to revoke the environmental clearance. Undisputedly, as already noticed, final order in that regard had not been passed. It has even been specifically stated by the applicant in his application itself that showed that the Commission was constituted under the provisions of the Commission of Inquiry Act, 1952 to go into illegal mining in a number of States, including Goa. The Shah Commission had submitted its report, which was placed before the Parliament on 7th September, 2012.

35. It can usefully be noticed at this stage that in the summary and recommendations made by the Shah Commission in relation to mining activity in Goa, it had noticed that the right to development must be fulfilled so as to equitably meet the developmental needs of the present and future generations. While noticing this principle, it pointed out various unacceptable activities being carried on with

mining operations and, therefore, it *inter alia* recommended as follows:-

> "f. All the mining activities should be stopped with immediate effect including transportation for all mining leases where there is no approval or clearance of the Standing Committee of NBWL and are falling within 10 kms. of eco-sensitive buffer zone.
>
> g. The State Government should take steps to place all cases before the Standing Committee of NBWL without further loss of time and till then, the operations of all such mines should be kept under suspension. The Standing Committee should take note of enhanced 192 production, approved by IBM and MoEF for the leases falling within 10 kms. The production should be reduced equivalent to production during the year 2000-2001.
>
> i. On perusal of records of Environmental Clearances given by MoEF in State of Goa, it is found that in 42 EC approvals, no condition as regard to wild life has been stipulated in the eco–sensitive zone, though many leases falls within 10 kms. from protected areas (16 EC approvals before 4.12.2006 and 25 EC approvals after 4.12.2006 for 50 mining leases). Such leases should be identified and action be taken. This should be considered as an undue favour extended to the lessees. Action should be initiated against all the officers/officials of MoEF who are involved in ignoring this well-known fact in Goa State.
>
> j. On going through the records available, it is noticed that MoEF (Environment Wing) has taken inconsistent and arbitrary stand while imposing specific condition for the mining leases though they are having the same parameters yardsticks while according Environmental Clearances under the EIA Notifications during the year from 2005 to 2010. Further, after imposing conditions, no action has been taken to follow up and for implementation of the conditions. Though this matter was in full knowledge of MoEF (Environment, Wildlife Wings) but the officers remain silent on the issue and permitted illegality to continue.
>
> m. The Director of Mines & Geology, State of Goa has issued order of closer of some mines while sparing the others to continue having the same

violations of non-approval of CWLW or Standing Committee of National Board for Wild Life or Competent Authorities. Similarly, the Goa State Pollution Control Board (GSPCB) also in many cases, unreasonable delay has been caused for issuing closer order. For example, M/s. Chowgule and Company Limited (T.C. No.31/55) and others wherein irreparable and irreversible damage to environment, eco–system, bio–diversity has already been caused when such closer order was issued. The said act of Director of Mines & Geology and Member Secretary of GSPCB is arbitrary, discriminatory and shown undue favour to some of the lessees where no closer orders are issued. Appropriate action should be initiated against them.

o. After going through the details in this matter, and records of MoEF, it is observed that there is total lack of co–ordination among the three wings of MoEF i.e. Environmental Clearance Section, Forest Conservation Section and Wildlife Section. This has resulted into illegalities and environmental, ecological damages in Goa. The MoEF should take immediate steps to establish complete co–ordination."

36. While making the above recommendations, the Shah Commission also noticed that many of the lessees have crossed the leased boundary and illegally extracted minerals from outside the leased areas. It also noticed that the extraction of excessive iron ore in Goa would result in the iron ore to disappear from the State of Goa much earlier than expected.

37. The State of Goa, immediately after placement of the report before the Parliament, passed a general order on 10th September, 2012 suspending all the mining operations in Goa, including that of the applicant. While this order was in force, it appears that the Union Minister of State for Environment and Forests (Independent Charge) had gone to Goa and made a statement that the environmental clearance granted in respect of 93 mines in that

State shall be suspended. Thereafter, on 14-09-2012, the impugned order came to be passed. The impugned order dated 14-09-2012 was passed in exercise of the powers vested in the Ministry in terms of Section 5 of the Act. It was directed in this order that the environmental clearance granted in each of the 139 cases by MoEF shall be kept in abeyance pending detailed inquiry in each case.

38. In paragraph 7 of this order, it was specifically noticed that immediate action in public interest was required to be taken, and therefore, in exercise of the powers conferred under Rules 4(5) and 5(4) of the Rules, the action was taken without giving notice to the appellant. Thus, the order was passed in public interest, keeping in mind the Shah Commission's report, which was placed before the Parliament on 7th September, 2012. Thus, it is obvious that the Central Government had taken note of the entire record, including Justice M.B. Shah Commission's report and the other orders, as is evident from the impugned order, and then passed the order, in public interest, suspending the environmental clearance granted to the appellant. Thus, in the light of the above provisions, now we have to examine whether the order dated 14th September, 2012 is violative of the principles of natural justice or suffers from any of the infirmities, as contended before the Tribunal at the very threshold.

39. It is not correct to contend that the impugned order does not state any reasons. On the contrary, the impugned order refers to the background as well as to the reasons which have persuaded the competent authority to exercise its powers in an urgent manner and

in public interest. The authority has taken into consideration the contents and records leading to the passing of the order by the State government dated 10-09-2012. They have also noticed that there are violations of environmental norms, statutory requirements and apprehension of large scale illegalities in the mining operations in the State of Goa. This *prima facie* view is not ill-founded. It is based upon the Shah Commission's report, which document was prepared after site inspection, collection of evidence and in accordance with the provisions of the Commission of Inquiry Act, 1952. Thus, we are unable to accept the contention that the impugned order is based on no material and does not state any reason. It is true that administrative orders must give reasons but not like judgments of courts. The authorities are expected to apply their mind to examine the matter from a wide perspective and with reference to the controversy in the issue. The authorities have referred to the records in the impugned order and some of these records have also been produced before us. In our considered opinion, the order is neither vitiated for want of application of mind nor for non-recording of reasons. The order *ex facie* shows application of mind and some reasons have certainly been recorded in the impugned order. The grievance with regard to breach of the conditions of environmental clearance notified by the appellant is separately pending before the competent authority in furtherance to the show cause notice dated 11th September, 2012. Those proceedings have not culminated into passing of any final order as of now. It is apparent that in view of the Shah Commission's report,

there is an imminent threat to the environment as well as untimely exhaustion of mining reserves of iron ore in the State of Goa. It is bound to have adverse effects on the ecology of the area, thereby disturbing the ecological and natural balance in the State of Goa. This would apparently amount to irreparable damage to the environment and the ecology. Lest the damage of such a magnitude should take place, it is always wiser to take preventive measures rather than to expose the State to the kind of danger indicated in the Shah Commission's report.

40. The order, in the present case, is for suspension of the environmental clearance during pendency of the main proceedings, thus, is preventive in nature.

41. Another very important aspect that we cannot ignore in the facts of the present case, is that taking note of the Shah Commission's report, the Supreme Court in Writ Petition No. 435 of 2012, *Goa Foundation v. Union of India* on 5th October, 2012, not only required the Central Empowered Committee (CEC) to submit its report but also passed the following restraint order:

> "A preliminary report from the CEC should reach this Court within four weeks from today. Put up on receipt of the report from the CEC.
>
> Till further orders, all mining operations in the leases identified in the Shah Commission's report and transportation of iron ore and manganese ore from those leases, whether lying at the mine-head or stockyards, shall remain suspended, as recommended in the Commission's report.
>
> IA Nos. 2580 and 2669 in Writ Petition (Civil) No. 202 of 1995 may also be listed along with this writ petition."

42. From the above order, it is clear that carrying on of mining activities, transportation of iron ore, manganese, etc. had been suspended. Thus, there are three different orders in force – suspending any carrying on of mining activity in the State of Goa by all the mine-lease owners including the appellant.

43. The judgment of the Supreme Court in *Onkar Lal Bajaj v. Union of India, (2003) 2 SCC 673,* is relied upon by the applicant wherein it held that the *enmasse* order cancelling the allotment of petrol pumps was vitiated. We are not impressed with this contention inasmuch as the facts of that case were entirely different than the facts of the case in hand. In the present case, there are multiple orders passed by different authorities and the Supreme Court of India, suspending the mining activity in the State of Goa. It is not that the mining leases of various persons including the appellant had been cancelled. In fact, a detailed inquiry is contemplated before the Supreme Court and CEC has been asked to submit a report in a similar case while the MoEF is conducting a detailed investigation where the appellants have been asked to put forward their entire case. Thus, in our opinion, the appellant cannot derive any advantage from the judgment of the Supreme Court in Onkar Lal Bajaj case *supra.*

44. Now, we will proceed to examine the merits of the contentions raised by the appellant that the impugned order suffers from the vice of arbitrariness and legal malice. Reliance in support of this contention is placed upon the judgment of the Supreme Court in

the case of *Kalabharati Advertisement v. Hemant Vimalnath Nari Chania & Ors.* (2010) 9 SCC 437.

45. No doubt it is a settled proposition of law that the State must act fairly without ill-will or malice in fact or in law. 'Legal' or 'lawful' or 'malice in law' has been explained in that judgment of the Supreme Court as follows:

> "**Legal Malice:**
>
> 25. The State is under obligation to act fairly without ill will or malice- in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207; Smt. S.R. Venkataraman v. Union of India, AIR 1979 SC 49; State of A.P. v. Goverdhanlal Pitti, AIR 2003 SC 1941; Chairman and M.D., B.P.L. Ltd. V. S.P. Gururaja & Ors., (2003) 8 SCC 567; and West Bengal State Electricity Board v. Dilip Kumar Ray, AIR 2007 SC 976).
>
> 26. Passing an order for an unauthorized purpose constitutes malice in law. (Vide Punjab State Electricity Board Ltd. v. Zora Singh & Ors., (2005) 6 SCC 776; and Union of India Through Government of Pondicherry & Anr. v. V. Ramakrishnan & Ors., (2005) 8 SCC 394)."

46. 'Arbitrariness' is a term used in contradistinction to the expression 'fairness'. What is arbitrary cannot be fair and what is fair cannot be arbitrary. This has to be examined with reference to

the facts and circumstances of a given case. Malice in law means something done in law without lawful excuse. It presupposes an act done wrongly without sufficient cause and reason. The plea of legal malice is sought to be substantiated in the present case on the basis that the impugned order was followed by the statement made by the Minister of Environment and Forests, a day prior to the order in Goa. In other words, a political statement made has resulted in passing of an omniscient order and thus has the element of arbitrariness. May be this argument appears to be attractive at the first blush but is found to be without substance when examined in some depth. Normally, if a political statement was made and an order was passed solely on that ground such an order may be liable to be set aside if it was unsubstantiated by records, had no reasons and was a result of non-application of mind. But that is not the situation herein. We have already held that there was sufficient record before the competent authority, i.e. the Shah Commission Report, the order of the State Government dated 10th September, 2012 and the show cause notice dated 11th September, 2012. Furthermore, the mining activity falls in two domains. The State Government can decline or reject an application filed by a person for obtaining grant of lease for mining activity while the EC is to be given by the Central Government. Thus, both the State and the Central Governments have functions to perform together though in separate realms. In these separate, well-defined fields, the order passed by the Central Government may even be to remove or correct the jurisdictional error in the entire process. The statement

of the Minister cannot be taken in abstract, *de hors* other attendant circumstances but must be examined in light of the other factors which would justify passing of the impugned order dated 14th September, 2012. In the case of *Kalabharti Advertising* (supra), the Hon'ble Supreme Court was somewhat concerned with a different issue and on the facts that the Corporation had passed an order in furtherance to an order passed by the High Court itself and therefore, the objection with regard to the maintainability of a petition before the Hon'ble Supreme Court while by-passing the High Court was held to be not tenable. Not only the statement of the Minister, but also the impugned order clearly show application of mind with reference to the records and the directive being issued in the larger public interest. It was not a case of an appeal from one's own order to oneself. Having examined the cumulative effect of the record before us and the contentions raised we are unable to hold that the impugned order suffers either from the vice or arbitrariness or that of legal malice.

Prejudice and Theory of Useless or Empty formalities : -

47. The law as stated in *Ridge v. Burbin* 1964 AC 40 that breach of principle of natural justice was in itself treated as prejudice and that no other defect/prejudice need to be proved. It was also expressed by the Hon'ble Supreme Court in the case of *S.L. Kapur v. Jagmohan* (1981) 1 SCR 746 to say that non-observance of principles of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is

unnecessary. It will come from a person who has denied justice that the person who has been denied justice is not prejudiced. With the passage of time and with the development of law, law underwent a significant change. In the case of *Malloch v. Aberdeen Corporation* (1971) 2 All England Reporter 1278 stated: "a great many arguments might have been put forward but if none of them had any chance of success then I can see no good reason why the respondents should have given the appellant a hearing, nor can I see that he was prejudiced in any way." Where the Courts took the view that there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India where no prejudice is caused to the person concerned and as such interference is not necessary. In *M.C. Mehta v. Union of India* (1999) 3 SCR 1173 the latter has then consistently been followed by the courts. The view accepted was that unless it is shown that non-observance has caused prejudice to the person concerned for the reason that quashing the order may revive another order which is itself illegal or unjustified. The order without strict observance of natural justice may not be set aside. The basis for such a view was that on admitted or undisputable facts if only one conclusion could be drawn which the authorities have taken, then the element of prejudice would lose its significance. Non-observance of principles of natural justice must, thus, satisfy some real prejudice being caused to the person concerned and not that it was merely a technical infringement of principles of natural justice. This view has also been reiterated by

the Courts that the breach of natural justice by itself would not be prejudicial if the undisputable proposition shows no arbitrariness on the part of the authorities concerned. Not mere violation of natural justice but *de facto* prejudice other than non-issuance of notice had to be proved.

48. To sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused to him for non-observance of such principles. It is a settled legal position that an order is to be examined on the touchstone of doctrine of prejudice.

49. Thus, it is evident that the law of prejudice stands on somewhat similar footing in India as well as in England. [*Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd., Haldia and Ors.* AIR 2005 SC 4217]

50. Still the principles of natural justice cannot be imprisoned in a strait-jacket formula. They are not rigid or immutable. They must be applied and construed on the facts of a given case. Their observance would depend upon the factual situation of each case. Whether, in fact, prejudice has been caused to the concerned person or not on account of denial of the requirements of natural justice to him, must be considered on the facts of a given case. The doctrine of prejudice has to be established by a plea and preferably by proof. The Courts have also taken the view now that if there is no prejudice, least would be chances of the court setting aside the order only on the ground that no hearing was granted.

51. While applying the principles to the present case, the appellants have failed to show any prejudice that has resulted from the alleged non-grant of the right of hearing to them. It is not in dispute before us that an interim order was passed by means of the impugned order suspending the mining activity. No hearing had been granted to the appellants. We have already noticed that there were records, reports and orders which had found large scale illegalities, irregularities and extraction of iron and manganese ore in excess of the leased area. *Inter alia* it was also recommended that mining activity, including that of the appellant, should be banned. These records are:

a. Shah Commission Report which had even been tabled before the Indian Parliament.
b. Order of the Hon'ble Supreme Court dated 5th October, 2012 banning the mining activity.
c. Order passed by the State of Goa dated 10th September, 2012 prohibiting carrying on of mining activity in the leased mining areas and the show cause noticed dated 11th September, 2012. These were the voluminous records which had been examined by the authority which applied its mind and even mentioned them in the order dated 14th September, 2012 banning the mining activity.

52. Even if this order had not been given effect to, still other orders producing the same results are in force. The appellants are duly represented before the Hon'ble Supreme Court and had the

occasion to put forward their cases before the Shah Commission. The Hon'ble Supreme Court has not varied its order dated 15th September, 2012 till date and even the order passed by the State Government has been in force. Thus, all the contentions and undisputable facts before us lead only to one conclusion that no prejudice has been caused to the appellant for non-grant of hearing to them. Only one view was possible that no different order could follow, more so in the larger public interest. Similarly, no other view is possible even before the Tribunal that no prejudice has been caused to the appellants for they having not been provided any hearing pre-passing of the impugned order.

53. Natural Justice means 'fairplay in action' and a clear distinction must be drawn between a case of 'no notice' or 'no hearing' on the one hand and a case of 'no fair hearing' or 'inadequate hearing' on the other. If the defect is of the former category and arises out of statutory obligations in the given case it may automatically make the order invalid but, if the defect is of the latter category the element of prejudice and failure of justice are required to be examined then it is only when such a conclusion is reached that the order may be declared invalid. One of the known but rare exceptions to the rule of *audi alteram partem* is the theory of 'useless or empty formality'. Where on admitted or undisputed facts, the view taken by the impugned order is the only possible view and it would be futile to issue any writ to compel observance of natural justice. Then this is called the 'useless or empty formality theory'. This theory has been considered at some length by the

Supreme Court of India in the case of *Aligarh Muslim University* supra as well as in *M C Mehta* supra. In the present case the appellants have not been able to show demonstrable prejudice beyond doubt and that the result would have been different had they been provided with an opportunity to present their case. Thus compliance to natural justice can be avoided because admitted and undisputed facts lead *prima facie* only to one conclusion that the appellants have indulged in violation of conditions of EC and lease terms and, therefore, the theory can be brought into service.

54. In the present case, one very important aspect that the Tribunal has to keep in mind is that the impugned order is not a final order, it is only an order of suspension during the pendency of a detailed inquiry to be conducted by the MoEF. It is in this background and the fact that various other orders and reports with similar directions against the appellant, including orders of the Supreme Court of India dated 5th October, 2012 have already been passed and to be enforced, that the facts of the present case have to be examined by the Tribunal. Even if the applicants have been granted a hearing, they would in no way be in a position to show that the reports/orders of the highest Court of the land as well as the State Government were without jurisdiction or were erroneous. Even if for the sake of argument it is assumed that the appellant could advance such an argument, the same would inconsequential as the MoEF would not be in a position to accept such an argument. Thus, no fruitful purpose would be served and in fact, in the facts and circumstances of the cases, the hearing even if

granted would be futile. On the cumulative examination of the facts of the present case and report before the Tribunal, it is clear that the theory of useless or empty formality, to some extent, if not in its entirety, would be applicable to the present case.

55. Having rejected all the contentions raised on behalf of the applicant, still, we must observe that the impugned order was passed on 14th September, 2012 and even till date, the proceedings have not been concluded. In other words, the order dated 14th September, 2012, has not culminated into passing of a final order by the competent authority. The order was passed during the pendency of a detailed inquiry and investigation to be conducted by the MoEF to come to final conclusion whether direction regarding suspending and prohibiting mining activities which has resulted in revocation of the EC granted by the MoEF on 4th May, 2007 needs to be passed or not. There can be no justification in the eye of law, that MoEF should keep this aspect pending for an indefinite period. The applicant has right to carry on a business that in law they are entitled to. Closure of their business certainly invades their rights. Thus, it would be expected that of the MoEF to pass the final order upon detailed inquiry expeditiously and without undue delay.

56. In light of the reasons aforestated and while declining to interfere with the impugned order date 14th September, 2012, we hereby direct the MoEF to complete its detailed inquiry and pass appropriate orders/directions as expeditiously as possible and in any case, not later than three months from today.

57. Parties are left to bear their own costs.

Justice Swatanter Kumar
Chairperson

Justice U.D.Salvi
Judicial Member

Dr. D.K. Agrawal
Expert Member

Prof. A.R. Yousuf
Expert Member

Dr. R.C. Trivedi
Expert Member

New Delhi
May 09, 2013