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

APPEAL NO. 68 OF 2012

In the matter of :

State Pollution Control Board, Odisha
Represented through its Member-Secretary,
Paribesh Bhawan,
A/118, Nilakanthanagar, Unit-VIII, Post Nayapali,
Bhubaneshwar-751012 .....Appellant

Versus

1. M/s Swastik Ispat Pvt. Ltd.,
   Represented through its Director
   Plant Site Road,
   Rourkela-769001

2. Senior Branch Manager,
   Indian Overseas Bank,
   Madhusudan Marg,
   Rourkela-769001

3. Central Pollution Control Board,
   Karkardooma, Delhi. .....Respondents

AND

APPEAL NO. 69 OF 2012

In the matter of :

State Pollution Control Board, Odisha
Represented through its Member-Secretary,
Paribesh Bhawan,
A/118, Nilakanthanagar, Unit-VIII, Post Nayapali,
Bhubaneshwar-751012 .....Appellant

Versus

1. M/s Patnaik Steel & Alloys Ltd.,
   A/22, 1st Floor, Falcon House, Cuttack Road,
   Bhubaneshwar

2. Branch Manager,
   State Bank of India, Commercial Branch,
   IDCOL House, Unit II, Ashok Nagar,
   Bhubaneshwar

3. Central Pollution Control Board,
Karkardooma, Delhi. .....Respondents

Counsel for Appellants :
Mr. A.K. Panda, Sr. Advocate along with
Mr. S. Panda and Mr. L. Sarangi, Advocates

Counsel for Respondents :
Mr. Dhananjaya Mishra, along with
Mr. Raj Bhushan Shinde, Advocates for Respondent No.1.
Mr. Gaurav Gupta, Mr. Ishan Jain and
Mr. U.C. Mital, Advocates for Respondent No.2
Ms. Alpana Poddar, Advocate for Respondent No. 3.

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 : January 9, 2014

JUSTICE SWATANTER KUMAR, (CHAIRPERSON):

1. By this common order, we shall dispose of two appeals, being Appeals No. 68 of 2012 and 69 of 2012, as common questions of law on somewhat similar facts and grounds arise for consideration in both these appeals. Appeal 69 of 2012 was argued as the lead case.

FACTS:

2. We may, at the outset, refer to the facts of both the cases giving rise to the present appeals. The State Pollution Control Board, Odisha, (for short the 'Board'), is a statutory body, constituted under the provisions of the Water (Prevention and Control of Pollution) Act, 1974 (for short the 'Water Act') and the Air (Prevention and Control of Pollution) Act, 1981 (for short the 'Air

Act'). The Board, in exercise of its powers, introduced bank guarantee system vide its Resolution No.17617 dated 18th August, 2003. The said resolution reads as under:

> "A number of Acts & Rules have been enacted for the purpose of preventing pollution from different sources & for protection of the environment. Basing on these Acts, the Central Pollution Control Board, State Govt. & the State Pollution Control Boards are empowered to file complaint cases resulting in the closing down of defaulting industries through disconnection of electricity & water supply. There is hardly any other provision to pressurise defaulting industries to install required pollution control system or to impress upon them to upgrade their existing pollution control systems so as to comply with the prescribed norms. The Hon'ble Supreme Court of India, while dealing with different public interest litigations on environmental matter, has laid down different principles in order to pressurise the industries to control pollution or to restore the environmental degradation through "Polluter to Pay" principle.
>
> It has been experienced that the orders of closure and disconnection of electricity etc. served on the industries at times create social problems like non-payment of wages to its workers due to lack of adequate provisions in the Act. Under such prevailing circumstances, a new instrument namely Bank guarantee system has been introduced by the West Bengal Pollution Control Board. Such an imposing of Bank guarantee has already come up before the judicial scrutiny in the Hon'ble High Court of Calcutta in the matter of WP5938(W) of 2000 wherein the letter has notionally endorsed the State Board to monitor the policy of Bank Guarantee towards effective pollution control.
>
> Introduction of Bank Guarantee system in respect of defaulting industries within the purview of State Pollution Control Board, Orissa was under the active consideration of the Board for some time past. This matter was placed before the Board in its 75th meeting held on 27.06.2003. After going through the concept paper prepared by the C.P.C.B., the Board unanimously resolved to introduce the Bank guarantee system for the defaulting industries in the following manner.
>
> a) Industry that fails to install necessary pollution control equipment so as to meet the prescribed standard.
>
> b) Industry whose pollution control equipment are inadequate to meet the prescribed standard.
> At the first instance, show cause notice will be issued to the defaulting industry indicating the intention of issuing

direction for closure. Then the industry will be asked to furnish a time bound action plan for installation of pollution control equipment or up gradation of the existing pollution control system. Simultaneously the industry will be asked to furnish Bank Guarantee of a stipulated amount for implementing the action plan. If the industry fails to comply within the timeframe, the amount of Bank Guarantee will be forfeited. Alternately if compliance is ensured in time the amount of Bank guarantee will be released. The industries, those will be asked to furnish Bank Guarantees are to be decided on case by case basis through a committee. Chairman, State Pollution Control Board has been authorised by the Board to constitute a committee, that will decide the procedures to be adopted including the quantum of Bank Guarantee submitted to this effect. However, the minimum Bank Guarantee should not be less than 10% of the pollution control equipment necessary for the purpose. The amount so forfeited will be utilised faithfully for pollution control abatement schemes/programmes of the said industry.

The original Bank Guarantee will be retained in the Accounts Section of the Head Office and the cashier will be responsible for its safe custody. Photo copies of the said instrument will be tagged to the concerned industry file endorsing simultaneously to the Law Officer. A register will be maintained by the cashier reflecting the following entries.

1. Name of the industry:
2. Name of the Bank standing as guarantor:
3. Reference file No.:
4. Amount of Bank Guarantee:
5. Date of submission:
6. Date of expiry:
7. Orders for release or forfeiture:
8. Remarks"

3. In Appeal 68 of 2012, the Board had granted consent to operate under the Air Act in respect of Respondent Unit's Sponge Iron plant on 24th July, 2007, valid till 31st March, 2011. This consent was issued after inspection of the premises. Thereafter, on 28th March, 2008, the Board issued a closure notice to the respondent-unit in terms of Section 33A of the Water Act and

Section 31A of the Air Act. In its notice, it was stated that, on the basis of inspection conducted on 15th March, 2008, a number of deficiencies were noticed in the working of the unit and there was no compliance with the conditions of the consent. The deficiencies noticed were as under:

- Bag filters attached to Kiln-I & II were not functioning properly thereby causing heavy Leakage in between heat exchanger and bag filter,
- Profuse leakage observed from the emergency cap and slip rings of both the rotary kilns,
- Accumulation of dust and fugitive emission was observed near bottom of all the bag filters attached to cooler discharge, intermediate bin, product house and stock house,
- Heavy fugitive emission was observed due to improper collection and handling of dust of bag filters at rotary kilns,
- Internal drains are not maintained properly,
- No water sprinkling is made on the internal road and heavy dust accumulated on the internal road. Approach road to the factory is not black topped,
- Neither soil cover nor water sprinkling arrangement has been provided in solid waste dumping area,
- House keeping is poor and heavy dust is accumulated near bag filter area, below kiln area, product house and stock house causing fugitive emission."

4. Vide letter dated 7th May, 2008, the Board informed Respondent No.1 (for short also 'the industry'), *inter alia,* that as a result of non-compliance and to consider the request of Respondent No.1 for permitting the unit to function, subject to such conditions, as may be imposed, Respondent No.1 had to furnish a performance bank guarantee for a sum of five lakh rupees, valid for three years and an affidavit in the prescribed proforma.

5. Respondent No.1, in compliance with the letter dated 7th May, 2008 of the Board, furnished the performance bank guarantee and

the affidavit on 8th May, 2008, undertaking that in the event of deliberate violation of the conditions stipulated, the bank guarantee amount may be forfeited in part or in full. On this condition, the industry was permitted to function on 12th May, 2008.

6. The Board carried out an inspection of the plant of Respondent No.1 and found operation of the industry satisfactory and that the non-compliances mentioned in the notice letter dated 7th May, 2008 had been complied with. The Board, vide its letter dated 4th June, 2008, directed Respondent No.1 to install and commission ESP in respect of the two kilns operated at its Sponge Iron plant and phase out the gas cleaning plant within six months. The industry was inspected again on 27th December, 2008 and the inspecting team made the following observations:

> "Both the kilns (50 TPD each) were in operation. Heavy fugitive dust emission was found to be taking place from Product House, I-Bin, coal circuit, kiln feed chutes and cooler discharge building. Most of the tanks/pits (for dust handling purpose) connected to the hoppers of GCPs and bag filters were dry and not covered leading to emission of dust from the pits. There was minor leakage of flue gas from the emergency caps of both kilns though both the GCPs were in operation. Emission from the stack connected to GCPs was visibly high."

7. In its inspection report, various deficiencies were noticed and the Board issued a show cause notice dated 24th February, 2009, calling upon Respondent No.1 to show cause as to why the consent to operate granted by the Board may not be revoked. This show cause notice was responded to vide letter dated 3rd March, 2009 and it was stated that they were taking appropriate steps to ensure compliance with the conditions imposed by the Board. Again on 23rd March, 2010, the inspecting team of the Board visited the unit

of Respondent No.1 for verification of the operational status of different pollution control equipment and for assessment of the overall environmental compliance by the industry. Certain deficiencies were pointed out in its report and again a show cause notice was issued on 21st May, 2010, requiring Respondent No.1 to show cause as to why the consent to operate may not be revoked. The Board, vide its letter dated 27th June, 2011, also called upon Respondent No.1 to extend the validity of the bank guarantee uptil 30th June, 2012. This was not done and the Board again issued a reminder on 17th October, 2011 to Respondent No.1 for extending the bank guarantee, as required. On 8th November, 2011, the industry of Respondent No.1 was again inspected and an inspection report dated 11th November, 2011 was prepared. Respondent No.1, after inspection, submitted the bank guarantee on 3rd April, 2012 for a sum of five lakh rupees, valid till 30th June, 2012. Thereafter, no action was taken by the Board. In fact, vide order dated 4th April, 2012, the Board granted consent to Respondent No.1 to operate till 31st March, 2013. The Assistant Environmental Scientist, the Environmental Engineer and the Sr. Environmental Engineer of the Board made a recommendation on 24th April, 2012 that the bank guarantee be forfeited in view of non-satisfactory performance and non-compliance with the environmental clearance conditions, and as a result thereof, the Board, vide its letter dated 26th May, 2012 requested the Indian Overseas Bank to forfeit the bank guarantee amount of five lakh rupees. The Bank, vide its letter dated 5th July, 2012 intimated the Board that the bank guarantee amount of five

lakh rupees stood forfeited and submitted a bank draft of five lakh rupees in that behalf. The action of the Board was challenged by Respondent No.1 by filing an appeal before the appellate authority under the Air Act.

8. It is the case of the Board that Respondent No.1 admitted even before the appellate authority that the environmental clearance conditions were not complied well within the stipulated time. Despite that, the appellate authority, vide its order dated 8th November, 2012 allowed the appeal preferred by Respondent No.1 and set aside the order dated 26th May, 2012 of the Board.

9. Aggrieved by the order dated 8th November, 2012 passed by the appellate authority, the Board has preferred the present appeal contending that the resolution of the Board requiring an industry to furnish a bank guarantee is in accordance with law. The Board has been vested with the power of issuing direction of closing an industry, and therefore, is requiring the industry to furnish a bank guarantee as a condition for grant and continuation of the consent, and it being less rigorous, would be permissible in law. It is a financial tool to achieve sustained compliance with the prescribed environmental parameters. The decision of the Board is not penal but is regulatory and compensatory in nature. Both these aspects are essential requirements for a clean and decent environment and are in consonance with the preambles of the Air Act and the Water Act. The industry has committed persistent violation of the terms and conditions of the consent order and the prescribed parameters.

It has caused a serious injury to the environment. Show cause notices on different dates were served upon the industry and even a number of inspections were conducted, including on 23rd March, 2010 and 3rd January, 2013, which showed that the industry had always been committing breach of the consent order. Resultantly, the bank guarantee had rightly been invoked and forfeited. It is further contended that the appellate authority has failed to appreciate the real controversy in issue and has taken into consideration irrelevant matters and grounds. Thus, its order is liable to be set aside. The industry has taken the benefit of running its unit by furnishing the bank guarantee and that too without any protest. Thus, the industry cannot be permitted to challenge the correctness of such condition.

10. As opposed to this, the contention on behalf of the private respondent-industry is that the Board is not vested with any power to ask for a bank guarantee. Such exercise of power is not backed by any statutory provision. The imposition of such condition is punitive in nature, and is therefore, beyond the scope of Section 31A of the Air Act. However, if any penalty is to be imposed, it has to be in accordance with the provisions of Chapter VI of the Air Act. Recourse to any other provision by implication or otherwise would be impermissible. Asking for furnishing of the bank guarantee itself is a penalty and so is its invocation. The only power vested with the Board is to prosecute the industry or direct its closure in accordance with law. The invocation of the bank guarantee, in any

case, is not as per terms of the bank guarantee as there was no deliberate act/default on the part of the industry and in fact it had made all efforts to take anti-pollution measures. The industry is not a polluting industry, and therefore, the encashment of the bank guarantee is bad in law. According to the respondents, the order of the appellate authority does not call for any interference.

11. In this appeal and in all the matters before the Tribunal, the stand of the Central Pollution Control Board (for short the 'CPCB') is that a bank guarantee can be asked for as it is in line with the doctrine of corporate social responsibility. The degradation of environment caused by the industry or any damage to the environment has to be made good by the industry. The industry has been a persistent defaulter and any direction to comply with the conditions of the consent order is in conformity with law.

12. The CPCB, in its 126th meeting, approved that the amount of bank guarantee to be furnished by a non-compliant industrial unit to the State Board shall be 10% (minimum) or more in specific cases of the cost of pollution control equipment. In this meeting, it was decided that in case of the non-compliant industrial unit, a bank guarantee would be furnished by the unit concerned to the State Board. This was primarily to achieve compliance of the prescribed environmental standards within a reasonable time frame. The CPCB approved the model prepared by West Bengal Pollution Control Board in that regard.

13. Now, we may notice the facts in Appeal No.69 of 2012. The necessary facts, as noticed by the appellate authority, are that the respondent-industry, in this case, is engaged in the business of manufacture of sponge iron and billet as well as generation of power in its industrial plant at Purunapani under Joda sub-division of Keonjhar district. The consent to operate the unit was granted by the Board and it was extended from time to time. The Board, while intimating the appellant that the compliance position has been verified by its Regional Office, Sambalpur, directed the appellant vide its letter dated 12th June, 2009 to furnish a performance bank guarantee in favour of the Board to the tune of Rs.17.50 lakhs, valid for three years, supported by an affidavit as per the proforma prescribed. The industry, vide letter dated 18th June, 2009, furnished the bank guarantee and also filed an undertaking. It was stated that in the event of deliberate violation of the terms stipulated in the letter dated 12th June, 2009, the bank guarantee would be liable for forfeiture in part or full. On 20th July, 2009, the Board, considering the application of the appellant for renewal of the consent, issued the consent order to operate the industry, valid till 31st March, 2010, under the Water Act. On 20th November, 2009, the industry wrote a letter to the Senior Environmental Engineer of the Board seeking extension of time to complete the installation of bag filters since it had already placed purchase order for supply and erection of bag filter system as well as to complete the concreting of the internal roads, etc. The Board, vide its letter dated 30th November, 2009, directed the industry to furnish a

report within 10 days stating the requisite steps and rectification measures taken for compliance with the issues mentioned therein. This was replied to vide letter dated 3rd December, 2009 pointing out that it had already submitted a few photographs of the concreting and black topping of the internal roads which could not be done because of prolonged monsoons. It also stated that the installation of bag filters would be completed by January, 2010 and water sprinklers and black topping/concreting the road would be done by the end of March, 2010 positively. The Board then asked the industry to furnish a compliance report. The industry asked for extension of time to comply with these conditions. Vide letter dated 17th May, 2010, the industry informed the Board of the requisite steps that it had taken, including installation of fixed topping/water sprinklers along side the internal roads to contain fugitive emissions due to vehicular traffic. The industry put up a claim that it had complied with the conditions and was adhering to the prescribed standards. Vide its letter dated 8th June, 2010, the Board granted consent to the industry to operate till 30th September, 2010 and directed the industry to complete the required jobs of (i) upgradation of bag filters as per the recommendations of the I.I.T., Kharagpur; (ii) installation of pneumatic dust handling system at hoppers of all bag filters; and (iii) concreting/black topping of remaining part of the internal roads. This was required to be done by 30th September, 2010 failing which the bank guarantee was liable to be forfeited. The industry, vide its letter dated 21st August, 2010, informed the Board that it had complied with all the

recommendations of the team of IIT, Kharagpur, and that no further compliance was required. On 27th November, 2010, the Board granted consent to operate till 31st March, 2011. Thereafter, on 7th July, 2011, the Board issued a show cause notice under Section 31A of the Air Act, directing the appellant to fulfil the requirements, as laid down by the IIT, Kharagpur, failing which a direction for closure of the industry would be issued without giving any further opportunity. In reply, the industry, vide its letter dated 20th July, 2011, requested the Board to grant time till 31st December, 2011 to complete the remaining work. The relevant part of this letter reads as follows:

> "….. In our compliance report, it was clarified that existing bag filters in CD and PH area, not only satisfy all the norms suggested by IIT, Kharagpur, but are superior to their recommendations, except the fan capacity. It is also explained that the fan capacity was based on the main duct size which is related to number of suction points, number of bags used, air to cloth ratio and motor rating. Since all the existing parameters were superior to the recommendation of IIT, technically, there was no need to increase the capacity of fans which could adversely affect the system.
>
> xx xxx xxx
>
> With regard to installation of Pneumatic Dust Handling System in Plant Area, we had requested for extension of time to complete the installation of pug-mills up to 31.12.2010 vide our letter no.PSAL/P/1029/10 dated 07.09.2010 which was allowed by the Board.
>
> Installation was also completed in scheduled time."

14. Again on 30th July, 2011, the industry wrote a letter to the Board intimating that it had already placed orders for manufacture, design and supply of two units of dense phase of pneumatic conveying system for bag filter dust conveying and sought time till December, 2011. It was also stated by the industry that their

existing systems were superior to the mechanism recommended by IIT, Kharagpur. The correspondence continued to be exchanged between the Board and the industry. The industry submitted that the consent was granted after the Board was satisfied that it had complied with the directions issued from time to time and was operating in accordance with law.

15. The industry, vide its letter dated 11th April, 2012, requested the Board to return the bank guarantee since it had complied with all the conditions. The Board did not return the bank guarantee in terms of the request of the industry and instead decided to invoke the same. At this stage, it may be noticed that the Board had inspected the industry on 29th January, 2010 to verify the non-compliance of the consent-conditions and to assess the present operational status. An inspection report dated 17th/20th February, 2010 was prepared wherein it was stated as under:

i. That the dust extraction system was not adequate and ought to be upgraded with higher capacity ID fan and adequate number of bags.
ii. That the installation of bag filters at iron ore circuit and raw material stock house had not started.
iii. That out of 850 meters of internal road only 350 meters had been made concrete.
iv. That installation of fixed water sprinklers along side of internal road not done.
v. That the Ambient Air Quality monitoring result showed that the concentration of SPM did not meet the prescribed norms.

16. Thereafter, in its inspection report dated 22nd April, 2010, it was noticed that during the inspection made on 8th April, 2010, the industry had not complied with the requirements and conditions stated in its earlier letter. It related to installation of pneumatic

dust handling system at bag filter hoppers; upgradation of the bag filter capacity; and monitoring of the ambient air quality result, which showed violation of the prescribed standards.

17. The industry was again inspected on 5th May, 2011 and, in its inspection report dated 27th May, 2011, the Board inter alia noticed the following deficiencies:

> "i. That no action had been taken regarding installation of pneumatic dust handling system at bag filter hoppers by the industry.
>
> ii. That the unit had not complied with the recommendations of IIT, Kharagpur.
>
> iii. That the industry had been granted consent to establish (NOC) for installation of a dry coal washery of capacity 50 TPH. As per the conditions in the consent to establish (NOC), the industry was to seek Environmental Clearance from the Ministry of Environment and Forests, Govt. of India. However, the coal washery along with dust extraction system was installed inside the premises and was ready for operation without obtaining Environmental Clearance from the MoEF and consent to operate from the Board.
>
> iv. Concreting of internal road was still not complete.

18. The Board issued a show cause notice dated 7th July, 2011 to the industry stating that several opportunities had already been given and sufficient time had been granted to comply with the requirements but the directions of the Board had not been fully implemented. The industry was asked to show cause by 7th August, 2011 as to why it be not closed in terms of the provisions of Section 31A of the Air Act. Reply to the show cause notice was submitted by the industry which claimed further time to complete the

remaining work and make good the non-compliances. Again, an extension of time till December, 2011 was sought by the industry vide letters dated 20th July, 2011 and 30th July, 2011. The industry was also inspected on 23rd August, 2011, particularly with respect to upgradation of bag filters, installation of pneumatic dust handling system at the bag filters and at the ESP. It was noticed that these had not been provided by the industry. It was then informed by the industry that it would be installing the said systems by 31st December, 2011. On this assurance, the consent was renewed till 31st March, 2012 vide order dated 23rd September, 2011. The relevant direction of the said order reads as under:

> "You are directed to complete the installation of PDHS at ESP/BFs hoppers within 3 months from the date of issue of this order. In case of non-compliance to the above is observed the Board may issue appropriate direction/initiate legal action as deemed proper."

19. The industry, vide its letter dated 21st March, 2012, informed that it had complied with the conditions and requested the Board to inspect the premises. The industry was again inspected on 24th March, 2012 and the inspection report dated 24th March, 2012 was prepared and the consent to operate was extended till 31st March, 2012 vide order dated 30th March, 2012.

20. The Assistant Environmental Scientist, the Environmental Engineer and the Sr. Environmental Engineer of the Board informed that the industry had failed to comply with the environmental norms and recommendations of IIT, Kharagpur, within the scheduled time-frame and recommended forfeiture of the bank

guarantee vide their letter dated 22nd May, 2012. Based upon these recommendations, the Board, vide its letter dated 26th May, 2012, asked the State Bank of India to forfeit the bank guarantee, in furtherance to which the Bank, Respondent No.2, remitted the amount of Rs.17.50 lakhs to the Board.

21. Aggrieved by this action of the Board, the industry filed an appeal before the appellate authority, constituted under the Air Act. The appellate authority, vide its order dated 8th November, 2012, accepted the appeal of the industry and set aside the action of the Board in forfeiting the bank guarantee furnished by the industry.

22. Aggrieved by the order dated 8th November, 2012 of the appellate authority, the Board has filed the present appeal before this Tribunal.

23. In the backdrop of the factual matrix afore-noticed and the contentions raised by the learned counsel appearing for the respective parties, the following issues require determination by the Tribunal:

(a) Whether the decision of the Board requiring industrial units to furnish bank guarantee is without jurisdiction?

(b) Whether the invocation of the bank guarantee by the State Board on the alleged breach is penal and thus impermissible under the provisions of the Air Act and the Water Act?

(c) Whether in the facts and circumstances of the case, the order of the appellate authority suffers from the infirmity of taking into consideration irrelevant matters and grounds and its order is liable to be set aside?

(d) Whether the invocation of the bank guarantee is or not in terms of the bank guarantee and what are its consequences?

(e) To what relief, if any, the appellant is entitled to?

24. The Water Act was enacted keeping in view the problem of pollution of rivers and streams, which had assumed considerable importance and urgency in the recent years as a result of growth of industries and increasing tendency of urbanisation to ensure that the domestic and industrial effluents are not allowed to be discharged into the water bodies without adequate treatment. Thus, the Water Act had provided for prevention and control of water pollution and maintenance or restoration of wholesomeness of water as well as for establishment of bodies/Boards required to achieve these purposes. Then the Air Act was enacted keeping in mind the increasing industrialisation and the tendency of the majority of industries to congregate in areas which are already heavily industrialised. The problem in relation to air pollution was felt to be more acute in those heavily industrialised areas which are densely populated. The Air Act was thus to provide for prevention, control and abatement of air pollution and also for establishment of the Boards to attain the said objective and to perform the functions connected therewith.

25. A very significant aspect of these Acts was the constitution of the Boards to exercise the powers vested and the functions which they were required to perform under the respective Acts. Presence of any pollutant in the atmosphere is air pollution under the Air Act, and any contamination of water or alteration of the physical, chemical or biological properties of water by any means is pollution under the Water Act.

26. In terms of Section 3 of the Air Act, the CPCB, and in terms of Section 4, State Pollution Control Boards are to be constituted. Chapter III of the Air Act deals with functions and powers of the Boards. We may appropriately refer to these Sections at this juncture:

"16. **Functions of CPCB.** –

(1) Subject to the provisions of this Act, and without prejudice to the performance, of its functions under the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), the main functions of the CPCB shall be to improve the quality of air and to prevent, control or abate air pollution in the country.

(2) In particular and without prejudice to the generality of the foregoing functions, the CPCB may-

> (a) advise the Central Government on any matter concerning the improvement of the quality of air and the prevention, control or abatement of air pollution;
>
> (b) plan and cause to be executed a nation-wide programme for the prevention, control or abatement of air pollution;
>
> (c) co-ordinate the activities of the State and resolve disputes among them;
>
> (d) provide technical assistance and guidance to the State Boards, carry out and sponsor investigations and research relating to problems of air pollution and prevention, control or abatement of air pollution;

(dd) perform such of the function of any State Board as may, be specified in and order made under sub-section (2) of section 18;]

(e) plan and organise the training of persons engaged or to be engaged in programmes for the prevention, control or abatement of air pollution on such terms and conditions as the CPCB may specify;

(f) organise through mass media a comprehensive programme regarding the prevention, control or abatement of air pollution;

(g) collect, compile and publish technical and statistical data relating to air pollution and the measures devised for its effective prevention, control or abatement and prepare manuals, codes or guides relating to prevention, control or abatement of air pollution;

(h) lay down standards for the quality of air.,

(i) collect and disseminate information in respect of matters relating to air pollution;

(j) perform such other functions as may be prescribed.

(3) The CPCB may establish or recognise a laboratory or laboratories to enable the CPCB to perform its functions under this section efficiently.

(4) The CPCB may-

(a) delegate any of its functions under this Act generally or specially to any of the committees appointed by it;

(b) do such other things and perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purposes of this Act.

17. **Functions of State Boards.**

(1) subject to the provisions of this Act, and without prejudice to the performance of its functions, if any, under the Water (Prevention and Control of Pollution) Act, 1974 (Act 6 of 1974), the functions of a State Board shall be-

(a) to plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof-,

(b) to advise the State Government on any matter concerning the prevention, control or abatement of air pollution;

(c) to collect and disseminate information relating to air pollution;

(d) to collaborate with the CPCB in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of air pollution and to organise mass-education programme relating thereto;

(e) to inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process and to give, by order, such directions to such persons as it may consider necessary to take steps for the prevention, control or abatement of air pollution;

(f) to inspect air pollution control areas at such intervals as it may think necessary, assess the quality of air therein and take steps for the prevention, control or abatement of air pollution in such areas;

(g) to lay down, in consultation with the CPCB and having regard to the standards for the quality of air laid down by the CPCB, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft:

Provided that different standards for emission may be laid down under this clause for different industrial plants having regard to the quantity and composition of emission of air pollutants into the atmosphere from such industrial plants;

(h) to advise the State Government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution;

(i) to Perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the CPCB or the State Government;

(j) to do such other things and to perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purposes of this Act.

(2) A State Board may establish or recognise a laboratory or laboratories to enable the State Board to perform its functions under this section efficiently."

27. From the bare reading of the above provisions, it is clear that under sub-section (1) of Section 16 of the Air Act, the main function of the CPCB is to improve the quality of air by preventing,

controlling or abating air pollution in the country. This is the fundamental function of the CPCB. Without prejudice to the generality of this function, the CPCB is to perform advisory functions, plan and co-ordinate the activities of the State Boards, provide training, collect requisite data and most importantly plan and execute a nation-wide programme for prevention, control or abatement of air pollution, and with this purpose in mind, the CPCB is required to lay down standards for quality of air. Besides the specific functions, it is obligatory on the CPCB to perform such other functions as may be prescribed. The State Boards have also to perform similar functions but greater emphasis has been laid in Section 17 of the Air Act on the advisory functions of the State Boards where it is required to advise the State Government concerned with respect to suitability of any premises or location for carrying on any industry which is likely to cause air pollution. The State Board is also required to inspect air pollution control areas to ensure adherence to air quality standards. The State Board has also to perform functions, as may be prescribed by the CPCB or the State Government.

28. Most importantly, under both Sections 16 and 17 of the Air Act, the CPCB and the State Board respectively have to perform such other functions and such other acts as may be necessary for the proper discharge of these functions and generally for the purposes of carrying into effect the purposes of the Air Act. If one analyses these provisions co-jointly or conjunctively, it does not admit of any ambiguity that prevention, control or abatement of air

pollution is the ethos of the functions of the Boards. In the scheme of the Air Act, every State Government, in consultation with the State Board, is required to issue a notification and declare, in such manner as may be prescribed, any area or areas within the State as air pollution control area or areas for the purpose of this Act. Thus it is only in a duly notified area in terms of Section 19 of the Air Act that the action for violation and for enforcement of the provisions of the Act could be taken by the Board. The prescribed standards under the Air Act shall have over-riding effect over other legislations including the provisions of the Motor Vehicles Act, 1939. Section 21 of the Air Act makes it mandatory that no person shall, without previous consent of the Board, establish or operate any industrial plant in an air pollution control area. Section 21(1) of the Air Act is prospective while the proviso to this sub-section contemplates that even the existing units have to take permission/consent of the Board and make appropriate application for that purpose from the date of coming into force of this Act. The application for obtaining consent has to be dealt with expeditiously by the Board. Thus, this Act squarely applies to all industries, either existing or which are expected to be established in any air pollution control area. After following the prescribed procedure and making such inquiry as it may deem fit, the Board shall, by an order in writing and for reasons to be recorded in writing, grant the consent applied for subject to such conditions and for such period, as may be specified in the order or refuse such consent in terms of Section 21(4) of the Air Act. The State Board can cancel this consent or refuse further

consent but it can do so only after granting a reasonable opportunity of being heard to the affected party. Section 21(5), of the Air Act makes it incumbent upon every person to whom consent has been granted by the State Board to comply with the conditions and these conditions would primarily relate to installation of control equipments, which will control and prevent the air pollution. Similarly, fixing of chimney or such other general conditions may be imposed by the Board. To put it simply, compliance with conditions in relation to prevention and control of air pollution, as imposed by the Board, is the paramount obligation of the person wanting to establish or carry on any industrial plant in the area in question. But for such compliance, such person would not be able to establish or carry on such industrial activity. The conditions of the order would have to be complied with at all times. The conditions imposed by the Board in terms of Sub-sections (6) and (7) of Section 21 of the Air Act shall be binding even if they are varied in accordance with the prescribed procedure or even upon transfer of interest in the industrial plant. The Board has the power to inspect an industrial unit wherever it apprehends that emission of any air pollutant in excess of the prescribed standards is likely to occur by reason of any person operating an industrial plant or otherwise in any air pollution control area. The Board may thereupon approach the court in terms of Section 22A of the Air Act and the court may even restrain such person from discharging any air pollutant. The Board is empowered to take air emission samples and make regular

checks that emissions are not beyond the prescribed standards. Orders of the Board are appealable under Section 31 of the Air Act.

29. Section 31A vests a very wide power in the Board where in exercise of its powers and performance of its functions under the Air Act, it may issue any direction in writing to any person, officer or authority and such directions would include closure, prohibition or regulation of any industry or operation and stoppage or regulation of supply of water, electricity or any other service to the industrial plant. This power is unfettered and has an over-riding effect over all the laws subject to the provisions of the Air Act and subject to any specific direction issued by the Central Government in that behalf. The power to issue directions under Section 31A is to be exercised in consonance with the principles of natural justice and is appealable to the National Green Tribunal in terms of Section 31B of the Air Act. Sections 37 to 39 of Chapter VI of the Air Act deal with certain penal actions which can be taken by the Board. If any person fails to comply with the provisions of Sections 21 and 22 or directions issued under Section 31A of the Air Act, he could be punished with imprisonment which may extend to a term not less than one year and six months but may extend to six years and with fine. Section 39 of the Air Act imposes a generic punishment of imprisonment uptil three months or with fine which may extend to Rs.10,000/- or with both wherever a person contravenes any of the provisions of the Air Act. No court, inferior to that of a Judicial Magistrate or a Metropolitan Magistrate of the first class shall take cognisance of any offence except on a complaint

filed by the Board or any officer authorised in this behalf who has given notice of not less than sixty days of the alleged offence.

30. From the above analysis, it is clear that the Board has preventive, punitive and curative powers. While reading the object and reasons in conjunction with Sections 16 to 18 and Section 31A of the Air Act, it is clear that the powers of the Board to issue directions are to be exercised with the primary object of prevention, control and abatement of air pollution. The most fundamental aspect of environmental law is prevention and control of pollution and to provide clean and healthy environment and wholesome water to the society at large. As already noticed, the provisions of Section 17(1)(a) casts upon the Board an obligation to do things and perform such acts as may be necessary for the proper discharge of its functions and generally for the purpose of carrying out the purposes of the Air Act. Upon analysis of the language of these provisions, it is evident that besides performing the specific acts and functions, the Board is entitled to do things or perform acts which may be in aid thereto and for carrying out effectively the purposes of the Air Act. Once it prepares a comprehensive programme for prevention, control and abatement of air pollution, and emission standards are prescribed, the Board then is required to issue the order of consent to various applicant-units to establish and operate their activities. The matter is not put to rest at that stage but the Board is required to ensure implementation of the terms and conditions of the consent order. It may then do such acts

and deeds as may be necessary to ensure effective implementation of the entire environmental programme. The powers vested in the Board are thus of a very generic nature and are not restricted in their scope and implementation. These powers have to be construed liberally and not so narrowly to the extent that it would defeat the very purpose of the Air Act. It will be appropriate to construe them in a manner that amplify their scope to the fullest to the extent in line with the object of the Act.

31. It may also be analysed here that Section 31A of the Air Act gives power to the Board to issue directions. Such directions could be issued, notwithstanding anything contained in any other law, by the Board to any person, officer or authority to comply with the provisions of the Air Act. The directions thus issued shall be binding. The legislature has laboured to give wider connotation to these provisions and has, therefore, provided an explanation to Section 31A and clarified that the power to issue directions would include the power to direct closure, prohibition or regulation of any industry, operation or process and even stoppage or regulation of supply of electricity, water or any other service. This power is 'inclusive' and not exhaustive. An inclusive definition or explanation would take within its ambit the power to do things besides what has been spelt out. Such inclusion is specific and must not be restricted by undue limitations. In the case of *State of Bombay v. Hospital Mazdoor Sabha* (AIR 1960 SC 610), the Supreme Court, while dealing with an inclusive definition under the Industrial Disputes Act, 1947 held that it was obvious that the words used in an

inclusive definition denote extension and cannot be treated as restrictive in any sense. Where we are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of wider denotation. The legislature, in its wisdom, has used different expressions like closure, prohibition and regulation. While the first two are specific terms, regulation is a generic term. It would take within its ambit other regulatory factors or directions which may not amount to prohibition or closure. It may be something short of these expressions and would still achieve the object of ensuring prevention and control of pollution and taking steps necessary for that purpose. Such an approach would be in consonance with the maxim *Noscitur a sociis*. The *Wharton's Law Lexicon*, 15th Edition explains 'regulation' as a word of broad import having wide meaning comprehending all facets not only specifically enumerated in the Act but also embracing within its fold the powers incidental to the regulation envisaged in good faith in the interest of the general public.

32. Keeping in view the legislative scheme and the object of the Air Act, it is evident that the Board is not incapacitated to issue a direction which may not be prohibitory or of closure in substance and application, but may be regulatory with an object to ensure that anti-pollution devices and anti-pollution measures are adopted to prevent and control pollution. For this purpose, the Board may require an industry to furnish a bank guarantee which would serve dual purposes. On the one hand, it would provide incentive to an industry to install anti-pollution devices so as to ensure non-

encashment of the bank guarantee, while on the other, in the event of default, resulting in pollution, the Board would be able to spend that money for remedial purposes to control environmental degradation or damage that has taken place as a result of such default. Both these purposes would squarely fall within the framework of law and the powers and functions of the Board. The purpose of requiring a Unit to furnish a bank guarantee is not penal *per se*. It is compensatory i.e. an amount which would be required to be spent upon rehabilitation and restoration of the environment due to the damage caused to it by default on the part of the Unit. We shall be deliberating upon this aspect at some length subsequently, but, at this stage suffices it to note that the Board has jurisdiction to grant consent to establish and operate or revoke the same, subject to such terms and conditions as it may deem fit and proper within the ambit and scope of Section 21 of the Air Act. Sub-Section 4 of Section 21 grants a statutory sanction to the Board to record reasons and the conditions, subject to which the order of consent is being given or is being refused. The proviso to Section 21(4) further empowers the Board to cancel the consent even before the expiry of the period for which it is granted, if the conditions subject to which the consent was granted, are not fulfilled. Besides preventing and controlling the pollution, the Board is commanded by the Legislature to ensure that the conditions of the consent order are satisfied and are enforced. These conditions would obviously relate to the twin objects of ensuring emissions as per prescribed standards and prevention of

damage to the environment. This is the paramount duty of the Board. The intention of the Legislature to ensure implementation of these facets is further elucidated by the language of Section 31A of the Air Act where the Board can issue directions as afore-mentioned in exercise of its powers and performance of its functions under the Act. Thus, there has to be a direct nexus between the directions contemplated under Section 31A of the Air Act and the powers and functions of the Board as contemplated under Sections 16, 17 and other relevant provisions of the Air Act. Once these Sections are read co-jointly, then it becomes clear that a direction which would ensure compliance of the conditions of the consent order and further the cause of prevention and control of pollution would be a direction permissible under law.

33. The procedure normally adopted by the Board is to permit the industrial operations for a definite period upon furnishing of Bank Guarantee for compliance and compensation, if required, and during integrin permitting the industry to comply with the various directions and the conditions stated in the consent order including installation of anti-pollution devices. This helps the sustainable development as industrial activity is not straightaway closed or prohibited but is permitted to carry on subject to compliance with the conditions imposed. Thus, it clearly falls in the domain of regulatory regime as opposed to prohibitory or closure regime.

34. The Board is a statutorily constituted expert body and is, therefore, competent to examine and even anticipate the likely

damage to environment by such disobedience and thus to remedy the wrong in a timely manner. It has been stated, time and again, that the Board has not been constituted to perform empty formalities. In fact, it has to prevent, control and abate environmental pollution and for achieving the purposes and carrying out the purposes of the Act effectively, it frames guidelines for taking effective measures. (Refer: *Bihar State Pollution Control Board & Anr. v. Hiranand Stone Works & Ors.* (AIR 2005 Pat 62)

35. For these reasons, we are of the considered opinion that asking for the bank guarantee, as an interim measure, during which the industrial unit is called upon to comply with the conditions of the consent order, does not fall outside the ambit of statutory powers vested in the Board.

CONDITION REQUIRING A UNIT TO FURNISH A BANK GUARANTEE – IS IT PENAL?

36. The rights and obligations under the Air Act do not fall in the realm of contract. They are a result of statutory regime contemplated under these Acts. The right to carry on a trade or occupation in terms of Article 19(1)(g) of the Constitution of India is subject to the limitations stated under Article 19(6) of the Constitution. The law has been framed by the State in terms of the Air Act and other related Acts which places a restriction or a limitation on carrying on of trade. This restriction is with regard to such trade being subject to the limitation of the legislations in relation to the prevention and control of pollution. No person can carry on an industry or trade activity without obtaining the consent

of a Board in a regulated area. The terms and conditions of consent so imposed by the Board do not attract the principles of contractual jurisprudence but are purely in the field of regulation by the Statute. With this clear dichotomy in mind, now we may proceed to examine if the condition in regard to the furnishing of the bank guarantee imposed by the Board is a penalty and therefore impermissible without aid of a specific law or without being backed by a specific provision of law.

37. Penalty law is a law that defines an offence and prescribes a corresponding fine, penalty or punishment. Such laws are construed strictly in favour of the person charged with the offences. "Penalty" is legal or official punishment such as a term of imprisonment. It may also mean recovery of an amount as a penalty measure in civil proceedings or an exaction which is not compensatory in character [Refer: *Karnataka Rare Earth v. Senior Geologist* (2004) 2 SCC 783; *Dunny v. Swetman* (1909) 1 Kings Bench 776; *Khemka and Company v. State of Maharashtra* (1975) SC 1549; *N.K. Jain v. C.K. Shah* AIR 1991 SC 1289; *Jagjit Cotton Textiles Mills v. Chief Commercial Superintendent, Northern Railways* (1998) 5 SCC 126].

38. Being punitive is the essence of 'penalty'. It is in clear contradistinction to 'remedial' and/or 'compensatory'. 'Penalty' essentially has to be for result of a default and imposed by way of punishment. On the contrary, 'compensatory' may be resulting from a default for the advantage already taken by that person and

is intended to remedy or compensate the consequences of the wrong done. For instance, if a Unit has been granted conditional consent and is in default of compliance, causes pollution by polluting a river or discharging sludge, trade affluent or trade waste into the river or on open land causing pollution, which a Board has to remove essentially to control and prevent the pollution, then the amount spent by the Board, is thus, spent by encashing the bank guarantee or is adjusted thereat and this exercise would fall in the realm of compensatory restoration and not a penal consequence. In gathering the meaning of the word 'penalty' in reference to a law, the context in which it is used is significant.

39. The Air Act provides a clear exposition of both penalty and compensatory concepts. Section 37 of the Air Act deals with the penalties that can be imposed by the Court of competent jurisdiction for violation of the provisions of Sections 21, 22 and 31A of the Air Act. This provision and the scheme in this regard do not admit of any ambiguity. On the other hand, it deals with the regulatory measures and power to issue directions for implementing the provisions of the Act in terms of Sections 16, 17, 21 and 31A of the Act. They operate in two distinct spheres which are incapable of being interchanged. It is the responsibility of the Board to ensure prevention and control of pollution on the one hand and compliance and implementation of the conditions imposed under Section 21 of the Air Act. While imposing these conditions and dealing with them, particularly their non-compliance, the Board has to keep in mind the three basic and fundamental principles which are now

statutorily stated in the Indian Environmental jurisprudence, i.e. sustainable development, polluter pays principle and precautionary principle. We may notice that the provisions of the Air Act, 1981 and the Water Act, 1974 are *para materia*, except the specific number of Sections, for instance, functions of the Board, establishing or operating an industrial unit, inspection, analysis reports and power to give directions are identically worded. Thus, it is not necessary for us to deal with the provisions of the Water Act independently. It suffices to state that the directions have been passed by the Board in exercise of the powers vested under Sections 31A and 33A of the Air Act and the Water Act respectively. As part of discharge of its duties and functions, the Board must take such precautionary steps as may be necessary to prevent and control the pollution. It must also, where the pollution has resulted particularly from non-adherence to the conditions imposed under Section 21 of the Air Act, remedy such wrong and make the person pay for such pollution. This would be in the nature of compensation and not punishment or a penalty, as understood in law. The word "compensation" derived from Latin word '*compensare*', meaning weighed together or balance; means anything given to make things equivalent of what the owner has been deprived of; a return or loss or a damage sustained, an act which a Court orders to be done or money which a Court orders to be paid by a person whose act or omission causes loss or injury to another, in order thereby the person indemnified may receive equal value for his losses. Thus, when 'compensatory' is examined with

reference to the environmental law it would obviously mean an amount equal to the damage done to the environment. This amount is assessed on approximate basis by a specialized body like the Board, at the time of imposition of such condition. Thus, it is a figure rationally arrived at and is intended to provide for a given situation in the interest of environment and is not a penalty in intent and substance within the framework of the Air Act. The Supreme Court in the case of *Karnataka Rare Earth* (supra) was dealing with the penalty and compensation payable under the Mines and Minerals Development and Regulation Act, 1957 and the rules framed thereunder. The Court was concerned as to whether the amounts payable to the State for loss of minerals owned by it, claimed by the State, would be a penalty or compensation and held as under:

> "We are clearly of the opinion that the marginal note 'penalties' cannot be pressed into service for giving such colour to the meaning of sub-Section (5) as it cannot have in law. The recovery of price of the mineral is intended to compensate the State for the loss of the mineral owned by it and caused by a person who has been held to be not entitled in law to raise the same. There is no element of penalty involved and the recovery of price is not a penal action. It is just compensatory."

40. Upon analysis of the above enunciated law, it is clear that a fine but unambiguous distinction between penalty and compensation has been accepted by courts and tribunals. Distinct and definite consequences flow from these actions. Their distinctions are procedural as well as consequential. A penal action cannot be permitted to take in its orbit, by process of overlapping,

an action which is patently compensatory in nature. Striking a balance between environmental interest and sustainable development would require the expert bodies like the Boards to follow a path which would permit industrial growth and still protect the environment without allowing any irretrievable injury to the environment. In view of that, it will certainly be permissible in law for an expert body to provide an opportunity to a unit to attain the prescribed standards of emission or effluent discharge before it is directed to be closed in exercise of the powers vested in the Board. Such approach would be in consonance with the scheme of the Air Act. More so, it will make a provision also to ensure restoration or rectification of the environmental damage done by the unit at its cost in the case of default.

41. With some emphasis, it was contended before us that furnishing of bank guarantee and its invocation would be a penal action and, therefore, a specific power needs to be vested in the Board enabling it to take such an action. In other words, the power requiring furnishing of a bank guarantee should be required by a specific legislative provision and cannot be implied from the language of Sections 16, 17, 21 and 31A of the Air Act. Reliance in this regard has been placed upon the judgment of the Supreme Court in *Khemka Company v. State of Maharashtra* supra where the Court was concerned with the provisions of the Central Sales Tax Act, 1956 and the State Sales Tax Act, 1953. The question was whether in the absence of a specific provision in the Central legislation, an assessee would be liable for penalty for default in

payment of taxes within the prescribed time under the State Act. The majority view of that judgment reads as under:

> "On a consideration of the provisions mentioned above, it seems to me to be clear that whatever may be the objects of levying a penalty, its imposition gives rise to a substantive liability which can be viewed either as an additional tax or as a fine for the infringement of the law. The machinery or procedure for its realization comes into operation after its imposition. In any case, it is an imposition of a pecuniary liability which is comparable to a punishment for the commission of an offence. It is a well settled cannon of construction of statutes that neither a pecuniary liability can be imposed nor an offence created by mere implication. It may be debatable whether a particular procedural provision creates a substantive right or liability. But, I do not think that the imposition of a pecuniary liability, which takes the form of a penalty or fine for a breach of a legal obligation, can be relegated to the region of mere procedure and machinery for the realization of tax. It is more than that. Such liabilities must be created by clear, unambiguous, and express enact-ment. The language used should leave no serious doubts about its effect so that the persons who are to be subjected to such a liability for the infringement of law are not left in a state of uncertainty as to what their duties or liabilities are. This is an essential requirement of a good government of laws. It is implied in the constitutional mandate found in Section 265 of our Constitution: "No tax shall be levied or collected except by authority of law""

42. We are afraid that the respondents cannot take advantage of the above judgment. It is for the reason that the facts and law of *Khemka and Company* supra are distinct and distinguishable. In that case, the Court was concerned with interpretation of fiscal laws which are to be construed strictly. Here, we are concerned with a social legislation and have to adopt a purposive construction. There the Court was concerned with a revenue centric law while here we are concerned with a law involving substantial question of environment. There, the Court was also concerned with a pure question of law relating to penalty while we are concerned with the

question of compensatory relief to remedy the damage to environment. A taxing statute is to be strictly construed. The subject is not to be taxed without clear words for that purpose and also that every Act of Parliament must be read according to the natural construction of its words. This is a settled principle. Reference in this regard can be made to the case of *State of Chhattisgarh v. VTP Construction* [(2008) 2 SCC 578)]. The Supreme Court had returned a finding that it was not a mere procedure or machinery for realisation of tax but even something more than that and such liability must be created by some specific language**.** In the case in hand, the regulatory regime under the Air Act permits taking of harsher steps in the nature of closure and prohibitory directions. Therefore, permitting a unit to operate for a limited period upon furnishing a Bank Guarantee for compliance of the conditions/directions imposed in the consent order, being an order of lesser gravity and consequences, would be permissible. It is in the interest of sustainable development and is even beneficial to the industry itself. The Bank Guarantee asked for is for compliance, compensation for environmental restoration, if required, and is not punitive in nature.

43. The respondents have also placed reliance upon the judgment of Delhi High Court in the case of *Splendor Landbase Limited v. Delhi Pollution Control Committee*, [(2010) 173 DLT 52] in support of their action that imposition of condition of bank guarantee is of penal consequences, and therefore, should be backed by a specific law. It is further their contention that this judgment of the Delhi

High Court was upheld by a Division Bench of the Delhi High Court without dealing with the question of penalty in LPA 875 of 2010 – *Delhi Pollution Control Committee v. Splendor Landbase Limited*. On the other hand, the appellants have relied upon another judgment of the single Judge Bench in the case of *Delhi Regent Automobiles Private Limited v. Government of NCT of Delhi* (Writ Petition No.7516 of 2007) where the Court took the view that power to direct furnishing of a bank guarantee was covered under the full range of the powers vested in the authorities and rejected the challenge to the power of the authorities. They have also relied upon a judgment of the Calcutta High Court which did not discuss the legal issue and also did not interfere in the direction requiring the units to furnish a bank guarantee.

44. In the case of *Splendor Land Base Limited (supra),* the learned Single Judge dealt with different questions arising in the case. Suffices it for us to notice that the cases related to the builders of various properties in the NCT of Delhi who had constructed shopping complexes or malls etc. had obtained environmental clearance under the Environmental Protection Act, 1986, and had complied with the EIA Notification of 2006. According to the builders they were not required to obtain clearance under the Air or the Water Act from the Delhi Pollution Control Committee (for short the 'DPCC') and the penalties, fines and the environmental damage in the form of fixed sums of monies or by requiring the builders to furnish bank guarantees as a condition to grant consent under the Acts concerned was impermissible in law. The learned Single Judge

of the High Court held that to the extent certain aspects have not been covered by EIA Clearance, it would be certainly open for the DPCC to examine those aspects and decide whether or not to grant consent to establish under the two Acts. Validity of the levy of penalties for environmental damages was discussed in paragraphs 56 to 69 of the judgment and the Court took the view that imposition of a pecuniary liability which takes the form of penalty or fine for breach of a legal obligation could not be levied as there was no statutory basis for a direction issued by the CMC/DPCC. The power to levy a penalty on any party is in the nature of a penal power and there has to be a specific power in the statute enabling the authority to do so. With this reasoning, the Court concluded that levying penalty by requiring furnishing of a bank guarantee and making the grant of consent to establish under the Water and Air Act conditional upon payment of such penalties and furnishing of such bank guarantees was not sustainable. This reasoning of the learned Single Judge was concurred by the Division Bench of the Delhi High Court and the Court also said that as per the provisions of the Acts concerned, only the Courts can take cognizance of the offences under the Acts and levy penalties.

46. It is evident from the above facts and the reasoning that there was actual levy of penalty or damages by the DPCC and it was in consequence of such imposition of penalty/damages that the Units were called upon to furnish bank guarantees for granting of consent. In other words, bank guarantee was required to be furnished in furtherance to the imposition of a penalty or damages

in that case. It was not an act *de hors* the imposition of penalty and had the element of punitive action. In the present case, it is not a consequence of a punitive or penal action but is in exercise of the powers vested in the Board in relation to recalling the conditions of consent and ensuring their implementation while also making compensatory provision for remedying the apprehended wrong to the environment. In the cases in hand, the Board has not imposed any penalty upon the units but has granted consent to them on certain conditions, none of which is punitive. They squarely fall within the power of the Board to prevent and control pollution in consonance with the scheme of the Acts concerned. Thus, on facts, the judgments of the High Court in *Splendor* (supra) do not have any application to the present case. In any case, we are of the considered view that asking for a bank guarantee as an interim measure for due performance of the conditions of the consent order being compensatory in nature, is not punitive.

46. We have already noticed above that there is a clear distinction between a penal and a compensatory provision. In such matters, the paramount question that would normally fall for determination before a court or tribunal would be whether the action contemplated is penal or compensatory. This issue shall have to be decided with reference to the facts of the case, the provisions of the law applicable and the intent of the authority concerned. Once it falls in the 'compensatory' field, then it will necessarily be beyond the purview of penalty. The Supreme Court, in the case of *Karnataka Rare Earth* supra, had stated that recovery of price of

minerals is compensatory action of the State for the loss of the minerals owned by it and there was no element of penalty. The law, in this regard, was clearly stated by the Supreme Court in the case of *Director of Enforcement v. MCTM Corporation Pvt. Ltd. and Ors.* [1996 (1) SCR 215] where the gravamen of the department was that the respondents had failed to repatriate the foreign exchange lying in Malaysia, which they had a right to receive in India and thus there was contravention of the provisions of Foreign Exchange Regulation Act, 1947. In that case, the authorities were performing *quasi judicial* functions and did not act like courts but only as administrators and determined the liability of the contravener for the breach of the obligations imposed under the Act. Explaining the expression, it noticed, "the expression 'penalty' is a word of wide significance. Sometimes, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a 'penalty'. When penalty is imposed by an adjudicating officer, it is done so in 'adjudicator proceedings' and not by way of fine as a result of 'prosecution' of an 'accused' for commission of an 'offence' in a criminal Court..."

47. This approach had also been applied by the Supreme Court in relation to environmental jurisprudence. The court distinguished between compensation for remedying damage caused to the environment on the one hand and penalty for causing pollution for non-compliance on the other. Reference in this regard can be made to the judgment of the Supreme Court in *M.C. Mehta v. Kamal Nath*

[AIR 2000 SC 1997] wherein it was elucidated that compensating degradation of environment caused due to non-adherence to the prescribed standards was different than being penalised for causing pollution and non-compliance with statutory obligation. Remedial and restoration measures in relation to degradation of environment resulting from default and the money spent would squarely come under the head of compensation.

48. In that case, the Supreme Court was considering the question relating to determination of quantum of fine for causing pollution and proceeded to clarify that conviction orders or fine, as contemplated under the provisions of the Air Act etc. must proceed by a trial in accordance with law and would not fall within the ambit of Article 142 of the Constitution of India. Following the principle stated in *M.S. Ahlawat v. Union of India,* it was observed that under Article 142 of the Constitution, the Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. Having said so, the Court, while referring to the case of *Vellore Citizens' Welfare Forum v. Union of India & Ors.* clearly stated the principle that the violator can be directed to pay compensation by way of costs for the restitution of the environment and ecology of the area. In addition to the specific provisions of the statute and the rules, the Court also referred to Articles 48A and 51A(g) of the Constitution under which the State shall endeavour to protect and improve the environment and to safeguard forests and wild life of the country. Further, the

Constitution casts a duty on every citizen to protect and improve the natural environment including forests, lakes, rivers, wild life etc. and the Court, thus, concluded that if a person, therefore, is guilty of causing pollution, he has to pay damages (compensation) for restoration of the environment and ecology. This would be besides the damages which he is required to pay to the person who has suffered on account of the act of the offender. This case thus provides a concept for compensation for causing degradation of environment by the polluter or violator.

49. This enunciation clearly shows that what is not compensatory in character can also be termed as a penalty, necessarily meaning that what is compensatory in character would not be a penalty. The term 'compensatory' would include something that is taken for compensating damage to environment or for remedying or abatement of environmental degradation.

50. In the present case, the general Resolution governing industries, particularly the defaulting industries, was passed by the Board on 18th August, 2003, as has been noticed earlier, intended to invoke the 'polluter pays' principle and required the industry to furnish a bank guarantee for compliance with the terms and conditions of the consent order and installation of pollution control equipment clearly stipulating faithful utilisation of the amount for pollution control abatement scheme/programmes of the said industry.

51. An objective analysis of the said Resolution in the light of the principles aforestated would clearly demonstrate that the bank guarantee asked for was not penal in nature but was clearly compensatory in its character and ensured prevention and control of pollution and restoration of environment. It is founded on the precautionary principle and is not beyond the statutory provisions of the Act concerned.

52. Now, we may examine the judgment of another learned Single Judge of the Delhi High Court in the case of *Regent Automobiles Pvt. Ltd.* (supra). In that case, the Court was concerned with the provisions of the Delhi Common Effluent Treatment Plants Act, 2000 (for short the 'DCETP Act') which had *para materia* provisions to the Act in question here. The challenge by the petitioner in that case was to the fixation of charges and recovery of dues towards setting up of a common effluent treatment plant. Upon inspection, deficiencies were noticed in the plant. A visit by the Inspection Team to the premises noticed the irregularities in the observance of parameters laid down for the related industries. After serving a show cause notice the petitioners in those cases were directed to furnish bank guarantees. The challenge was that the direction to furnish bank guarantees for specific amounts was without any legal authority. Rejecting this argument, the Court while referring to the provisions of Section 16 of that Act, which is para material to Section 31A of the Air Act, came to the following conclusion:

> "14. It is an established Rule of statutory interpretation that every provision, which confers a power should be construed in

its own terms, enabling the authority the full range of options, which may naturally fall within it. Asstt. Collector of Central Excise, Calcutta v. National Tobacco Co. of India AIR 1972 SC 2563; Jamaluddin Ahmad v. Abusaleh Najmuddin 2003 (4) SCC 257; likewise the express grant of a certain kind of power implies, in cases, exclusion of other powers. This Rule also iterates that everything necessary to carry out the purposes of the grant can be done by the authority entrusted with the power Ref. State of U.P. v. Poosu AIR 1976 SC 1750; State of Karnataka v. Vishwabharathi Housing Co-operative Society AIR 2003 SC 1043.

15. The petitioners' contention, though attractive that the power to issue directions cannot comprehend the issuance of directions to furnish guarantees, cannot be accepted. The power to issue directions, under Section 16 extends to "regulate" the industry or unit. The expression "regulate" in the context, wherever used, has to be given the widest meaning. In a remedial or regulatory enactment, as the Act undeniably is, this expression acts as a crucial power conferral on the authorities - the extent of such power is even closure of the industry or unit. Such being the case, the court cannot limit the options available to statutory authorities to meet emerging challenges, towards ensuring compliance with the provisions. In given cases, the Commissioner may not deem it appropriate to take the extreme step of closing down the unit; yet, to ensure that good practices are put in place, he may issue specific directions, and as a measure to ensure compliance, require furnishing of guarantee, valid for a period, or as to enable him to invoke it, to remedy the harm, which is sought to be addressed by the Act or Rules framed under it. In arriving at this conclusion, the overriding nature of Section 16, which begins with a non obstante clause, cannot be lost sight of."

53. From the above referred conclusion, it is clear that the Court heavily relied upon the wide scope of the regulatory powers. This judgment of the learned Single Judge was distinguished by the Court in *Splendor* case (supra) holding that it was of no assistance to the petitioners before it as the provisions of the DCEPT Act were different and that the Water Act and the Air Act did not contain such provisions.

54. The power to issue directions under Section 16 of the DCEPT Act is vested in the appropriate Authority while the punitive and penal consequences stated under Sections 17 and 18 of that Act are not vested in the Board. These are the penalties provided which had to be inflicted by following the due process of law as contemplated under that Act. The judgment in the case of *Regent Automobiles Pvt. Ltd.* (supra) can be applied to the facts of the present case with greater similarity.

55. At this stage, we may also notice that there has to be a direct nexus between the directions issued within the ambit and scope of Sections 21 and 31A of the Air Act and the object sought to be achieved by issuing such directions. This nexus should be relatable to the functions and powers of the Board on the one hand and to the object of the Act on the other. Once this twin test is satisfied, then validity of such condition can hardly be questioned. We have already held that such nexus in the present case does exist. The purpose was to prevent and control pollution while permitting the industries to operate, as opposed to the closure of the industries and thus, obstructing the sustainable development. For these reasons, we hold that the plea of the respondent that the direction for furnishing of the bank guarantee was punitive or penal, is liable to be rejected.

56. In regard to the judgment of a Bench of this Tribunal in the case of *Hindustan Coco Cola Beverages Pvt. Ltd. vs. West Bengal Pollution Control Board*, Appeal No. 10 of 2011 decided on 19th

March, 2012, we may notice that the Bench had relied upon the judgment of the High Court in the case of *Splendor Landbase Limited v. Delhi Pollution Control Committee* supra and expressed a view that the expression 'any direction' appearing in Section 33A of the Water Act was not wide enough to include power to issue directions in relation to furnishing of bank guarantees. The main thrust of the judgment was on the fact that it returned a finding that the industry was able to show cause that it was not causing any pollution or violating any parameters. Firstly, we do not agree with the principle stated in that judgment and secondly, in the present case, the appellant has been able to demonstrate on record that the conditions of consent order were not complied with despite opportunity.

EQUITY, WAIVER AND ITS EFFECT:

57. The respondent-company has been engaged in the business of manufacturing sponge iron and billets as well as generation of power in its industrial plant established at Purunapani under Joda sub-division of Keonjhar district. On being satisfied, it was granted the consent by the Board to start its operations. From the records, it appears that the consent was granted and extended from time to time. The consent to operate the industry was granted till 31st March, 2009 subject to compliance with the conditions contained in the order of consent issued from time to time. During the inspection on 29th January, 2009, the Inspecting Officer found that the unit had started operating 7 MW FBC boiler without obtaining the consent to operate, had not installed bag filters at raw material

stock house and iron ore screening section, had not yet started blacktopping/concreting of internal roads and had not complied with the conditions of the consent order dated 30th June, 2008. The team found other deficiencies which were pointed out. Based upon this inspection, the industry was issued a notice in terms of Sections 21 and 31A of the Air Act on 29th April, 2009 requiring the industry to show cause as to why the consent be not refused and closure direction be not issued against the industry until the violations are rectified to the satisfaction of the Board, to which the industry submitted its reply on 4th May, 2009 stating that it was taking further effective measures to control the pollution within the next few months. It also stated that the situation had improved considerably. It based its defence on the fact that the plant was located in a remote area and it was difficult to get men and machinery and requested the Board that time be granted till 31st December, 2009 to complete the work detailed in the notice. As is obvious from the reply, there was no serious dispute with regard to the default in compliance as well as resultant pollution from the industry. While considering the application of the industry to operate the plant, as submitted in March, 2009, the Board, in furtherance to its Resolution, asked the industry to furnish a bank guarantee for an amount of Rs.17.50 lakhs which was to remain in force for a period of three years from the date of its execution and, in the meanwhile, all necessary steps were required to be taken by the industry to ensure that no environmental pollution was being caused. In furtherance to this letter of the Board, the industry, vide

its letter dated 18th June, 2009, without demur or protest and, in fact, in continuation to its request for extension to operate, furnished the bank guarantee along with an affidavit. It will be useful to refer to the affidavit which had been furnished by the industry assuring the Board of complete compliance. The relevant extracts of the bank guarantee that permitted the Board to encash the bank guarantee, in its discretion, reads as under:

> "2. WHEREAS the industry has undertaken to operate the existing Pollution Control Systems and / or other pollution control measures effectively and install the required pollution control measures within the stipulated time to the satisfaction of the Board in terms of Letter No. 9276 dt. 12.06.2009 of the Board and to meet the standards prescribed by the Board and in case of failure to comply the same during the stipulated period of three years, the bank guarantee can be forfeited by the State Pollution Control Board, Orissa partly / fully depending upon the gravity of the violation. We (State Bank of India, Commercial Branch, Bhubaneswar) do, hereby, undertake to pay to the Board an amount not exceeding Rs.17,50,000/- as and when demanded by this Board within three years from the date of execution of Bank Guarantee.
>
> 3. We, State Bank of India, Commercial Branch, Bhubaneswar, hereby, undertake to pay this guarantee without any demur merely on a demand from the Board. However, our liability under this agreement shall be restricted to an amount not exceeding Rs.17,50,000/- (Rupees seventeen lakh fifty thousand only).
>
> 4. We, State Bank of India, Commercial Branch, Bhubaneswar, lastly undertake not to revoke this guarantee during the currency except with the prior consent of the Board in writing."

58. It was upon compliance with these conditions and with a clear understanding and commitment on the part of the industry that it shall comply with all the requirements stated by the Board in a time bound manner that the industry was permitted to operate within the time extended from time to time. It was obvious that but for

such furnishing of the bank guarantee and undertaking to comply with the conditions, the Board would have exercised its option to close the industry under Section 31A of the Air Act.

59. On 19th/24th September, 2009, the industry was inspected to verify the compliance with the show cause notice dated 29th April, 2009 and to examine the status of various pollution control measures adopted by the industry. A detailed inspection report was prepared and it was mentioned in the said report the steps that had been taken by the industry as well as the steps which had not been taken by it. Having received this inspection report, the industry, vide its letter dated 20th November, 2009 requested the Board for extension of time from 31st December, 2009 to 31st March, 2010 for compliance with the conditions. In this letter, it was specifically stated that due to unfavourable circumstances, the contractor did not complete the job and had left half way and after persuasion and with extra support extended by the industry, the contractor had resumed the work and the industry required further time. The request for further extension of time was allowed by the Board vide its letter dated 5th January, 2010 to rectify the defects aforestated by 31st March, 2010 positively and to furnish a compliance report. The industry was again inspected on 29th January, 2010. During this inspection, certain observations were made by the Inspecting Team and it was found that various requisite steps had still not been taken by the industry and furthermore the ambient air quality monitoring result showed existence of pollution and emissions were in excess of the prescribed parameters. Still, another inspection was

conducted on 8th April, 2010. It was stated in this report that the unit had not taken any steps towards installation of pneumatic dust handling system at the bag filter hoppers. The ambient air quality monitoring result still showed violations. Vide its letter dated 8th June, 2010, the Board informed the industry about the drawbacks noticed during the above inspection and warned the industry that the bank guarantee would be liable to be forfeited and renewal of the consent would not be granted if the needful was not done. This state of affairs persisted. The unit was again inspected on 5th May, 2011 and another letter dated 7th July, 2011, being a show cause notice, was issued by the Board informing the industry of its violations and the proposed action of the Board to pass direction of closure under Section 31A of the Air Act. The industry was called upon to complete the upgradations and modifications of the bag filter system as well as installation of pneumatic dust handling system. This show cause letter dated 7th July, 2011 was responded to in detail by the industry vide its letter dated 16th July, 2011 wherein the industry explained its various difficulties including those with the suppliers and stated that the work would be completed by 31st December, 2011, thus, finally praying for grant of time till 31st December, 2011 to complete the remaining work which was in progress. This request was reiterated by the industry vide its letter dated 30th July, 2011. On 23rd August, 2011, the premises of the industry were again inspected and certain deficiencies came to be noticed. In the inspection report, it was noticed that the unit had placed a purchase order for a pneumatic

dust handling system, which was to be received shortly. Vide its letter dated 5th September, 2011, the industry informed the Board that certain modifications had been carried out by them and that CD Bag Filter ID Fan and the Product House Bag Filter ID Fan had been upgraded and requested that their consent be renewed. Vide its order dated 23rd September, 2011, the Board granted the consent to operate, valid uptil 31st March, 2012 and this consent was for the purposes specified in the consent order relating to 1x350 TPD, 8 MW WHRB + 7 MW FBC Boiler + 2 x 10 T/IF subject to strict compliance of the conditions stipulated in the consent order and the industry was given three months' time to complete the installation of PDHS at ESP/BFs hoppers. Vide its letter dated 21st March, 2012, the industry informed the Board that the consent to operate is required for lifting of iron ore, coal and dolomite and the consent, which was valid till 31st March, 2012, should be further renewed. In furtherance to this letter, on 24th March, 2012, the unit was inspected and a detailed inspection report was prepared which was communicated to the industry on 27th March, 2012. In this report, it was noticed that the bank guarantee was valid till 12th June, 2012 and whatever direction had been issued had been complied with and the plant was operating efficiently. In this report, it was also communicated that the ambient air quality at certain points was exceeding the prescribed parameters. The observations and recommendations, as stated in this inspection report, were as follows:

"OBSERVATIONS & RECOMMENDATIONS:

1. The unit has completed all the installation of the bag filters as per the recommendation of IIT, Kharagpur. All the bag filter houses have also been provided with the pneumatic dust handling system and stored in a common silo.

2. The flue dust collected from the hopper of the ESP is transferred through pneumatic dust handling system to the common silo of 120 cubic meter capacity.

There was no leakage of flue gas from the slip rings all the rotary kilns. There was also no leakage of the flue gas from the emergency caps of the BC of Kilns.

Improvement is required in the house keeping. Regular cleaning of the internal road inside the plant premises shall be done.

The unit shall install water meter at various section of the plant to estimate the water use and submit Cess Return to the Board. The unit has not yet applied for Cess to the Board.

All the internal drain shall be lined.

More plantations along the factory boundary premises and other open spaces is required.

Fixed type rotary water sprinklers/gun spray shall be provided at the solid waste dump.

Renewal of Consent to Operate may be considered for further years with special conditions under Water, Air and E(P) Act."

60. On 30th March, 2012, the industry was allowed to operate till 31st March, 2013, subject to strict compliance with the conditions stipulated in the consent granted earlier by the Board and it was specifically stated that in case of failure of the working/installation of pollution control devices or non-compliance with the stipulated norms, steps shall be taken to stop the functioning of the process plant. It appears from the record before us that the I.I.T., Kharagpur, had made certain recommendations in regard to

providing of anti-pollution devices by the industry, which had not been done by the industry within the stipulated time granted. Three senior officers of the Board prepared a cumulative report for the period starting from 24th September, 2009 to 24th/27th March, 2012 and after noticing various repeated defaults and non-compliances by the industry, it recommended as under:

> "In view of failure to comply with environmental norms and comply with the recommendations of IIT, Kharagpur within scheduled time frame, the bank guarantee may be forfeited."

61. Taking a view on this recommendation, the Board directed the Branch Manager, State Bank of India, vide its letter dated 26th May, 2012, to invoke the bank guarantee and forfeit the same for non-compliance. The bank guarantee was valid till 12th June, 2012. The request of the Board was agreed to and the Bank actually encashed the bank guarantee and credited a sum of Rs.17.50 lakhs to the account of the Board towards full and final settlement of the claim on the basis of the bank guarantee.

62. Even thereafter, a number of inspections of the industry were carried out by the Board, some of them recorded satisfactory performance while the other pointed out serious lapses and defaults on the part of the industry. Even in the inspection report dated 3rd January, 2013, the Inspecting Team made the following observations:

> "1. There was visibly flue gas emission at emergency cap of DRI kiln-III.
> 2. The emission from the common stack connected to common ESP of kiln – I & II was visually high indicating malfunctioning of ESP.

3. Fugutive dust emission was observed from CD area of kiln – III, common product house and coal crusher area indicating the bag filters at these locations were not working properly.
4. Leakage of flue gas was taking place from slip rings of DRI kiln-I.
5. PDHS system installed at the hoppers of ESP of kiln – III was found to be in defunct condition for which heavy dust nuisance in fugitive forms was observed to be taking place.
6. Hug accumulation of dust was observed at various process areas like ESP area, all kiln area, coal crusher area, iron ore crusher area and other work zone area haphazardly indicating improper dust handling and poor housekeeping practice adopted by the unit.
7. Accumulation of dust on internal roads was also observed causing fugitive dust nuisance during vehicular plying."

In view of the persistent defaults, the Committee recommended taking of suitable action against the unit.

63. From the above narration, it clearly shows that the industry has been a persistent defaulter and polluter. The parameters, particularly relating to air and ambient air quality, were found to be violative of the prescribed standards. The Board provided opportunity after opportunity and extended the time in favour of the industry to completely carry out its directions and provide anti-pollution devices. One of the letters aforenoticed written by the industry to the Board further clearly showed that the former never disputed the allegations of the latter. For various reasons, the industry always prayed for extension of time which on most of the occasions was allowed by the Board in the interest of the industry and development. The bank guarantee was furnished by the industry without demur or protest. In fact, the language of the undertaking afore-reproduced clearly shows that the entire act of the industry was voluntary and it accepted the conditions without any protest either on facts or on law. It not only accepted such

conditions but even implemented the directions by furnishing the bank guarantee and the undertaking. This obviously means that to this entire process and the conditions therein, the industry had acquiesced itself. Furthermore, it took advantage of the situation and persuaded the Board to elect extension for compliance as opposed to closure of operations of the industry. The Board, having considered various factors and facets of the problem, permitted extension while it had the power to issue order of closure in terms of Section 31A of the Air Act. Having persuaded the Board and the Board having altered its action in a particular manner of which advantage accrued to the industry, the industry would also be estopped from challenging the correctness of that very action, the benefit of which accrued to it over a long period right from 2009 to 2012. Objection, if any, that could be raised by the industry, had been waived by it through its conduct and action. It is a case of acquiescence on the one hand and on the other, the respondent could even be estopped from challenging the correctness of that very order, the benefit of which it had enjoyed. *Estoppel* is a rule of equity and evidence. It bars or prevents one from asserting the claim or right that contradicts what one has said or done before or what has been legally established as true. Similarly, 'waiver' is actual intent to abandon or surrender his right by a person i.e. a right or an objection may be available to a person in law but the person consciously not only waives that objection or right but in fact, acts to the contrary. Like in the present case, if the respondents actually believed that they could raise an objection

with regard to the condition to furnishing of the Bank Guarantee, they ought to have raised it right at the very initial stage but they not only failed to raise such objection albeit acted to the contrary by submitting a Bank Guarantee without demur and protest. At this stage, we may also refer to the judgment of the Supreme Court in the case of *Chairman and MD, NTPC v. Reshmi Constructions, Builders and Contractors* (AIR 2004 SC 1330), where the Court, as a general principle, has held that one who intentionally accepts the benefits of a contract or conveyance is estopped from denying the validity or binding effect on him of such contract or conveyance. The appellant Board has also relied upon the judgment of the Supreme Court in the cases of *Shyam Telelink Limited, now Sistema Shyam Teleservices Limited v. Union of India* [(2010) 10 SCC 165]; *Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond and Gem Development Corporation & Anr.* [(2013) 5 SCC 470] and Halsbury's Laws of England, 4th Ed., Volume 16(2), which state that "on the principle that a person may not approbate and reprobate a special species of estoppels has arisen. The principle that a person may not approbate and reprobate expresses two propositions:

> (1) That the person is question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.
>
> (2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent."

In other words, if one knowingly accepts the benefits of an order, he is estopped from denying the validity or the binding effect thereof.

WHETHER OR NOT INVOCATION OF BANK GUARANTEE IS PROPER:

64. We have already discussed above that it was as a result of persistent defaults on the part of the industry that the Board made an objective assessment on the basis of various inspection reports and then decided to invoke the Bank Guarantee rather than issuing directions for closure of the unit. The industry had failed to discharge its corporate social responsibility. It had done damage to the environment which it was liable to make good. As a persistent defaulter, it also raised no grievance against the encashment of the bank guarantee which, it had furnished of its own accord and without protest in furtherance to Board's letter dated 12th June, 2009. At no point of time during the period from 2009 to 2012, did it raise the issue in regard to the power and authority of the Board to ask for furnishing of the bank guarantee. On the contrary, it enjoyed the benefits thereof by carrying on its activities, despite being a defaulter. The data furnished in the inspection reports of the Board leaves no doubt in our minds that the bank guarantee had been invoked when on repeated inspections, it was found that the industry is a persistent defaulter and thus, was causing air pollution, particularly in relation to ambient air quality and after issuing show cause notices to the industry from time to time. The Board, thus, was fully justified in invoking the bank guarantee. Ancillary but the most significant question that now arises for

consideration is whether the bank guarantee had been invoked as per its terms. Clause 2 of the bank guarantee which we have reproduced above states that the industry had three obligations – (a) to operate and instal the existing and the requisite pollution control system and/or other pollution control measures effectively within the stipulated time, and (b) this was to be to the satisfaction of the Board in terms of its letter dated 12th June, 2009, and (c) the industry was to meet the standards prescribed by the Board.

65. In case of failure to comply with the same during the stipulated period of three years, the bank guarantee would be forfeited by the Board, the Bank having undertaken to pay the same when demanded by the Board within the period of the guarantee. The invocation letter issued to the Bank on 26th May, 2012 clearly stated that the industry had failed to comply with such conditions within the stipulated time and several environmental non-compliances were observed during the tenure of the bank guarantee. This invocation was founded on the satisfaction of the Board. That satisfaction, of course, has to be fair and not subjective, but objectively arrived at. The Board having considered various pros and cons, prepared a cumulative assessment of the breaches committed by the industry and keeping in view its General Resolution, took the decision to invoke the bank guarantee rather than closing the industry at that stage. Such invocation, therefore, is proper, in terms of the bank guarantee and not malafide. The bank guarantee is an independent contract to the contract or order in furtherance to which it is furnished and can be invoked as per its

terms. The purpose is to ensure payment stated in the bank guarantee. There are only two exceptions to the general rule for encashment of the bank guarantee as per its terms – (i) a fraud in connection with such bank guarantee that would vitiate the very foundation of such a bank guarantee and (ii) where a special equity in favour of the applicant exists which will result in an irretrievable harm or injustice to one of the parties concerned when encashment of the bank guarantee can be withheld or can be said to be illegal or unjustifiable. Reference in this regard can be made to the judgment of the Supreme Court in *Vinetec Electronics Pvt. Ltd. v. HCL Infosystems Ltd.* [(2008) 1 SCC 544] and *BSES Limited v. Fenner India Ltd.* [(2006) 2 SCC 728] amongst others. The invocation of the bank guarantee, which act stands completed by payment made to the Board by the Bank, does not fall in any of the exceptions that have been carved out in the judgments afore-referred.

66. The present case, certainly, does not fall in either of the above categories. In fact, it is not the case put forward by the applicant. Thus, we have no hesitation in holding that the invocation of the bank guarantee by the Board, in its satisfaction, is justifiable and is in accordance with law.

67. At this stage we may also deal with the merit or otherwise of the order dated 8th November, 2012 passed by the appellate authority. Primarily, two reasons appear to have weighed with the appellate authority while allowing appeal against the order of the Board dated 26th May, 2012. Firstly, that the Board was satisfied

with the pollution control measures undertaken by the industry and had indicated so in the Inspection Report dated 1st March, 2012. Secondly, there was required to be a deliberate violation on the part of the industry to invite the consequences of invocation of bank guarantee in terms of the affidavit filed by the industry before the Board. Both these reasons cannot be sustained by us. Of course, the Inspection Report dated 1st March, 2012 had indicated that the industry was working satisfactorily. But the appellate authority ignored two very important facts from its consideration. One that there were more than eight inspections that had been conducted by various technical teams of the Board and in most of them not only breach of the terms and conditions of the consent order was noticed but it was also clearly mentioned that there was serious pollution caused by the industry particularly in relation of the ambient air quality. The other being that before passing the order dated 26th May, 2012, the Board had taken into consideration the cumulative effect of the various inspections and a co-joint report dated 22nd May, 2012 which was the basis for passing of the impugned order. Both these aspects do not find even a mention in the order of the appellate authority. The other reason can also not be accepted by us because the affidavit filed by the industry before the Board is not the foundation of encashment of bank guarantee. We have already noticed that as per law the bank guarantee is an independent contract and the bank guarantee does not use the expression 'deliberate'. This is the word used in the affidavit. The bank guarantee was required to be invoked/encashed strictly as per

its terms. Under the terms of the bank guarantee, the industry had undertaken to operate the existing pollution control systems and/or other pollution control measures effectively to the satisfaction of the Board. In the case of failure to comply the bank guarantee could be forfeited. Thus, the primary and paramount consideration was the satisfaction of the Board in relation to the upkeep and continued maintenance of the anti-pollution devices. Even as per the letter of the Board dated 7th May, 2008, the industry was to comply with the conditions of the letter as well as the other conditions which may be imposed by the Board from time to time, in default of which, the bank guarantee was to be invoked. In terms of this letter, the industry was required to take all steps for continuous and satisfactory environmental compliance, which the industry on its own showing had failed. To read *mens rea* or the term 'deliberate' into the bank guarantee would not be permissible. *Mens rea,* as understood in the criminal jurisprudence, strictly speaking, would hardly have any application to the environmental jurisprudence. It is governed by principles such as Polluter Pays Principle and doctrine of absolute liability. The word 'deliberate' used in the letter dated 7th May, 2008 has to be given its due and normal meaning in relation to the facts and circumstances of the case taken cumulatively and not in abstract. Various letters of the industry clearly show that for a long period of more than three years they were not able to maintain the environmental standards and were not able to install the required devices. Even in January 2013, inspection of the industry had been conducted by a team of

technical experts who found that there were visible flue gas emissions, fugitive dust emissions which were impermissible and required an appropriate action to be taken against the industry.

For these reasons, we are not in a position to concur with the view taken by the appellate authority.

68. Before entering into the realm of general discussion and the directions that the Tribunal needs to pass in the facts of the present case and in the larger administration of environmental justice, we may answer the issues/questions formulated by us in paragraph 24 of this judgment. The answers are as follows: -

a. Resolution of the Board for imposing a condition upon the industrial plants/units to furnish a bank guarantee as an interregnum for compliance and/or in the nature of compensation cannot be held to be without the authority of law or jurisdiction, in so far as it is not penal or punitive.

b. In the facts and circumstances of the present case, invocation of the bank guarantee by the Board for non-compliance of the conditions stated in the consent order and in view of the undertaking furnished by the industry cannot be held to be penal and impermissible under the provisions of the Air Act.

c. The order of the Appellate Authority suffers from apparent errors of facts and law. The appellate authority has taken into consideration irrelevant matters on the one hand and ignored other

relevant matters on the other. The order of the appellate authority, thus, is liable to be set aside.

d. The bank had furnished an unequivocal guarantee for payment of the stated amount. In case of failure to comply during the specified period to the satisfaction of the Board, the bank guarantee could be forfeited. The bank guarantee has been invoked by the Board as per terms of the guarantee. Consequently, the Board would be entitled to receive the guarantee amount, however, would be entitled to use the same only for the purposes of compliance and/or for making good the environmental loss or degradation caused by the applicant.

e. The applicants' appeal is partially allowed and directions have been issued in the larger public interest.

GENERAL DISCUSSION:

69. Having answered the formulated questions and dealt with the specific pleas raised by the respective parties before the Tribunal, now we need to divert ourself to questions of some significance which call for issue of appropriate directions. First is that from the facts on record, it is clear that the Board does not have appropriate policy of inspection of industrial units in place. Sometimes, inspections are being conducted after two months while on other occasions, inspections are not conducted for years together. The other matter relates to grant/renewal of consent at intervals which can hardly sustain the scrutiny of law.

70. We are not oblivious to the fact that it may not be quite appropriate to put any restrictions on the authority of the Board to inspect industrial units as none is contemplated under the provisions of the Air Act but still the Pollution Control Boards should have a clear and transparent 'inspection policy'. It would serve the purpose of prevention and control of industrial pollution better and would also facilitate inspection programme of the Boards. The Boards should spell out, when inspections, at regular intervals in the normal course, should be conducted. Of course, this would be in aid and not in derogation to the right of the Board to conduct surprise or need-based inspections. In the normal course, regular inspections should be carried out, preferably on annual or bi-annual (twice a year) basis. This would help maintaining proper data of inspections as well as ensuring desired implementation of the conditions, if any, imposed in the consent orders.

71. Section 21 of the Air Act places restrictions, both on establishment and operation of any industrial plant located in an air pollution control area without previous consent of the Board. The legislative intent behind this provision would lead to decipher two concepts - one, the consent for the purpose of establishing an industrial plant while the other for operation of that plant. The purpose of this Section is to ensure that when a unit or an industrial plant is given consent to operate, the unit ought to have satisfied all the conditions stated in the order of consent to establish and would have installed the requisite effluent treatment plants and other anti-pollution devices to ensure that it causes no

pollution. It necessarily implies that this is the rule and permitting a unit to operate, subject to satisfaction of certain time bound conditions, is an exception, that too a rare one. To adopt exception as a rule is not the intent of this law. We are unable to appreciate the practice adopted by the Boards for granting consents for short terms like on an yearly or six-monthly basis and that too subject to varied conditions. Consent to operate should be granted preferably for a longer period and continuation should require maintenance and operation of the plant ensuring 'no pollution'. It must not be used as a device to hamper industrial development and cause avoidable loss to the industry. The purpose should be prevention and control of pollution. For better management of its affairs and for ensuring prevention and control of pollution, the Board should adopt the practice of granting consents for a substantial and reasonable period while ensuring that the anti-pollution devices and the Effluent Treatment Plants have been installed and the unit is 'compliant' and 'non-polluting' one. The scheme behind Sections 21 to 26 and 31A of the Air Act is that the Board is empowered to grant, refuse, renew and even cancel the consent. Wherever an industry to whom the consent has been granted conditionally, fails to satisfy or comply with the conditions imposed, the Board can withdraw the said consent in accordance with law. Thus, there is no purpose in law to grant consent for six months or three months, as has been done in the present case. This certainly appears to us to be an arbitrary exercise of powers. Greater obligation is placed upon the Board, particularly in view of the Constitutional mandate to

prevent and control pollution and to ensure that a clean and decent environment is provided to the public at large. This is the statutory obligation upon the Board. The Board must formulate its policies in a manner which will be in consonance with the scheme of the Air Act and the Constitutional mandate and would better serve the public interest.

72. Thus, we direct that the Boards henceforth shall clearly formulate their inspection policy, which should be fair, transparent and objective. Further, we direct that all the Boards henceforth shall grant consent to operate only to those units which have satisfied the conditions imposed and have installed ETP/Anti-pollution devices as directed under the order of consent to establish. Such units should also be compliant and non-polluting. The consent should be granted preferably for a period of two years or even more. During the period thus allowed, the Board should make inspections in terms of its 'inspection policy'. If the unit/industry is found to be defaulting, has failed to comply with the conditions of the consent order or failed to install ETPs/Anti-pollution devices and there is malfunctioning of the unit, the consent should be revoked or renewal denied in accordance with the provisions of the Air Act. Such mechanism should be a rule and its exception is to be in rare cases.

73. Wherever the Board requires a unit to furnish bank guarantee for compliance of conditions of consent order, installation of anti-pollution devices and ensuring that it is a pollution-free unit, then,

in such cases, the Board should ensure that its order provides for a 'time targeted action plan'. In default of which and upon inspection, such bank guarantee would be liable to be invoked/encashed for environmental compensation and restoration purposes. Making such provision would ensure, on the one hand, that the industry does not cause avoidable pollution and on the other, the Board performs its functions timely and effectively.

74. In view of our detailed discussion supra, we partially allow these appeals and set aside the order of the appellate authority under appeal. We hold that the condition requiring the respondents to furnish the bank guarantee is not penal and encashment thereof is neither unjustified nor covered under any of the exceptions stated in the judgment of the Supreme Court in the case of *Vinetec Electronics Pvt. Ltd.* (supra).

75. However, we further direct that the amounts received by the Board against encashment of bank guarantee shall, in preference to all other, be utilised for the compensatory purposes or restoration of the degraded environment resulting from emission and discharge of effluents and other pollutants in violation of the prescribed standards by the industry. Remnant, if any, may be utilised for installation of such effluent treatment plants/anti-pollution devices, directed to be installed under the order of consent or otherwise in the unit of the industry as it would help in bringing down the emission/pollution levels and bringing it in line with the prescribed parameters, thus protecting the environment. The Board shall have

no authority or power to forfeit this amount and use it for any other, including for its own, purposes.

76. The appeal is, thus, partially allowed with the above directions, however, leaving the parties 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
January 9, 2014