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

ORIGINAL APPLICATION NO. 24 OF 2011
AND
(M.A. NO. 129 OF 2012, M.A. NOS. 557 & 737 OF 2016)

IN THE MATTER OF:

Samir Mehta
9A, Dhiraj Apartments
11, Peddear Road,
Mumbai-400026
Maharashtra

.....Applicant

Versus

1. Union of India
   Through the Secretary
   Ministry of Environment, Forests & Climate Change
   Paryavaran Bhavan
   CGO Complex, Lodhi Road,
   New Delhi - 110003

2. State of Maharashtra
   Through the Chief Secretary
   Mantalaya
   Mumbai -400032

3. Maharashtra State Pollution Control Board
   Through the Member Secretary
   Kalpatar Point, 3rd & 4th Floor,
   Sion Matunga Scheme Road No. 8,
   Opp. Cine Planet Cinema
   Near Sion Circle,
   Sion (East), Mumbai -400022

4. Maharashtra Maritime Board
   Through its Chief Executive Officer
   Indian Mercantile Chambers, 3rd Floor,
   14, Ramjibhai Kamani Marg, Ballard Estate,
   Mumbai-400038

5. Delta Shipping Marine Services SA
   Through its Legal Representative
   Karnakis & Karnakis, Global Plaza,
   50th Street, 21st Floor, PO Box 0834-01251
   Panama, Republic of Panama.

6. Adani Enterprises Limited
Through its Managing Director
Adani House, Near Mithakali Circle,
Navrangpura, Ahmedabad -380009
Gujarat.

7. Delta Navigation W.L.L.
Villa No.: 213, Zone 39,
Street 343, PO Box 7639,
Alsadd Area, Near British Council
Qatar.

8. Union of India
Through Indian Coast Guard
Ministry of Defence, Govt. of India
Coast Guard Headquarters,
National Stadium Complex
Purana Quila Road
New Delhi-110001

9. M/s Astra Asigauri Insurance
Through its Attorney
Bucharest Municipality
3 Nerva Traian Str. Building M
101, 10th Floor, 3rd District.

10. Interport Marine Services Pvt. Ltd.
Through its Director
1/29 C (basement)
Shanti Niketan, Rao Tula Ram Marg,
New Delhi-110021.

11. Delta Group International
Through its Manager
Al Saad Street, Post Code 7639
Doha Qatar.

12. GAC Shipping (India) Pvt. Ltd.
Through its Constituted Attorney
Badheka Chambers, 31 Manohardas Street,
Fort, Mumbai-400001.

13. Ministry of Shipping

.....Respondents

COUNSEL FOR APPLICANT:
Mr. Raj Panjwani, Sr. Advocate, Mr. Ritwick Dutta, Mr. Rahul Choudhary and Ms. Meera Gopal, Advocates.

COUNSEL FOR RESPONDENTS:

Ms. Panchanjanya Batra Singh, Advocate for MoEF (Respondent No. 1)
Mr. Mukesh Verma and Mr. Devesh Kumar Agnihotri, Advocates for Respondent Nos. 2 & 3.
Mr. Preshit Surshe, Advocate for Respondent No. 4
Mr. Kavin Gulati, Senior Advocate along with Ms. Mukta Dutta and Rohit Sharma, Advocates for Respondent No. 6
Mr. Sumit Goel and Mr. Lalit Chauhan, Advocates, Ms. Sreeparna Basaq and Mr. Tanuj Agarwal Advocates for Parekh & Co. (Respondent No. 7 & 11)
Mr. A.K. Prasad, Mr. Panshul Chandra and Mr. Jaydip Pati, Advocates for Respondent No. 8
Ms. Diya Kapur and Ms. Akshita Sachdeva, Advocates for Respondent No. 9
Mr. Tishampati Sen, Advocate for Mr. P.B. Suresh and Mr. Vipin Nair, Advocates for Respondent No. 10
Mr. Harish Vadyanathan Shankar, Advocate for Respondent No. 12

JUDGEMENT

PRESENT:
Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Mr. Justice U.D. Salvi (Judicial Member)
Hon'ble Prof. A.R. Yousuf (Expert Member)
Hon'ble Mr. Ranjan Chatterjee (Expert Member)

Reserved on: 2nd August, 2016
Pronounced on: 23rd August, 2016

1. Whether the judgment is allowed to be published on the net?
2. Whether the judgment is allowed to be published in the NGT Reporter?

JUSTICE SWATANTER KUMAR, (CHAIRPERSON)

The present application raises questions of public importance and significance of environmental jurisprudence, in relation to pollution caused by sinking of ship and oil spill in the Territorial Water, Contiguous Zone and Exclusive Economic Zone of the country (India) and consequences and liabilities arising therefrom.

FACTS:

The Applicant, a resident of Mumbai claims to be an environmentalist pursuing various environmental concerns before different forums for the last two decades. According to the Applicant, he was on the Committee constituted by the Ministry of Environment, Forest & Climate Change (for short, 'MoEF&CC') of Matheran Eco-Sensitive Zone as well as on the Committee of Mahabaleshwar Panchagani Regional Board constituted by the State of Maharashtra to prepare master plan of the Eco-Sensitive Zone. The Applicant has filed the present application under Sections 14 and 15 of the National Green Tribunal Act, 2010 (for short, 'Act of 2010') raising substantial questions relating to the environment, restitution of the environment and compensation commensurate to the damage done to the ecology on the facts of the present case.

2. Respondent Nos. 1, 2, 3 and 4 are the MoEF&CC, State of Maharashtra, Maharashtra Pollution Control Board and Maharashtra Maritime Board. All are the official Respondents and/or the instrumentalities of the State who are vested with statutory powers to maintain and protect the environment and ecology. Respondent No. 5 is the owner of the ship 'M.V. RAK' (for short, 'the Ship') which was carrying coal for and on behalf of Respondent No. 6. Respondent No. 6 is an Indian Company with its registered office at Ahmedabad. The Ship was carrying more than 60054 MT coal in its holds. The Ship contained 290 tonnes of fuel oil and 50 tonnes of diesel. Its voyage was from Indonesia to Dahej.

3. On its voyage to destination, the ship sank approximately 20 Nautical Miles from the coast of South Mumbai. There was an oil spill in August, 2011 which occurred in the Arabian Sea, off the coast of Mumbai due to the sinking of the ship. The spilled oil from the ship spread beyond Mumbai to Raigad District. Traces were noticed particularly between Uttan in Bhayandar and Gorai beach. Continuous trail of oil leak from the ship was observed upto 12 Nautical Miles. A very thick oil slick up to one nautical mile and a thick layer of oil upto two Nautical Miles was also observed. During the first few days, oil was leaking at the rate of 1–2 tonnes per hour and on August 12, 2011 according to the Applicant, the rate of oil spill was 7 to 8 tonnes per day as per the information of the Coast Guard. Press Information Bureau Report and the press release of the MoEF&CC indicated said statistics. It is reiterated that the ship was carrying more than 60000 MT of coal for Adani Enterprises Limited for its thermal power plant at Dahej in Gujarat. As a result of the oil spill, there has been damage to mangroves and marine ecology of the Bombay coast. Various press information and articles were published in the newspapers during August, 2011 and particularly from 8th to 12th August, 2011. The impact of the oil spill has been clearly noticed and is visible on the mangroves of Mumbai. The lower portion of mangroves at Bandra had turned dark because of a layer of oil and got destroyed. The Government had also taken the view that the oil seen at Juhu Beach is due to localized events and not due to oil spill, but this was a misconception. Other accidents of oil leak from other ships had also taken place in 2010 near Uran.

4. It is the specific case pleaded by the Applicant that oil spill impact commonly known as marine oil spill is a form of pollution. It includes release of crude oil from tankers, offshore platforms, drilling rigs and wells, as well as spills of refined petroleum products – gasoline and diesel and heavier fuels used by large ships in the seas. The general impact due to oil spill is that it spreads in the water depending on its relative density and composition. The oil slick formed as a result may remain cohesive, or may break up in the case of rough seas. Waves, water currents and wind force the oil slick to drift over large areas, impacting the open ocean, coastal areas, and marine and terrestrial habitats in the path of the drift. Oil that contains volatile organic compounds partially evaporates, losing between 20 and 40 percent of its mass and becomes denser and more viscous (i.e. more resistant to flow). Over time, oil waste weathers (deteriorates) and disintegrates by means of photolysis (decomposition by sunlight) and biodegradation (decomposition due to microorganisms). The oil spill waste reaches the shoreline or coasts. It interacts with sediments such as beach sand and gravel, rocks and boulders, vegetation and terrestrial habitats of both wildlife and humans, causing erosion as well as contamination. It has definite impact on fish, marine mammals, birds, coastal marshes, mangroves, wetlands, wildlife habitats and their breeding ground.

5. India relies heavily on its marine environment for trade and commercial operations. The Indian coast is becoming increasingly vulnerable as there is significant increase in all types of oil tankers/bulk carriers/container ships passing through the Indian

Ocean. The Study 'How vulnerable is Indian coast to oil spills?' Impact of MV Ocean Seraya oil spill' Current Science, 95 (4), 504 [25 August 2008] show the various adverse impacts of oil spill on the Indian Coast. The oil spills particularly on the Indian Coast cause major damage to marine ecology. The Applicant submits that the ship owner as well as the person/company for whom the cargo is being transported is, therefore, liable to pay compensation and ensure restitution of environment.

6. The damage to the coastal, marine ecology has increased by the day. There is serious threat to various aspects of the coastal area and marine environment particularly in India. According to the Applicant, all the Respondents, namely, Respondent no. 5 who is the registered owner of the ship, Respondent nos. 7 and 11 who in fact are the sister concerns of Respondent no. 5 responsible for the voyage of the ship and its sinking and these Respondents along with other Respondents are also liable for all the damage caused. They are also liable to pay compensation for restitution and restoration of the ecology, eco-system on the basis of 'Polluter Pays Principle'. They are also liable to pay costs to Respondent nos. 1 and 4 for containment of the oil spill and for taking preventive measures. The Applicant also prays that the movement of the ship be allowed only after detailed safety measure and regulations are in place in accordance with the 'Polluter Pays Principle'. According to the Applicant, in view of the provisions of Section 17(1) of the Act of 2010, the 'person responsible' for causing adverse impact on the environment is liable to pay compensation. The Applicant claims that on account of damage caused to aquatic flora &

fauna, mangroves, fishermen and the damage done to the environment including soil, water, land and eco-system, the Respondents have a joint and several liability to pay compensation claimed in the application.

7. While relying upon the judgments of the Supreme Court of India in the cases of *'M.C. Mehta and Another v. Union of India & Ors.'* (1987) 1 SCC 395, *'Indian Council for Enviro - Legal Action v. Union of India'* (1996) 3 SCC 212 and *'Subhash Kumar v. State of Bihar & Ors.'* (1991) 1 SCC 598, the Applicant prays for the following reliefs:

A. Direct the Respondent Nos. 2 to 4 and the Central Pollution Control Board to submit reports on the impact of the Oil spill on the environment.

B. Direct the Respondent No. 1 to Respondent No. 4 to submit the cost incurred by them on the containment of the oil spill.

C. Direct and hold the Respondent No. 5 and Respondent No. 6 be made liable for the damage caused to the ecosystem and pay compensation of the loss to ecology and livelihood in accordance with the 'Polluter Pays Principle'.

D. Direct that the restitution of the area is undertaken in accordance with the 'Polluter Pays Principle'.

E. Direct that movement of the ship be allowed only after detailed safety measures and regulations are in place in accordance with the 'Polluter Pays Principle'.

F. Direct that the damage likely to be caused during transportation of fuel such as coal by ship should be

factored in the Environmental Impact Assessment of a power plant.

G. Pass any such other or further order as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

Let us now deal with the defences and replies filed by the different public authorities.

8. Respondent No. 1, MoEF&CC at the very outset in its reply stated that the Maharashtra Pollution Control Board, DG Shipping, Indian Coast Guard and the Indian Navy co-ordinate the pollution control activity and Maharashtra Pollution Control Board has already issued a letter to the ship owner company, Respondent no. 5 to remit financial aid of Rs. 3 Crores towards the remedial measures taken to mitigate damage caused to the fragile marine environment. On merits, it is submitted that as reported by the Department of Environment, Government of Maharashtra and the Indian Coast Guard, the ship, sank about 20 Nautical Miles off the coast of Mumbai on 4th August, 2011 resulting in an oil spill. It was carrying 60054 MT cargo of coal, 290 tonnes of fuel oil and 50 tonnes of diesel. The ship was on her voyage from Indonesia to Dahej, Gujarat. The provisions under the CRZ Notification are applicable upto the territorial water limit i.e. 12 Nautical Miles=22.22 KM (1nm=1.852 Km) whereas the oil spill occurred at 20 Nautical Miles off the coast of Mumbai. Therefore, the provisions of the CRZ Notification are not applicable in this case. As per the decision taken in the meeting of the Committee of the

Secretaries held on 4th November, 1993, the Ministry of Shipping is responsible for the prevention and control of pollution arising from ships all over the sea including the major port areas. It is further submitted that the Indian Coast Guard, Ministry of Defence is the Central Coordinating Agency for combating of oil pollution in the coastal and marine environment of various maritime zones in the country. As per the Government of Maharashtra, oil was leaking at the rate of 1.5 to 2 tonnes/hour initially which later on reduced to 0.5 tonne/hour. However, no oil spill was reported from the sunken ship after 21st August, 2011. Patches of oil and oil covered debris were detected near the beaches in Juhu, Dadar and Alibaug. A thin oil slick was observed upto 8 to 12 Nautical Miles around the ship Carrier and a thick slick was seen between 3 to 5 Nautical Miles. The Environmental Impact Assessment study was assigned to the National Environmental Engineering Research Institute (herein referred to as NEERI), Nagpur to assess the environmental damage of oil spill caused due to the ship sinking. The Maharashtra Pollution Control Board (for short 'the Board') was to substantiate whether the spill on Juhu Coast was a localized phenomenon or was for reasons other than the sinking of the ship. While referring to the earlier incidents and the study conducted, it was stated that the collision between *MSC Chitra* and *MV Khalijia* had caused significant disturbance to marine and coastal habitats. There were changes in the water quality in the natural variations. Though, in that case an adverse impact of oil spill was short lived and the affected segments recovered quickly but in relation to the incident in the present case, there was severe damage

and a sum of Rs. 3 Crores has to be remitted towards the remedial measures taken to mitigate the damage caused to the marine environment.

9. It appears from the records that no independent reply has been filed by Respondent No. 2, the State of Maharashtra. However, a detailed reply has been filed on behalf of the Respondent No. 3, the Board wherein it is stated that the Board has been constituted and is primarily responsible for the prevention and control of air, water and all other pollution in the areas under its jurisdiction. After coming into force of the Water (Prevention and Control of Pollution) Act, 1974, which was adopted on 1st June, 1981 the State Government had declared the whole State of Maharashtra as the 'Water Pollution, Prevention and Control Area' shown in the map of Maharashtra. The Board has been further entrusted with the implementation of the Environment (Protection) Act, 1986 and the Rules framed there under, which have been extended to the whole of India and the Central Government has been empowered to take such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment and preventing, controlling and abating the environmental pollution. In relation to the ship in question, it is stated that the Director General, Shipping (for short 'DG Shipping') had informed the Board about the sinking of the ship on 4th August, 2011, which was on her voyage from Lubuk Tutung, Indonesia to Dahej, Gujarat with the cargo containing, 60054 MT of Coal. It had been reported that the said ship also contained furnace oil and diesel oil, thus, increasing the chances of oil spill from the ship and thereby

endangering the aquatic life and the marine environment. DG Shipping further informed that the Indian Coast Guard was requested to render immediate assistance to this ship and to also direct the Shipping Corporation of India, the charterer of *Smit Lumba*, ETV to send the unit to the casualty site for rendering assistance. The Indian Coast Guard dispatched their ships to the site rescued the crew members aboard and also dispatched their oil pollution response ship namely '*Samudra Prahari'*. The Mumbai Port and the National Hydrographic Officer, Dehradun were advised to issue navigational warning so that the mariners were warned of the said danger. The Directorate under the provisions of Merchant Shipping Act, 1958 (for short 'Act of 1958') in terms of Section 356J & 356K had issued statutory notice to the ship owner, ship manager and the local ship agent on 4th August, 2011. The Director of Shipping had further informed that the ship had submerged at 40 kilometers away from the Mumbai coast. The jurisdiction of Union of India, being a sovereign, is stated to be up to 12 Nautical Miles and as far as the incident is concerned, the primary responsibility for initiating further line of action in respect of the pollution caused by the ship is on the DG Shipping and the secondary responsibility is on the MoEF, Government of India, as it is for them to prevent, control and abate environmental pollution. After having received the intimation, different departments had taken different actions and they can be summed up as follows and as per the reply filed by the said Respondents:-

> "(i) The Respondent-Board vide letter dtd. 4/8/2011 informed the District Collector, Mumbai, Sub

Urban and the Municipal Commissioner, MCGM about the incidence and requested them to initiate necessary mitigation measures and to be prepared for the possible disastrous situation. A copy of the said communication dtd 4/8/2011 made to the said Competent Authorities is enclosed and marked herewith as **Exhibit R-3.**

(ii) The Officials of the Respondent Board visited the Arabian sea shore and close vigilance on the incidence was kept by the team of Board officers. There was no immediate effect of the oil spill on 4th August, 2011, however the Indian Coast Guard dispatched their oil pollution response ship namely 'Samudra Prahari' to deal with the said pollution and disaster caused thereof.

(iii) The Respondent Board caused the coastal monitoring and collection of sea water samples at various beaches from 4/8/2011 to assess the oil content in sea water and submitted to the Central Lab for further analysis.

(iv) It is further submitted that oil leak was observed near Juhu beach on Sunday 7th August, 2011, the officials of the Respondent Board at Mumbai immediately visited the oil spill spread area near Juhu beach and collected the samples for analysis. In this regard a meeting was called by the DGS and in its press release reported that the oil leak in Arabian sea was at an approximate rate of 1.5 to 2 tons per hour from the sunken ship MV Rak Carrier and also informed that the said oil had spread to about 7 Nautical Miles around the ship.

(v) The DGS had decided to take the daily review at my incidence and held daily meetings of all concern stake holders for further necessary steps to combating the oil-spill and preventing it from spreading in the sea.

(vi) Taking into account the gravity of the incidence, the Respondent Board had lodged a complaint/filed FIR on 8/8/2011 at yellow gate Police Station, Mumbai against the owner of the ship company under Section 7, 8 and 9 of the Environment (Protection) Act, 1986 and section 43 and 45A of the Water (Prevention and Control of Pollution) Act, 1974. A copy of the complaint is enclosed and marked herewith as **Exhibit R-4.**

(vii) Further, the Environment Department, Govt. of Maharashtra vide letter No. Oil Spill/2011/TC-1 dated 8/8/2011 directed the Brihanmumbai Municipal to take up the beach cleaning work immediately and provided **financial assistance** to the said work. A copy of the letter dtd 8/8/2011 is enclosed and marked as an **Exhibit R-5.** The

Environment Department further vide letter No. Oil Spill /2011/TC-1 dtd 8/8/2011 issued work order to M/s. National Institute of Oceanography, Regional Centre, Mumbai for Environmental Impact Assessment (EIA) to study on pollution due to oil spill. The said letter dtd 8/8/2011 addressed to NEERI is enclosed as **Exhibit R-6.**

(viii) The Respondent Board vide letter dtd 12/8/2011 to ship owner of the company i.e. Respondent No. 5 to remit financial aid of Rs. 3 Crore towards the remedial measures of fragile marine environmental damage. A copy of the letter dtd 12/8/2011 is enclosed as an **Exhibit R-7.**

(ix) The DG of Shipping had directed the ONGC to release a suitable specialized diving support ship to undertake the Preliminary Assessment of the oil being released from the sunken ship. A copy of the letter dated 10/8/2011 is enclosed as an **Exhibit R-8.** The DG shipping also instructed the local P&I correspondent (protection and indemnity) to engage an expert diving supervisor to guide the diving operations which was commenced. The expert divers were instructed to identify the source of leak and if practicable and possible to plug such leak to check the outflow. The DG-Shipping advised the P&I correspondent (Interport Marine Services Pvt Ltd) to immediately seek the expertise of the International Tanker Owner Pollution Federation, to assist in conducting the survey mapping of the affected areas and provide guidance to the concerned authorities including owner to deal with the cleanup operation alongwith the coastline. Further, the Coast Guard ships namely Samudra Prahari, Varuna and Kamla Devi carried out the spraying of dispersants (OSD) in areas where the oil slick was spotted.

(x) The Respondent Board had constituted two teams for the extensive monitoring purpose engaging 10 Field Officers under the supervision of two Sub Regional Officers and daily monitoring from 4/8/2011 was carried out and samples were collected twice in a day fixing 9 location as following:

i) Gate way of India
ii) Culaba
iii) Worli Sea Face
iv) Dadar Beach
v) Juhu Beach
vi) Varsova
vii) Marve
viii) Madh
ix) Gorai Beach

Further, sea water samples from the affected beaches were also collected.

(xi). The Hon'ble Minister of Environment Deptt., Govt. of Maharashtra, Environment Secretary, Chairman Central Pollution Control Board also visited the affected area on 9/8/2011. They dignitaries also took the review o the mitigation work related to the oil spill. Further, the Hon'ble Chairman of CPCB and his team further visited to the probable affected area such as Gate way of India, Worli Sea Face, Dadar Beach, Juhu Beach. Versova, Madh and Marve Beach on 9/8/2011 including the grounded ship MT Pavit. At the time of visit, floating oil was observed at Juhu Beach, Madh and Marve Beach. The samples collected by the Board officials revealed that the oil and grease levels in the sea water was up to 135 mg/l at few locations.

(xii). The Respondent Board had taken regular review of the oil spill incidence in co-ordination meeting held by DGS, further field observations were briefed to the DGS, Coast Gaurd authorities and the concerns during the meeting.

(xiii).It is submitted that the Respondent Board does not have jurisdiction for more than 5 Kms. in deep sea, hence MPCB had to depend on Coast Guard and DG Shipping for information. The Rak Carrier was submerged at 40 kms from the Mumbai coast."

10. It is the contention of the State of Maharashtra and the Board that they have a very limited role i.e. to monitor the exact cause of action and to communicate the details thereof to the Environment Department of the State of Maharashtra. The Board had informed various authorities, as has been stated above. Furthermore, the Board had lodged a complaint at Yellow Gate Police Station, Mumbai against the owner of the ship company under Sections 7, 8 and 9 of the Environment Protection Act, 1986 and Sections 43 and 45A of the Water (Prevention & Control of Pollution) Act, 1974. Under provisions of the Environment (Protection) Act, 1986, Respondent Board had called upon the private Respondents to remit the financial aid of Rs. 3

Crores towards the remedial measures taken to conserve the fragile marine environment. NEERI in furtherance to the work order placed by the Board vide order dated dated 12th August, 2011 had submitted the Interim Report. The assignment work presented in the report of NEERI was limited to the first interim assignment based on data information, water and sediment samples which were being analysed. The work was in progress and subsequent report was to be submitted.

The Board had also decided to take steps, to recover the cost of remediation and compensation from the ship owner owing to the damage caused by the ship sinking, after the receipt of the report.

11. The Tribunal vide its order dated 6th September, 2012 had directed Respondent nos. 2 to 4 to file an affidavit specifically indicating the amount spent for the aforesaid purpose i.e. exact damage caused and the cost incurred by them on the containment of oil spill. Additional affidavit dated 14th September, 2012 was filed on behalf of Respondent no. 3 and in that affidavit it was stated that the Board had conducted initial review of the environmental damage caused by the oil spill to the marine ecosystem in all the four districts namely, Mumbai city, Mumbai Suburban, Thane and Raigad. Even the initial review assessment had indicated that damage was caused to, inter alia, the shoreline, beaches and mangroves in and around the said area. A statement showing the details regarding Financial Assistance given to various authorities has been placed on record that reads as follows:

> "Details regarding Financial assistance given to District Collector, Raigad and District Collector, MCGM for

clean up activity, for the study of Environmental Assessment regarding pollution due to Oil Spill from MV Rak Carrier.

Sl. No.	**District Collector**	**Amt. In Rs. Issued by MPC Board**	**Cheque No.**	**Date**
1.1	Raigad District Collector	Rs. 10 Lakh	481903	8/8/2011
1.2	MCGM	Rs. 10 Lakh	481904	8/8/2011
1.3	Financial assistance given by MPCB for the study of Environmental Assessment regarding pollution due to Oil Spill from MV Rak Carrier	Rs. 37.5 Lakh		

12. The final NEERI report had been submitted in pursuance of the Board's work order dated 12th August, 2011, during the pendency of the proceedings before the Tribunal in April, 2013. In the report besides providing summary of proceedings and making some recommendations, it also suggested remedial steps that were required to be taken. It also noticed that damage to the environment, ecology and flora and fauna of the area had occurred due to oil spill.

13. Respondent No. 4, Maharashtra Maritime Board filed an independent reply taking up the stand that it is constituted and functioning under the provisions of Maharashtra Maritime Board Act, 1996 and its jurisdiction is to the extent of Port limits of 48 minor

ports on the coastline of State of Maharashtra and neither their impleadment nor presence is necessary for proper and effective adjudication in the present application. According to the Respondent no. 4 on 6th August, 2011, it had received a mariners notice issued by Jawaharlal Nehru Port Trust regarding sinking of ship carrying a cargo of coal in position latitude 18 degree 46.287' N Longitude 072'29.194'E' in chartered depths of 36 meters on 4th August, 2011. The position of the said ship was inside the Bravo W" outer anchorage which is under the control of Mumbai Port Trust. The area where the ship sank did not fall under the port limits of the minor ports in the State of Maharashtra. After receiving the navigational warning dated 8th August, 2011, the said Respondent had issued necessary Notice to all Regional Port Offices informing about the sinking of the ship. Actions were initiated by the Indian Coast Guard to prevent the oil pollution. For this purpose, operation "Paryavaran Suraksha" was undertaken by the Coast Guard from 7th August, 2011. The main object of the operation was to prevent damage to the fragile marine environment along the Maharashtra Coast.

Different reports were sent from time to time. Respondent no. 4 has not incurred any expenses or cost in relation to the containing of oil spill resulting from sinking of the said ship. Hence, they had prayed for deletion of their name.

14. Before we proceed further to spell out the defence taken by other private Respondents, it will be necessary to refer to the respective Respondents' impleadment and deletion from array of parties and

their description in the case. Initially, the application had been filed with just six Respondents. Name of Respondent no. 5, Delta Group International was ordered to be deleted from array of parties vide order dated 22nd February, 2012 and its name was replaced by Delta Shipping Marine Services SA, through its legal representative. Respondent No. 5 is the owner of the ship and the consignment of coal belongs to the Respondent no. 6. Respondent no. 6, Adani Power Dahej Limited was substituted by Adani Enterprises Limited, Adani House, Ahmedabad in terms of the order dated 22nd February, 2012. Respondent no. 5, Delta Shipping Marine Services SA was served but had failed to put in appearance despite service, hence, the Tribunal had proceeded ex-parte against them in these proceedings vide order dated 7th August, 2012.

Respondent no. 6, filed MA No. 129 of 2012 praying for deletion of its name from array of parties on the ground that it was only the consignee of the cargo that was being carried by the ship. It further prayed that it is on the basis of Polluter Pays Principle that the Tribunal has to adjudicate in cases where there has been contamination of the environment. The Investigation Report had concluded that the cause of accident resulting in the leakage of oil and the spread of the oil across the coastal waters and shores of Mumbai was unseaworthy ship which had been poorly maintained and was technically not suited to handle the water ingress. The Delta Group International had taken up the plea that it was not the owner of the ship and therefore, is not a necessary party. Affidavit dated 15th February, 2012 affirmed by the Managing Director of Delta Group

International was filed stating that they are not the owners of the ship and that the true owner of the ship is Delta Shipping Marine Services SA, Panama. Reference was also made to the Charter Party Agreement for carriage of the cargo. This Agreement clearly shows that the owner of the ship was Delta Navigation WLL, Al Sadd Street, Doha, Qatar and there is no change in ownership. Director of Delta Group International (who is the owner of the ship) had a subsidiary company, which had entered into a Charter Party Agreement for carriage of the cargo from Indonesia to Dahej. The statement made by then Respondent no. 5 was contrary to the facts. Erstwhile Respondent no. 5, Delta Group International, Qatar and Delta Navigation WLL, Qatar were the owners of the ship and subsidiary respectively. Thus, they were required to be added. Further, in the application, impleadment of Astra Asigurari Insurance Reinsurance Co. was pleaded on the ground that it was the company that had insured the voyage and in terms of the insurance policy covered the pollution, fines and wreck liabilities. Thus, it was also a necessary party. Respondent No. 6 also prayed for impleadment of Interport Marine Services Private Limited. This party in their letter dated 10th August, 2011 had stated that P&I Correspondent shall arrange all the costs of operation for pollution control which are made payable by the owner of the ship for the purposes of identification of the owner and determination of law of compensation under marine environment. It was pleaded that this party should be impleaded. Respondent no. 6 also pleaded that Union of India, through Ministry of Shipping and Ministry of Defence should be impleaded as Respondents, in terms of

the provisions of the Act of 1958. The Ministry of Shipping was responsible for carrying out the proceedings in relation to the determination of compensation and damages. All these facts had been put forward by this Respondent while praying for deletion of its own name. It prayed for addition of the abovementioned Respondents:

> "i. Re-implead Delta Group International, Qatar as a Respondent in O.A. No. 24/2011;
> ii. Implead Delta Navigation WLL, Qatar as a Respondent in O.A. No. 24/2011;
> iii. Implead Astra Asigurari Insurance and Reinsurance Co. as a Respondent in O.A. No. 24/2011;
> iv. Implead Interport Marine Services Pvt. Ltd. as a Respondent in O.A. No. 24/2011;
> v. Implead the Union of India through the DG of Shipping, Ministry of Shipping as a Respondent in O.A. No. 24/2011;
> vi. Implead the Union of India through the Indian Coast Guard, Ministry of Defence as a Respondent in O.A. No. 24/2011;"

15. Notices were issued to the above parties vide order dated 13th September, 2012. Delta Group International, Qatar and Delta Navigation WLL, Qatar both were ordered to be impleaded vide order dated 22nd November, 2012, after notice was served upon them. Astra and M/s. Interport Marine Services Private Limited had taken time to file reply to the application. Vide order dated 3rd January, 2013, it was ordered by the Tribunal that the presence of the said Respondents would be necessary for proper adjudication of the issues involved in the present case before the Tribunal and directed their impleadment, the Tribunal also the directed the CEO of the Maharashtra Maritime Board to appear before the Tribunal. The requests of Respondent no. 6 for deletion of its name was declined

vide order dated 3rd January, 2013. Even M/s. Astra Asugurari Insurance Reinsurance Co. and M/s. Interport Marine Services Private Limited were directed to be impleaded as Respondents in the main application vide the same order. Vide order dated 19th February, 2013, Delta Group International and its agents GAC Shipping (India) Private Limited were ordered to be impleaded as Respondent no. 11 & 12, respectively. Newly added/substituted Respondent no. 5 was also directed to be added as a party vide order dated 15th April, 2013. Thus, in entirety, there were 13 Respondents in the present application. Vide same order, Ld. Counsel appearing for the parties were directed to answer the questions formulated i.e. a) who is the owner of the ship in question; b) whether Delta Navigation and Delta Shipping Marine Services SA are subsidiaries of Delta Group International; c) what is the relationship between these companies and d) whether GAC Shipping (India) Pvt. Ltd. is the agent of any of these companies in India.

STAND OF RESPONDENT NO. 8

16. Respondent no. 8, Indian Coast Guard in its reply took a stand that it is an Armed Force of the Union, which is administered by the Ministry of Defence. In terms of the Section 14 of the Coast Guard Act, 1978, it has been empowered by the Government of India to combat oil spill in various maritime Zones and to act as a Central Coordinating Agency in the coastal and maritime Zones in terms of the Rules. It is averred that at about 0740 hrs on 4th August, 2011 the ship while at the anchorage of Mumbai experienced heavy flooding

and requested assistance through Ship Traffic Service, Mumbai. On communication with the Master of the ship, it was evident that the chances of the ship sinking existed as there were no submersible pumps available onboard to pump out the ingression of sea water. At about 0840 hrs on the same day the Coast Guard Helicopters of 842 Squadron and Indian Navy were launched concurrently for coordinated rescue efforts, as the ship was about 22 Nautical Miles from coast with 30 crew members on board. The specialized pollution control ship of the Indian Coast Guard, '*Samudra Prahari*' was diverted from routine patrol and emergency towing ship *Smit Lumba* was directed to proceed to render assistance to the ship. Merchant ships operating in the area were also diverted to augment rescue efforts. Indian Coast Guard/Indian Navy helicopters successfully evacuated all crew of the ship and airlifted them ashore by 1015 hrs on the same day. The ship subsequently sank at the same position at about 1345 hrs on 4th August, 2011, due to excessive flooding onboard.

Indian Coast Guard ship, '*Samudra Prahari*' was directed to remain in the area to monitor the developing situation. On 5th August, 2011, Indian Coast Guard ship, *Samudra Prahari* reported the oil spill from the ship and commenced pollution response operation to combat and control oil pollution. Subsequently, on report of heavy oil spill on 7th August, 2011 Regional Headquarters (West) launched "Ops Paryavaran Suraksha 02/11" for effective mitigation of oil spill. Oil spill mapping was carried out using Coast Guard Dornier Aircraft and additional ships were deployed to augment the pollution response

efforts. Coast Guard Units applied churning and Oil Spill Dispersant spray tactics to mitigate oil spill. On report of tar balls on few beaches, shore clean up was coordinated with State agencies and volunteers. Regular helicopter sorties were undertaken for oil spill assessment/coastal reconnaissance to monitor extent of pollution. The operation continued for 11 days and finally terminated on 21st August, 2011 on drastic reduction of oil discharge and localization of the spillage area. Thereafter, Coast Guard ships were deployed in the area to monitor the situation. The day wise details of the extent of the oil spill from the ship and details of Coast Guard Ships deployed and the quantity of oil spill dispersant sprayed are as under:

Date	**Extent of oil spill**
05 Aug 11	Thin/broken sheen of oil of approximately 200m in breadth extending south easterly direction upto 2.5 Nautical Miles.
06 Aug 11	Approximate 0.025mm thick oil sheen extending ENE from datum upto 2.5 Nautical Miles thereafter deviating ESE upto 07nm prior extending NE 7 Nautical Miles. Estimated oil spill approx 120 T.
07 Aug 11	Continuous leakage of approx 2-2.5 T oil moving ENE-ESE direction upto 7 Nautical Miles forms the sunken ship. Launched Operation 'PARYAVARAN SURAKSHA-02/11'
08 Aug 11	Lond snaking oil slick extending upto 12 Nautical Miles from the datum along ENE-WSW direction of 300m width.
09 Aug 11	Oil spill reduced to 500L/h. Long snaking oil slick extending upto 8 Nautical Miles along ENE-W direction of width 100m. Silvery oil film possibly emulsified oil and tar ball patches in few areas at Bandra Bandstand and Dadar Chowpatty.
10 Aug 11	Fresh slick 300-400L around the sunken ship extending to 3.5 nautical in NE direction of about 600m width. Snaking oil slick extending upto 11 Nautical Miles from datum along WSW-ENE direction with width of 200m. Thin silvery oil NNE-SSW direction upto 2 Nautical Miles short of

	Madh Island.
11 Aug 11	Primary slick silvery tendril extending upto 9 Nautical Miles along NE-SW direction of approx width 200m. A secondary tendril thin film originating 11 Nautical Miles from datum extending upto 7 Nautical Miles off Mahalaxmi in NNE-SSW direction. Oil slick around the sunken ship reduced to approx one mile in length with width of 200m.
12 Aug 11	Primary slick silvery tendril extending upto 7 Nautical Miles along ENE-WSW direction of width less than 200m. Silvery thin film of secondary tendril originating 8 Nautical Miles from datum extending upto 6 Nautical Miles off Mahalaxmi in NNE-SSW direction. Oil slick around sunken ship reduced to less than one mile in length of width 200m.
14 Aug 11	Intermittent oil spill patches and silvery sheen extending upto 3.5 Nautical Miles from datum in NE direction. Small patches of emulsified oil off Colaba point. The oil spill area near sunken ship extended upto 1 Nautical Miles with width of approx 200m.
15Aug 11	Fresh traces of oil spill observed extending upto one nautical mile from the datum with width of 100m in NE direction Silvery oil film was observed extending upto 3.5 Nautical Miles from the datum.
17 Aug 11	Very thin film and broken layer of oil extending upto one nautical mile in E direction. Considerable reduction in discharge of oil from the sunken ship. No trace of oil beyond three Nautical Miles from the datum.
18 Aug 11	A thin layer of broken oil slick and intermittent silvery sheen extending up 3.5 Nautical Miles in E direction. Discharge rate of oil from the sunken ship is further reduced.
19 Aug 11	Minor trace of black and brown patches of oil spill in vicinity of sunken ship.
21 Aug 11	Oil spill from sunken ship is negligible and found only in 600m radius. Terminated Operation 'Paryavaran Suraksha-02/11'.

The details of Coast Guard Ships deployed and the quantity of Oil Spill Dispersant sprayed as appended below:

Ser	**Name of Coast**	**Date of Departure**	**Date of return to**	**Qty of OSD**	**Remarks**

	Guard Ship	**from Harbour**	**Harbour**	**Spray**	
(a)	Samudra Prahari	06 Aug 11	08 Aug 11	1600 Ltrs	
		09 Aug 11	10 Aug 11	400 Ltrs	
		11 Aug 11	14 Aug 11	1200 Ltrs	
		20 Aug 11	23 Aug 11	690 Ltrs	
(b)	Sankalp	07 Aug 11	09 Aug 11	1400 Ltrs	
		14 Aug 11	17 Aug 11	1700 Ltrs	
(c)	Samrat	17 Aug 11	20 Aug 11	--	--
(d)	Varuna	10 Aug 11	11 Aug 11	--	--
(e)	Amritkaur	08 Aug 11	08 Aug 11	400 Ltrs OSD and collected Water Samples	
		09 Aug 11	09 Aug 11		
		10 Aug 11	10 Aug 11		
(f)	Kamla Devi	05 Aug 11	06 Aug 11	--	--

17. About 1500 liters of Oil Spill Dispersant Type-III were sprayed by the Coast Guard's Dornier aircraft. Further, Dornier aircraft of Coast Guard Air Squadron, Daman and Chetak helicopter of 842 Squadron undertook 05 sorties amounting to approx 12 hours of flying and 19 sorties amounting to approx 10 hrs of flying respectively in pollution response configuration. The Coast Guard team comprising of 30 enrolled personnel alongwith 70 workers of Brihan Mumbai Municipal Corporation started the cleanup operation at Alibaug, Juhu, Versova, Gorai, Madh, Uttan, Kihim and Awas. Subsequently, it is stated that the DG, Shipping issued notice to owners and agents under Section 356 (J) of Act of 1958 for their liability towards the pollution caused by oil spill. The capitation charges of Rs. 3,11,86,954.43 (Rupees Three Cores Eleven Lakhs Eight Six Thousand Nine Hundred Fifty Four and Forty Three paisa only) toward the pollution response efforts

undertaken by Coast Guard was to be paid by the ship owners/agents, which has not been paid by them till now.

Name of the ship/Aircraft	**Duration (hrs) of deployment**	**Amount (Rs.) (Capitation charges)**
ICGS Sankalp	123:15	1,29,72,556.26
ICGS Samudra Prahari	219:55	31,17,974.36
ICGS Samrat	77:00	81,39,643.14
ICGS Varuna	80:15	35,53,414.42
ICGS Amrit Kaur	16:00	4,38,898.75
ICGS Kamla Devi	32.30	8,77,797.50
CG Helo	09:30	5,22,500.00
CG Dornier	12:00	9,24,000.00
OSD Type II 5590 ℓ @ 67.50/ ℓ	--	3,77,325.00
OSD Type III 3300 ℓ @ 79.65/ ℓ	--	2,62,845.00
Total	570:25	**3,11,86,954.43**

This Respondent while giving the above mentioned details and/or while dealing with the parawise reply of the application, primarily took the plea that the averments made in the application are of general nature and based on a general scientific view on oil spill and therefore, do not call for any reply.

STAND OF RESPONDENT NO. 13

18. DG Shipping as Respondent no. 13 has stated that it is functioning under the provisions of the Act of 1958 and as per the relevant rules framed under the Act of 1958, which are applicable to any ship which is registered in India or any ship which is required by this Act, inter-alia so registered incremental to the provisions of the Act. The Ministry of Shipping, through the DG and the Indian Coast

Guard under Ministry of Defence, Government of India had jurisdiction to implement the provisions under Part-XI A of the Act of 1958 for prevention and containment of the pollution from ships within the Exclusive Economic Zone or with reference to such incidents occurring in the high seas.

It is also stated that enforcement of some of the provisions, under Part-XI A of the Act of 1958 is with regard to contravention of the *MARPOL, an International Convention* (Protocol 73/78 on marine environmental prevention and protection) for the work of issuance of notice to polluting ships and measures for preventing or containing oil pollution has also been delegated to the Indian Coast Guard and/or Indian Navy as the case may be.

The Ministry of Shipping had issued an executive order in January, 2008, where the DG Shipping has been assigned to perform Maritime Assistance Services (MAS) for the purposes of acting as a focal contact point for ships in need of assistance and for supervision of salvage operations as is required under International Maritime Organization (IMO) Resolution 950(23). The other facts with regard to sinking of ships have also been adopted by this Respondent. It is further stated, that the ship being a ship other than an Indian ship, the provisions of Part-XIA of the Act of 1958 in respect of prevention and containment of pollution of the sea by oil are applicable to it within the coastal waters of India. This provides jurisdiction with regard to the control of marine pollution under the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones

Act, 1976 (for short, 'Act of 1976'). DG Shipping in exercise of the powers vested in it by the Ministry of Shipping through orders dated 25th July, 1989 and 21st June, 1990 had invoked the provisions of sections 356 (J), (K) & (L) under Part-XIA of the Act of 1958 to prevent or minimize pollution from the said sunken polluting ship, which then was about 20 Nautical Miles from Mumbai within the jurisdiction of the EEZ of India.

It is stated that the provisions of the Act of 2010 under which the present application has been filed do not extend to the Act of 1958. All the important requisite steps were taken by the Ministry of Shipping to protect the sensitive coastline of Maharashtra, including the populated seashores of Mumbai under the Polluter Pays Principle. Upon receipt of information on 4th August, 2011, the DG Shipping, Respondent no. 9, in the capacity of being the designated MAS provider, had carried out various steps to inform the District Administration Authorities, other concerned authorities and had convened regular review meetings to combat, control and clean marine oil pollution at sea, to activate the necessary contingency plan, requested to rescue the crew, mobilized the emergency towing ship, '*Smit Lumba'* and issued Monsoon Advisory, 2009. As already stated, it had issued statutory notice under Section 356 (J)&(K) of the Act of 1958, to the ship owner, charterer, agent and master for making arrangements to prevent, contain, control and clean the oil pollution from the said ship. Amongst others, it had also mobilized *'Malaviya'* 36, a specialized ship managed by the Oil and Natural Gas Corporation (for short 'ONGC') for pollution response at the owner's

cost as the owners, masters and agents failed to comply with the directives issued to them under Section 356 (J) of the Act of 1958. It also ordered a preliminary inquiry under Section 359 of the Act of 1958. The list of claims to the ship owner and charterer for expeditious payments was also submitted. DG Shipping being interface as the Maritime Administration of India on behalf of the Government of India to the International Maritime Organization (IMO) which adopts various international maritime convention/protocols/ treaties with respect to, inter alia prevention of pollution, pollution response and payment of liability & compensation thereto and has become a party to many such global instruments, took action accordingly. The inquiry had been completed by Ministry of Shipping through the DG Shipping and a copy thereof placed on record.

The recommendations of the said statutory preliminary report were accepted and thereupon the following actions were taken to prevent such causalities in future in the Indian waters:

> "1. Issued casualty circular to shipping industry in respect of the lessons learnt [Casualty Circular No. 01 of 2012 (File No. 11-NT(49)/2011-Vol. II dated 12/07/2012) same available on DGS website www.dgshipping.com].
> 2. Issued Merchant Shipping [Regulation of Entry of Ships into Ports and Anchorages and Offshore Facilities] Rules, 2012, to restrict the entry of substandard ships into the Indian waters with certain conditions. The same is available on DGS website www.dgshipping.com].
> 3. Is in the process of strengthening the Port State Control [PSC]/Flat State Implementation [FSI] inspection regime to identify in advance substandard ships calling the Indian Ports.
> 4. Monitors the movement of such ships through reported National Automatic Identification System [ASI] Network established at D.G. CommCentre, Mumbai."

19. It is stated that the DG Shipping exercised due diligence and discharged all the responsibilities entrusted to them in accordance with law. They prayed for deletion of their name from the application. However, they also prayed that the directions may be issued to the owner of the ship, agent and charterer of the ship to make the payment of the dues of Indian Coast Guard and Oil and Natural Gas Corporation for services rendered without any further delay.

20. The Ld. Counsel appearing for Respondent nos. 9 & 11 had argued the matter on different occasions, however, when the matter was being heard in 2016, they submitted that they have not received instructions from their respective clients. However, no letter of revocation of their authority was placed on record. We may notice that in 2016, in fact, the matter was being reheard and the Ld. Counsel on behalf of their respective clients have entered appearance on earlier occasions.

Let us now deal with the defences and replies filed by the different private Respondents.

STAND OF RESPONDENT NO. 5

21. As already noticed, Respondent no. 5 initially in the application had been described as Delta Group International. The name of Respondent no. 5 was substituted because an affidavit had been filed on behalf of Respondent no. 5 stating that the true owner of the ship was Delta Shipping Marine Services (SA) and not Delta Group International. The Respondent no. 5 had filed a very short affidavit on

15th February, 2012 and Paragraph 2 of the said affidavit read as under:

> "I say that Delta Shipping Marine Services (SA) are the owners of the ship M.V. Rak Carrier. Hereto annexed and marked as Annexure-I is a copy of the certificate of registry issued by the panama registry confirming the same. in the certificate itself it is stated that the legal representative of Delta Shipping Marine Services (SA) are Karnakis & Karnakis and hey have their office at Global Plaza, 50th Street, 21st, Floor, P.O. Box-0834-01251 panama, Republic of Panama."

As is evident from the above affidavit of Respondent no. 5, it was restricted to informing the Tribunal with regard to true, lawful and registered owner of the ship.

Thus, resulting in substitution of the name of Respondent no. 5. Mr. V.K. Ramabhadran, Advocate who was appearing for the then Respondent no. 5 had got the above name of Respondent no. 5 substituted. Thereafter, he did not appear and a notice was ordered to be issued to him vide order dated 3rd January, 2013 returnable on 23rd January, 2013. Mr. V.K. Ramabhadran, Advocate, appeared and in view of the statement made on behalf of Respondent no. 11 that they had been directed to appear for the said Respondent no. 11 and their interest was common with Respondent no. 5. Consequently, on their statement Mr. V.K. Ramabhadran, Advocate was discharged from the case. Thereafter, nobody appeared on behalf of Respondent no. 5 despite a fresh notice being served upon them as recorded in the order dated 15th April, 2013 and, therefore, vide order dated 15th April, 2013 and even by an earlier order, ex-parte proceeding was directed to be taken against Respondent no. 5.

STAND OF RESPONDENT NO. 6

22. In the application as originally filed, Respondent no. 6 had been described as 'Adani Power Dahej Limited'. Thereafter, an application was filed wherein it was stated before the Tribunal that this was not the correct name of the company and thus, not responsible for the transaction. The name was substituted to 'Adani Enterprise Limited' vide order dated 28th February, 2012. After the substitution of the name, Respondent no. 6 filed the reply for and on behalf of the Adani Enterprise Limited which, in fact, was the consignee. The said Respondent while denying the allegations made in the application admitted that leakage of oil has occurred in the present case. However, the consignee of the cargo could not be held responsible for the damage caused by such oil spill. It was stated as a preliminary submission that the subject matter of the application was already being investigated and adjudicated by the two government departmental agencies, namely, the Board and DG Shipping. Vide letter dated 12th August, 2011, Respondent no. 3 directed the owner of the ship to remit financial aid towards remedial measures in respect of the oil spill. It had also filed a criminal complaint against the owner of the ship under the provisions of the Environment (Protection) Act, 1986 and the Water (Prevention and Control of Pollution) Act, 1974 and other actions were also proposed to be taken by the authorities. It was admitted that a statutory notice under Section 356(J) and 356(K) of the Act of 1958 was issued to the owner of the ship, the ship manager and the local ship agent, calling upon the said noticees to take such actions in relation to the oil spill, including action for

preventing the escape of oil from the ship and for removal of oil slicks from the surface of the sea. The present application is in respect of an identical event and the application should not be entertained. The 'Polluter Pays Principle' is not applicable against such Respondents in the facts and circumstances of the present case. Pollution essentially involves the contamination of soil, air and water with noxious substances. The answering Respondent is only a consignee of the Cargo and cannot be said to have indulged in any activity which has resulted in contamination of sea water or the coastal areas. According to this Respondent, no act of pollution and/or responsibility thereof can be attributed to a situation where the substance is not within the control of the said Respondent. Non-coking coal was neither hazardous nor noxious.

Respondent no. 6 had also filed reply affidavit, of course without leave of the court in respect of affidavit filed by some of the other Respondents. In this reply, a preliminary objection was also taken as to the jurisdiction of this Tribunal. It was stated that cause of action did not take place within the territory of India. The accident occurred around 20-25 Nautical Miles from the coast of Mumbai, which is beyond the territory of India that extends only upto 12 Nautical Miles and therefore, the Tribunal has no jurisdiction to entertain and decide the application. While, reiterating the stand already taken, Respondent no. 6 had denied its liability and prayed even for deletion of its name. However, it is stated that the investigation report has specified the cause of the accident and sinking of the ship and it does not attribute any role of the cargo owned by Respondent no. 6. It is

stated that Respondent no. 11 had acted as broker/agent for the owner of the ship Respondent no. 5, which had not been earlier disclosed. They had entered into Commercial and Brokerage Agreement dated 20th April, 2011 with Respondent no. 5 to provide services for locating, negotiating, fixing and co-ordinating the execution of commercial contracts and contracts of affreightment for which the ship could be used or employed. According to this Respondent, Respondent no. 5 has produced two relevant documents including Telecommunications Certificate and Certificate of Registration, a document showing the previous owners of the ship, marine protection, Indemnity Insurance Policy, the Bunker Blue Card Certificate and the Charter Party Agreement with Libra Shipping. Despite this fact, they have not disclosed their true and correct relationship with Respondent no. 5; Delta Navigation WLL as per the Charter Party Agreement is stated to be the owner of the ship, even at the end of the Commercial and Brokerage Agreement dated 20th April, 2011. The signature had been appended by the company for and on behalf of the owners, which is evident from the fact that the Delta Navigation WLL has signed the documents in its own capacity and not for and on behalf of the Respondent no. 5. Respondent no. 11 is not only commercial broker of the ship but even contacted with Respondent no. 12 to ensure that the Cargo reaches safely. In relation to Respondent no. 12, the replying Respondent points out in the affidavits filed by Respondent no. 12 that it had on 19th July, 2011 and 21st July, 2011 received telephone calls from one Mr. Md. Backri of Delta Group International informing that the ship is presently at

the outer anchorage of Mumbai Port, enroute to Dahej and was running out of the bunkers. It was Respondent no. 11 who also contacted Respondent no. 12 for rendering service to assist the ship and save crew-members. All communications and payments of money were made by Respondent nos. 11 and 12 and there is not even a mention of Respondent no. 5. They have denied the averments that the ship was chartered by Respondent no. 6, it was only a consignee or the ultimate recipients of the goods and had no access to the ship either before the voyage or during transit. The Charter Party Agreement dated 28th May, 2011 clearly shows that Libra Shipping at Dubai was the charterer. They denied their liability as stated by Respondent no. 9 and averred that there is no connection between the sinking of the ship and the power plant and it is completely incorrect that Respondent no. 6 is liable to any damage.

It is specifically pleaded by this Respondent that the environmental impact which had been caused by the event of 4th August, 2011 are solely attributable to leakage of the oil from ship and all other authorities have also stated the same. The cargo owned by the replying Respondent has no connection, whatsoever, with the environmental damage sought different remedy under the present application. It is stated that the cargo transported by the ship, was 60054 MT of non-coking coal which had no effect on the marine or coastal eco-system. Referring to the case of collision of two ships, namely, M.S.C. Chitra and M.V. Khalija on 7th August, 2010, it is stated that it was a case of leakage of oil as a result of collision of the ships which were carrying hazardous chemicals and that was totally a

different case. The authorities have also found that the owner of the ship is responsible for causing pollution and also responsible for restitution of environment. The extent of civil liability for loss or damage caused by an oil spill has been laid down in *International Convention on Civil Liability for Oil Pollution Damage, 1992* (for short, 'Liability Convention'). This Convention had been signed, accepted and ratified by India and in furtherance thereto it has enacted Part-XB of the Act of 1958 which stipulates the details of pollution and the manner in which such oil spill pollution is to be dealt with and the liability of the persons responsible. Ascertained, on the true construction of the provisions, no liability can be fastened upon anybody except the owner of the ship. On merits, the liability is denied. Loss of cargo, which is comprised of coal in sea, does not have any connection with the leakage of oil, the oil slick or the oil patches observed subsequent to the wreckage of the ship. It is submitted that an oil spill has also been identified as release of bunker fuel which is the subject of the present application. It is clear that the answering Respondent does not have any connection with such cause or effect from the oil spill especially in context of the present case. There is no specific denial of damage caused to the marine eco-system, coastal, ecological, livelihood of fishermen and human health by the oil spill from the ship. Since the replying Respondent has no role in the incident that may have occasioned the leakage of oil from the ship which carried the cargo, the principle of 'no fault', which is made applicable to accidents by virtue of section 17(3) of the Act of 2010, does not cover the answering Respondent and

it is neither engaged in a hazardous and inherently dangerous activities nor is it dealing with substance which are hazardous or dangerous. At this juncture, we may also notice that in the application filed by this replying Respondent being M.A. No. 129 of 2012 afore-referred, it had made reference to the investigation report which refers to the observations that have been made on the basis of the depositions of the officers and crew of the ship and the documents made available by the various agencies and the inquiry conducted by the Maharashtra Maritime Board by the order of the DG Shipping. Following are the observations and conclusions made in the reports:

"**Observations**:

a. Maintenance of the machineries, hull and cargo holds, ballast tanks have not been carried out properly by the ship owner.
b. There were a number of deficiencies and defects on deck and engine reported to the representatives of the ship owner/manager on the board but no efforts were made to rectify the same.
c. The ship owner has not made efforts to supply adequate spares on board before the ship was commercially deployed. Technical snags were not reported to the concerned authorities by the ship owners.
d. Necessary action was not taken by the ship owner to repair the auxiliary boiler which had frequent water tube cracks despite the Chief Engineer having informed the ship owner.

Conclusions:

a. The arrangements for pumping out water from the ballast tanks, cargo holds and fuel oil tanks were insufficient to tackle the distress situation on board, even though the water ingress and been detected in time.
b. Master of the ship neither sought any assistance from the shore nor even considered taking such assistance.
c. While the ship was sinking, maritime assistance service was not intimated as required by the international regulations.
d. Chief Officers and second engineer failed to take effective measures during the contingency period as machineries were not maintained properly.

e. Poor loading, non-follow up of sequence and delayed de-ballasting was the cause of the ship sailing down by head. As the ship by down by head, it was not possible to take suction from the fuel oil tanks.
f. Poor housekeeping by the ship staff and poor maintenance of the ship, not complying with the previous class requirements and not engaging well reputed classification proves to be the main cause of the casualty.
g. Technical failure of the main engine, auxiliary engine and machinery was an important contributing factor of the accident heavy weather conditions added to flooding of the ship compartments and causing sinking."

Respondent no. 6 had relied upon the above observations to support its contentions that other Respondents are liable for claims.

STAND OF RESPONDENT NO. 9

23. ASTRA had not been impleaded as a party Respondent in the application when the original application was filed. Vide order dated 3rd January, 2013, this Respondent was ordered to be impleaded as party Respondent in the main application. This Respondent filed its detailed reply dated 11th February, 2013.

This Respondent filed its reply without prejudice to challenge its impleadment. Under the preliminary submissions it took an objection that the Applicant has no *Locus Standi* to file the present application and the same cannot be entertained by the Tribunal. The application can be filed only by the persons stated under Section 18(2) of the Act of 2010. The Applicant is not an aggrieved person whose rights have been directly affected. The Applicant has not shown in his petition as to how he is entitled to claim the relief and how he is an interested party. According to him, he is interested in the state of Marine

environment and ecology which would not enable him to file this application by expanding the scope of the Doctrine of *Locus Standi.* Further, it is averred that the application does not involve any substantial questions relating to the environment and it is not the case where the direct statutory violation of any of the legislations listed in the Schedule 1 of the Act of 2010 has been raised or even intended to be raised alleged in the application. Thus, the application is not maintainable.

It is stated that in terms of the Section 1(2) of the Environmental Protection Act, 1986 it extends to whole of India, however, the incident of the ship sinking did not take place within India nor within its territorial waters and, therefore, must be considered to have taken place outside India and the Act of 1986 would have no application. If at all there is any jurisdiction, it is vested in the authorities within the purview of the Act of 1958. As such the Tribunal does not have the Jurisdiction in the matter under the provisions of the Act of 1958. Subject to these submissions it is further averred in the reply that the Tribunal has no jurisdiction over Respondent no. 9 in the present application because Respondent no. 9 is not the person responsible for causing pollution or for any other act covered under Schedule II of the Act of 2010. It is only the person responsible against whom orders can be passed under the Act of 2010 and the liability if any, has to be imposed between the persons responsible for the occurrence in question. Respondent no. 9 claims that it is not a proper party to the present proceedings. It is submitted that role of Respondent no. 9 is limited to a policy of insurance that it had issued to the ship owner

and this policy has subsequently been avoided due to breach of warranties by the ship owners. The liability under the contract of insurance can only be by the insurance company to the ship owner and only in terms of the contract of insurance. No third party can make any claim against the insurance company. The dispute between Respondent no. 9 and the insurance company is beyond the jurisdiction of the Tribunal. The contract of insurance explicitly provides that it will be governed by Romanian law and subject to the jurisdiction of the courts of Romania. In fact, there are no subsisting or surviving, direct or legal interests of the replying Respondents in the present proceedings. The present petition is, thus, liable to be dismissed, *qua* Respondent no. 9 at the very threshold. It is further submitted by this Respondent that only connection of Respondent no. 9 to the present dispute is that the ship owner, Delta Marine Services, SA, Panama, had entered into a contract of insurance with Respondent no. 9, a company which was incorporated under the laws of Romania. Pursuant to which Respondent no. 9 has agreed to insure certain risks in accordance with the terms and conditions of the insurance contract. It is necessary to clarify that Respondent no. 9 is not an International Protection & Indemnity Club (P&I Club) but is a company providing insurance cover and is only bound by the terms and conditions of such insurance contract. The ship owner has breached the representations, warranties and undertakings contained in the contract of insurance and Respondent no. 9 is not liable to the ship owner under the said contract of insurance. In the event of marine pollution the provisions of the Act of 1958, Part XC and Part

XI A are attracted. These provisions do not make it necessary for a carrier to have insurance cover unlike Part X-B of the said Act which requires compulsory insurance in respect of ships carrying 2000 tons of oil or more in bulk as cargo. In view of the provisions of the Act of 1958 the Tribunal will have no jurisdiction. The principal relief has been claimed against the Board and the Union of India and its agencies. Cost and compensation has been claimed from the ship owner and the charterer.

24. The role of Respondent no. 9 was limited only to P & I insurance coverage for the ship which was disclaimed and for nothing else and therefore no relief would lie against the Respondent no. 9. As per the terms and conditions of the insurance policy the ship owners/insured undertake to satisfactorily maintain the condition of the ship throughout the entire period of the insurance contract. The accident investigation report prepared as per the orders of the DG, Shipping would show that the ship was not seaworthy and the state of its maintenance was far from satisfactory. The trouble for the ship started from 27th June, 2011 onwards when it entered the Bay of Bengal and started having frequent blackouts and drifted for 5 days to have the repairs carried out and despite repeated requests, no help was forthcoming from the ship owners. Thereafter, on 7th July, 2011 due to ingress of water, the ship sought permission to seek refuge in Colombo but the ship owners refused permission and the ship continued her voyage “limping” towards Mumbai. The ship docked in the outer anchorage outside Mumbai Port on 19th July, 2011 and sought to take fuel and supplies but was unable to do so and there

was heavy flooding reported in the cargo holds on the previous day. The ship's master declared the ship to be unseaworthy and refused to proceed with the voyage and it was only then that the ship owners consented to repairs being made. It is thereafter reported that despite some repairs being made to the ship and 30 MT of Diesel oil being supplied on 29th July, 2011 to the ship to continue with the voyage, the flooding in the cargo holds could not be remedied. Thereafter, a defect was detected in the one of the 2 generators on board of the ship but the ship owner however advised that the voyage should continue. The master refused to proceed and on 1st August, 2011 the ship's generator was repaired but it could not proceed due to heavy flooding. Thereafter, further damage took place on 2nd August, 2011 and water ingress was suspected in the fuel tank. On 3rd August, 2011 the ship asked for pumping equipment to remedy the flooding and were told by the representative of the ship owner in Mumbai that the boat with the pumps would reach by 0300 hrs on 4th August, 2011. It is, therefore, recorded that due to the situation worsening further and seeing no help forthcoming, the master on 4th August, 2011 at 0700 hrs called the Ship Traffic System (VTS) Mumbai for assistance and naval helicopters were rushed to the site of the ship to rescue the crew and the bag containing the ship's various certificates could not be recovered and the ship sank before the towing boat could reach the distressed ship by 10 a.m. The DG's report further goes to state that it appeared that certification surveys of the ship were carried out in a biased manner and this is in complete breach of the principle of *ubber imafides* which is the keystone of any insurance contract. In any

event, it is submitted that the policy contains a 'pay to be paid clause' which requires that for Respondent no. 9 to be found in any way to be liable, it is necessary that the ship owner to first pay the liability imposed upon it and Respondent no. 9's role is limited only to reimbursing the expense of the ship owner. It is further submitted that the 'pay to be paid clause' has been recognised in common law.

On merits it is stated that the Applicant does not have any expertise in assessing the merits of oil pollution or in marine biology or botany. The averments made in the application need to be verified by factual statements of the witnesses and the Applicants, to prove the same. It is disputed that the oil spill occurred within the State of Maharashtra, it occurred beyond the 12 Nautical Miles limit of territorial jurisdiction. The averments made in para 5 to 8 were denied for want of knowledge. However, it is stated that there is nothing on record to show that any adverse impact has taken place on the mangroves due to oil pollution. In the sea there are other oil spills and other incidents, several containers of hazardous pesticides are also said to have fallen into the sea. The report placed on record is an interim report according to which more seasonal data is required to attain a sound knowledge about the effects on mangroves seedlings establishment as well as faunal communities. The report has to be proved. Schedule II of the Act of 2010 does not mention anything about the oil spills and it is stated that actual damage and cause of damage has to be proved by the Applicant. Respondent no. 9 has no relation to any of the frequent oil spills on the coast as averred by the Applicant and the Respondent cannot be made a party. Respondent

no. 9 has no role in the present proceedings as it is not engaged in any hazardous or inherently dangerous industry which poses a potential threat to the health and the safety of the persons or the environment. The Tribunal can pass orders only against the person responsible for causing the pollution or environmental harm and Respondent no. 9 is not a person responsible, therefore, no liability can be imposed upon it. On these averments Respondent no. 9 prays for dismissal of the application.

25. It may also be noticed here that the Respondent no. 9 has also filed reply to M.A. No. 129 of 2012 an application filed by Respondent no. 6 for impleadment of Respondent no. 9. That application, as already stated, was allowed and Respondent no. 9 was impleaded as Respondent. The Learned Counsel, Ms. Diya Kapur, Advocate had moved an application bearing application no. 557 of 2016 praying for discharge on 23rd May, 2016. It was on the ground that firstly, she has no instructions and secondly the company of Respondent no. 9 is now in liquidation and that a provisional liquidator KPMG had been appointed to take charge of the assets of the company vide orders of the Court in Romania dated 3rd December, 2015. This application has been heard and we see no reason to discharge the counsel or this final stage of the case. In para 3 of this application it has already been admitted that the Counsel had addressed arguments on various occasions from 1st July, 2013 to 17th February, 2014 on merits before the Tribunal. In other words, the learned Counsel had appeared for the Respondent no. 9 on various dates and even in the year 2015 had argued the matter. As there was a change in constitution of the

Bench, as one of the Hon'ble Members of the Bench had retired in the meanwhile, the matter was again put up for hearing and the arguments already addressed by the counsel appearing for the various parties were again addressed in the year 2016 when the matter was reserved for Judgment. The application is also liable to be dismissed on the ground that the authority of the counsel has not been revoked by any competent authority and, in fact, no letter of revocation of the authority of the counsel has been placed on record. As far as the legal proceedings in Romania are concerned, no order of any Competent Court which will be binding on the Tribunal, has been brought to the notice of the Tribunal *qua* Respondent no. 9 have been stayed.

In light of this, we see no reason to allow the application. In fact, the counsel has already argued the matter and nothing survives in this application. This application i.e. 557 of 16 is consequently dismissed as having become infructuous.

STAND OF RESPONDENT NO. 10

26. Respondent no. 10 has filed an independent reply though it has been stated in the very opening paragraphs of the reply that the answering Respondent (Respondent no. 10) is the correspondent of the P&I (protection and indemnity club) with whom the subject ship has been insured, that is, of Respondent no. 9. The Learned Counsel appearing for the Respondent no. 9 stated that Respondent no. 10 has not been appointed as an agent but was required to consider the claims filed on the basis of the policy and forward the same to Respondent no. 9's office i.e. M/s Astra Asiguari Insurance.

According to Respondent no. 10 the appointment was made vide letter dated 15th March, 2011. In face of Section 230 of the Indian Contract Act, 1872, no agent can be proceeded against when the Principal is identified and sued. Relying upon the judgement of the Hon'ble Supreme Court of India in the matter of *Vivek Automobiles Ltd. V. Indian Inc, (2009) 17 SCC 657* it is stated that the agent cannot be sued when the principal had been disclosed. It is averred that the impleadment of the answering Respondent is only to identify the real owner of the alleged offending ship. Thus, the Respondent states that it has no commercial arrangement with the owner of the ship. It had no undertaking in the activity relating to the recovery of the sunken offending ship and is only the correspondent of the P&I (Protection and Indemnity Club) in the proceedings. The owner of the ship is Delta Group International, from whom the said Respondent was taking instructions to make certain essential supplies to the ship. Taking the similar stand like Respondent no. 9 it is stated that the Applicant has no *Locus Standi* and if there is any claim which can be passed for causing pollution from sinking of the ship, it lies against is the owner of the offending ship. The DG shipping vide its letter dated 5th February, 2013 has already stated that, as per the statutory requirements, it is only the owner or its agents or the master or charter of the ship who have the responsibility to bear the cost of the expenditure incurred. Under these circumstances neither the answering Respondent nor its principals are in any way connected with the incident or liability attached thereto.

To that extent the stand taken by the Respondent no. 9 and 10 is common.

STAND OF RESPONDENT NO. 11

27. Respondent No. 11- Delta Group International has filed the reply through its Manager, Md. Bakri Osman Mahgoub. Respondent No. 11 was impleaded as party Respondent in the application vide order dated 7th February, 2013 and according to the replying Respondent it is not a necessary party and its name is liable to be deleted from the array of parties. It is averred that as far as ship Carrier is concerned, the same is owned by Delta Shipping Marine Services S.A. of Panama. Delta Navigation WLL is a group company of answering respondent. Delta Navigation WLL is unrelated to Delta Shipping Marine Services S.A. of Panama. The answering respondent is the broker who had entered into Commercial and Brokerage Agreement dated 20th April, 2011 with the owner i.e. Delta Shipping Marine Services S.A. of Panama of the ship to provide services for locating, negotiating, fixing and co-ordinating the execution of commercial contracts and contracts of affreightments for which ship could be used and employed. Delta Shipping Marine Services S.A. Panama, was incorporated on 14th April, 2011 and the company purchased the said ship and got it registered in its name on 18th April, 2011. The insurance of the ship was obtained by the said company from Astra Asigurari Insurance and Reinsurance Company Astra SA, Romania- Respondent No. 9. The technical Managers were appointed by the owners and all other statutory and class compliances were also obtained by the said company themselves. All these documents show

that Respondent no. 5 - Delta Shipping Marine Services S.A. of Panama is the owner of the ship. There is nothing on record to say that the replying Respondent or its group company Delta Navigation has any shareholding or interest in Respondent no. 5. There is no privity of interest in anyway between the answering Respondent company, Delta Navigation and Delta Shipping Marine Services S.A. of Panama. There is no case made out by the Applicant for lifting the corporate veil of Delta Shipping Marine Services S.A. of Panama to find out how the parties are inter-linked. The entire law in India and abroad is premised on Corporate Personality. Respondent no. 5 has been incorporated in Republic of Panama and Directors of the said company consist of Mr. Pedro Ortega Jones and Mr. Roberto Ortega Jones. The 100% shareholder of the company is an entrepreneur Mr. Petros Tsiamouris of Greek origin. The answering Respondent states that it has no shareholding in the said company. Respondent no. 5 had applied to the Maritime Authority of Panama for the issue of Telecommunication Certificate which was issued on 19th April, 2012 stating therein that it was a real owner of the ship. The insurance policy was obtained on 28th April, 2011 from Respondent No. 9. There also Respondent no. 5 has been disclosed to be the owner of the ship. Respondent no. 5 had obtained Bunker Blue Card certificate of its ship in April, 2011 and the said certificate was valid as on the date of the casualty. It is the averment of this Respondent that Bunker Blue Card is issued by an insurer as proof that it will fully meet the liability claims set out in the Bunker Convention. Respondent no. 11 had entered into Commercial Brokerage Agreement with Respondent no. 5

on 20th April, 2011 as stated to provide services. Delta Navigation a group company of the answering respondent signed a Charter Party Agreement dated 28th May, 2011 with M/s. Libra Shipping Services, Dubai (charterers) to transport about 60000 tonnes of coal from Indonesia to Gujarat for respondent no. 6. The Charter Party Agreement was a voyage C/P agreement as would be evident from the C/P itself. Delta Navigation signed the C/P on behalf of the owner of the ship and not as owners because Delta Navigation were not the owners of the ship. Delta Navigation signed the C/P on behalf of the owner of the ship because answering Respondent company and Delta Navigation acted as broker in finding commercial contracts of affreightment for the employment of the ship, on the basis of Commercial and Brokerage Agreement dated 20th April, 2011. As per the investigation report dated 14th June, 2011, during its voyage from Indonesia to Gujarat and particularly from 19th July, 2011, the ship seems to have encountered various problems and ultimately sank in the international waters on 4th August, 2011 off the coast of Mumbai. The Coast Guard rescued the crew of the ship on the same day after a distress call was given by the master of the ship. It is important to note that statutory and class documents, etc. such as registry certificate, insurance, telecommunication certificate, trim and stability certificate, SOPEP certificate, statement of compliance of International Anti Fouling Systems, Bunker Blue Card, etc. are compulsorily kept on board for inspection by port authorities. It was on the basis of the aforementioned documents that the arrival of the ship off Mumbai coast was declared to the Indian Port Authorities. According to

Respondent, it may be noticed that it is impossible for the ship to have all her statutory documents and classification documents issued in the name of the owners, if on arriving at a port the authorities find that the ship belongs to another company then that company appears as owner in the statutory and classification documents on the basis of which the ship loads cargo, sails and arrives at the destination port. The reference to the website of Delta Navigation, on the basis of which it is alleged by the Respondent that Respondent no. 7, Delta Navigation and the answering company-Delta Shipping Marine Services S.A. of Panama are also concerned and answering Respondent is the real owner of the ship, is not correct. On bare perusal of the website, it is clear that there is no reference to the ship and there is no statement to confirm that they are group companies and/or Delta Navigation is the owner of the ship. The replying Respondent is registered in Qatar showing that Delta Navigation is a group company and they have wide range of activities from trade in children wear to general building construction. The submission of the Applicant and that of Respondent no. 6 in M.A. No. 129 of 2011 that on the basis of C/P agreement dated 28th April, 2011 it could be concluded that the replying Respondent is the owner of the ship is misleading and is factually incorrect. As a matter of Maritime Law, it is impossible for a voyage to equate itself with the owner. It is only in the case of bareboat/demise charters that the charterers can be held responsible for the safety of the ship and her seaworthiness. Any agreement that is signed on behalf of the owner cannot be read as if

they have been signed by the owner. Reliance is placed on the following clauses of the Agreement:-

> *"III. UNDERTAKING BY THE BROKER*
> The Broker shall use its best endeavours so far as reasonably practicable to provide the owners with the employment for heir ship, in accordance with sound practice.
> *IV. BROKERS SERVICES*
> The broker will provide the services of locating, negotiating, fixing and coordinate the execution of commercial contracts and contracts of affreightment to which the ship can be used and employed."
> *VI. EXCLUSION OF LIABILITY*
> The income of the brokers commission will derive as a percentage of the actual credited amounts to the owner. As such the broker will bear no responsibility of any reason for uncollected freight, hire, or any other amounts due to owners deriving from such contracts of employment/affreightment.
> *VII. OBLIGATION OF THE OWNERS*
> The owner is obliged to keep the ship in a fit and seaworthy state through their operational managers as well as their technical managers and tam. The brokers will bear no responsibility for any loss or damage that may be caused to the owners and/or charterers and/or cargoes receivers and/or any third parties during the performance of a contract of employment which is attributed to the performance of the ship, crew their technical managers or the owners as whole."

On the strength of the above clause, it is submitted that no liability can be fastened on the replying Respondent in view of clause-VII. If there was any other owner of the ship then they would have got the same insured under a policy. The Bunker Blue Card certificate has also been issued in the name of Respondent no. 5. There are large number of companies which are using the Greek alphabet “Delta” and merely because some of the companies which are Respondents are using the similar name would be of no consequence. On that basis, the answering Respondent cannot be held to be liable as the owner. The technical managers of the ship were Coral Technical Services of

Jordan as reflected in the documents as per the International Ship Security certificate issued by the flag State of the ship.

According to this Respondent, the ship was off the Mumbai coast and it was delaying her approach to the port of discharge. The receiver of the cargo i.e. Respondent no. 6 had contacted the answering Respondent because they knew them as an entity. They booked the ship for them as broker. The answering Respondent tried to contact the owner of the ship-Delta Shipping Marine Services S.A. of Panama and also Coral Technical Services but there was no response. They had practically abandoned the ship due to financial trouble and due to the unwillingness of their insurers to live up to the expectation of the insured and Coral Technical was also not responding. The answering Respondent had tried to help the cargo owner by trying to appoint agent in India that could help the ship with supplies so that cargo could reach safely to its destination. The effort, therefore, was certainly not on account of ownership etc of the ship but was purely based on the fact that the answering Respondent had been the broker for the cargo and also to help the cargo owner inter-alia on a personal basis. It is also stated that Respondent No. 5-Delta Shipping Marine Services S.A. of Panama appointed lawyers in Greece and these lawyers appointed lawyers in India to deal with the situation and they met with the Coral Technical Officials. The repatriation of the crew of the ship was paid by the lawyers of Respondent no. 5 in Greece. It is submitted that in a marine casualty the technical managers, the insurance company of the ship, the classification society, the master of the ship as well as the owners of

the ship are the only persons who can be held liable or as potentially responsible for what went wrong and how the casualty could be avoided, but the replying Respondent cannot be held liable for the same. The word 'WLL' in Qatar has similar import as the word 'LTD' in India and are used by legally independent bodies.

On the above premise, the answering Respondent submits that it has no place of business in India and is not involved in the accident as such and the Tribunal has no jurisdiction to proceed against the answering Respondent and name of answering Respondent should be deleted from the array of parties.

We may also notice that as late as on 3rd August, 2016, the Counsel appearing for Respondent no. 11 has even filed the written submissions giving the brief facts of the case as well as giving its relationship with Respondent no. 5 on the same lines as afore-stated in the main reply.

In the written submissions, besides submitting that it has no relationship with Respondent no. 5, it has also been submitted that the liability to compensate, if any, towards pollution damage, ete., is that of the insurance company i.e. Respondent no. 9 and not that of Respondent no. 5. Respondent no. 9 undertook to continue to make good liability for pollution damage for a further period of 90 days from the date of the policy or its termination. The Bunker Blue Card stated that "provided always that insurer may cancel this certificate by giving three months written notice to the above authority whereupon the liability of the insurer hereunder shall cease as from the date of the

expiry of the said period of notice but only as regards to the "incident arising thereafter." In relation to jurisdiction of the Tribunal, it has not been specifically stated in the reply. It is also submitted that under the Act of 1976, the incident occurred at 20 Nautical Miles from Mumbai harbour and in terms of the provisions of the Act India's sovereignty extend over the natural resources in the Contiguous Zone and Exclusive Economic Zone Sections 6(3)(d) and 7(4)(d) of the Maritime Zones Act, 1976 confer exclusive jurisdiction on the Central Government to preserve and protect the marine environment and to prevent and control marine pollution within this Zone. Keeping in view the provisions of the Act of 1958 the authority specified under the Act of 1958 shall only have jurisdiction in the case of oil pollution and does not give jurisdiction to the Tribunal.

We may also notice that after hearing was practically concluded, M.A. No. 737 of 2016 was filed on behalf of the Counsel appearing for Respondent no. 11 praying that they should be discharged from the case as they have no instructions from Respondent no. 11. The clients have not got any reply with them even after repeated reminders. As already noticed while dealing with M.A. No. 557 of 2016, this matter has been heard time and again and even now before the present application was filed, the arguments have practically been concluded and the case has been reserved for judgment. The application was filed on 26th July, 2016 and the case has been reserved for judgment on 2nd August, 2016. There is no document placed before us to show that Respondent no. 11 has revoked the authority and the Counsel appearing in the matter seeking instructions of whatever kind is a

matter which primarily falls in the domain of the client and the lawyer relationship. Court proceedings can hardly be affected as a result thereof. For these reasons, we dismiss M.A. No. 737 of 2016 without any order as costs as to it had already become infructuous.

STAND OF RESPONDENT NO. 12

28. Despite opportunities and being represented, the Counsel appearing for the Respondent no. 12 did not file reply to the main application. However, reply was filed to M.A. No. 129 of 2012 filed by Respondent no. 6 for impleadment of other Respondents, including Respondent no. 12. Thus, it will be useful to refer to the contents of the reply. It is stated that Respondent no. 12 was not the agent of the ship nor was so appointed by Respondent no. 11. It is stated that sometime on 19th July, 2011, Respondent no. 12's sister concern in Qatar was contacted by Delta Group requesting assistance for arranging certain supplies to their ship, RAK Carrier, which was then in outer anchorage Mumbai, which request was passed on to the Respondent no. 12. On 19th and 21st July, 2011, Respondent no. 12 received telephone calls from one Mr. Md. Backri of Delta International Group W.L.L., informing that their ship, MV Rak Carrier, which was enroute to Dahej in Gujarat, was running out of bunkers and to arrange for bunkers and other supplies to the ship. According to Mr. Bakri, due to bad weather conditions prevailing on account of the ongoing monsoon season, various suppliers were not willing to make deliveries at outer anchorage and requested Respondent no.12 for help to assist in arranging for bunkers, fresh water and food items to the said ship thus, the replying Respondent came into the picture.

They had nothing to do with the ship. They were neither the agent nor the owners. Pursuant to the request for assistance, Respondent no. 12 contacted M/s. Mercury Marine Suppliers and arranged for the requested supplies to the ship which were delivered to the ship on 23rd and 27th July, 2011, by the ship, M.V. Albatross 19 and M.V. Al Samridihi respectively. Respondent no. 12 was the third party whose role was limited as stated. The bill for the said supplies was submitted by Mercury Marine Suppliers and not by Respondent no. 12. M/s Delta International Group W.L.L. paid for the said supplies through this Respondent. Once monies were paid to the suppliers and accounts rendered, matter between Respondent no. 12 and Delta International Group came to an end. On 4th August, 2011, Respondent no. 12 received an email from D.G. Shipping informing that the ship sank due to bow submerged and water ingress into the ship at posn1846N 072,28.7E. Certain details were asked for, which were provided including the information that Respondent no. 12 had nothing to do with the ship. By a further email on the same day i.e. 4th August, 2011, a notice ostensibly under Section 365 (J) & (K) of the Act of 1958 addressed to Delta Group and Respondent no. 12 as the purported agents, was sought to be served upon the Respondent by D.G. Shipping. Respondent no. 12 vide their letter dated 5th August, 2011 replied and clarified that they have nothing to do with the ship and they are not their agent. M/s Taurus Shipping Pvt. Limited were the main agent at discharge port-Dahej, and that M/s Kshitij Marine Services were the discharge port sub-agents of the ship, at Dahej. Subsequently, the D.G. Shipping including the then Nautical Advisor

to the Government of India, telephonically informed the Respondent no. 12 that the crew has been evacuated from the ship and instructed the Respondent no. 12 to make arrangement for the crew members. On 5th August, 2011, a meeting was held at the office of the D.G. Shipping when the D.G. Shipping and M/s Interport i.e. local correspondent of the P&I Club of the ship again requested the Respondent no. 12 to make arrangements for the accommodation of the crew members of the ship on humanitarian grounds. Arrangements were made on humanitarian grounds and M/s Interport had agreed to bear the cost. This does not make Respondent no. 12 liable for any action in accordance with law. On 5th August, 2011, Respondent no. 12 addressed an email to Delta International Group W.L.L. inter-alia calling upon them to respond to D.G. Shipping and to make their own arrangements in Mumbai. In the mail, it was also clarified that they were not appointed as agents and they were not acting as such. The only role of Respondent no. 12 was to make supplies and to make arrangements on humanitarian grounds. According to this Respondent, after sinking of the ship on 4th August, 2011, at the request of the D.G. Shipping and confirmation from M/s Interport, the arrangements were made purely on humanitarian grounds and they were not the agents of the ship, and for that matter, any person interested in the ship. On these facts, the said Respondent prayed for discharge from the array of parties.

29. Having discussed with some elaboration the case pleaded by the respective parties in the present case and keeping in view the multiple but contradictory pleas which have been raised by the parties for

consideration before the Tribunal, it is essential for us to formulate the issues which are of some national and international importance pertaining to environmental jurisprudence that arise for determination by the Tribunal.

1. Whether the Applicant has no *Locus standi* to institute the present application with the prayers?

2. Who is the owner of the ship and a person responsible and interested in terms of the relevant laws in force?

3. Which of the Respondents are liable and/or responsible, if so, how and to what extent, within the ambit and scope of Sections 14, 15 and 17 read with Section 20 of the National Green Tribunal Act, 2010?

4. Whether the Tribunal has jurisdiction to entertain and decide the present case and whether or not the provisions of the Merchant Shipping Act, 1958 oust the jurisdiction of this Tribunal?

5. Whether the Ship, M.V. Rak Carrier was seaworthy at the commencement of the voyage and remained so, till its arrival at about 20 Nautical Miles off the coast of Mumbai where it sank on 4th August, 2011?

6. Whether on 4th August, 2011 the Ship while it sank or immediately thereafter caused pollution by oil spill or otherwise? Further, whether the sunk ship even presently lying in the 'contiguous Zone' along with its cargo, has caused in the past and is a continuous source of pollution at that site to the sea, aquatic life and/or to the shore itself?

7. What compensation, damages and which of the Respondents are liable to pay for causing pollution and degradation of marine environment in terms of Sections 15 and 17 read with Section 20 of the National Green Tribunal Act, 2010?

8. Whether the insurance company incurs no liability whatsoever in the facts and circumstances of the case?

9. What is the effect of the winding up proceedings pending before the Romanian Court in relation to the insurance company upon the proceedings pending before this Tribunal?

10. The directions that are required to be issued in the present case?

11. Relief?

30. As already noticed the present application had been filed under Sections 14 & 15 of the Act of 2010, where the Applicant has claimed that he is a person seriously involved in the protection of environment and particularly, the Eco-Sensitive Zone and Marine Environment. The Applicant has prayed for relief, damages, restoration, restitution and issuance of directions for prevention and control of pollution, resulting from the oil spills. We may notice that right at the initial hearings of the application the Tribunal had directed expansion of the scope of hearing of the application and passed orders in that behalf.

Issue No. 1: Whether the Applicant has no *Locus standi* to institute the present application with the prayers?

31. According to some of the Respondents who have taken the objection of *locus standi*, it is contended that Applicant is not a person as contemplated under Section 18(2) of the Act of 2010 and *locus standi* under the provisions of the Act of 2010 cannot be expanded like in a public interest litigation before the higher courts. It is also contended that the Applicant is a resident of Mumbai and has no interest or involvement in the coastal area which is alleged to have been affected because of oil spill and other offending acts as alleged, thus, they pray for dismissal of this application on that ground alone.

In order to examine the merits of the case, it would be necessary to refer to the object and reasons for enactment of, the Act of 1986 as well as the Act of 2010. The Right to healthy environment under the Indian Constitution has been held to be a Fundamental Right which is included in 'Right to Life' as enshrined under Article 21 of the

Constitution. The Act of 1986, was enacted to provide for the protection and improvement of environment and for matters connected therewith. The primary object of the Act of 1986 was to implement the principle of the United Nations Conference on Human Environment held at Stockholm in June, 1972. The concern over the state of environment has grown world over. The decline in environmental quality has been witnessed by increasing pollution of different forms. A general legislation of environmental protection was enacted with primary objective of protecting the environment and to ensure proper check and balances for the protection of the same. The Act of 2010 was enacted for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources, including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto and further with a specific object of effective and expeditious environmental justice. Both these enactments have defined the expression 'environment' in very wide terms but in identical language. Section 2(a) of the Act of 1986 which is identical to Section 2(c) of the Act of 2010 reads as under:

> "environment" includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.

The above definition, therefore, provides an insight into the legislative intent of giving a very liberal construction to the Statute itself which would practically apply in all matters and events relating

to environment. Section 2(j) of the Act of 2010 defines the word "person" which would include an individual, a company, an association amongst others even every artificial juridical person, not falling within any of the proceedings of sub-clause 3 of Section 25 of the Act of 2010. This again reflects that the definition of "person" is to be given a liberal interpretation and it is an inclusive but not exhaustive definition and includes an individual, even a juridical person in any form. Under Section 14 of the Act of 2010 the Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved and such question arising out of the implementation of the enactments specified in Schedule I. Of course, such civil disputes relating to environment have to be filed within the prescribed period of limitation. Under Section 15, the Tribunal can pass an order giving any of the reliefs stated in that Section. The reliefs could relate to relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in Schedule I (including accident occurring while handling any hazardous substance); for restitution of property damaged and for restitution of the environment for such area or areas. Section 18 of the Act of 2010 deals with the applications under Sections 14 and 15 of the Act of 2010 and who can claim such reliefs. The application has to be filed by a person, who has sustained the injury; or the owner of the property to which the damage has been caused; or any person aggrieved, including any representative body or organization, amongst other specified Applicants. The contention

before the Tribunal is that a person filing an application has to be a person who has suffered personal injury otherwise he would have no right to file the application. This argument is misplaced. Under the provision of the Section 18(2) of the Act of 2010 which again have to be interpreted in light of the objects and reasons of the statute and the definition of 'environment' and scope and ambit of Section 14 of the Act of 2010. The expression 'any person aggrieved' appearing in Section 18(2)(e) of the Act of 2010 is to be given a wider meaning. This expression is not to be restricted only to a person who has suffered personal injury. It is to be interpreted and understood in contradistinction to Section 18(2)(a) where the person who has suffered injury personally can invoke the jurisdiction of the Tribunal under Section 14, 15 and 16 of the Act of 2010. Obviously, both these clauses are not meant for the same class of persons. A person who has not suffered any personal injury or does not have the personal grievance but his grievance is of general form of a larger public interest, such person can certainly invoke the jurisdiction of the Tribunal in terms of Section 14 of the Act of 2010. If we were to accept the contention of the Respondents then the very object of the two enactments would stand defeated. In other words, a person would not be able to approach the tribunal if he is intending to protect the general environment, ecology and marine environment. There could be a number of cases where a person had not suffered personal injury or may not be even aggrieved personally because he may be staying at some distance from the place of occurrence or where the environmental disaster has occurred and/or the places of accident.

To say that he could not bring an action, in the larger public interest and for the protection of the environment, ecology and for restitution or for remedial measures that should be taken, would be an argument without substance. This view can be substantiated even from the language of Section 18(2)(e) where even a representative body or organization can bring an application for environmental adjudication before the Tribunal. Obviously a body or an organization *per se* would not suffer any injury or may not have any grievance. Once the Legislature in its wisdom has used the expression of such wide meaning and scope, it would be impermissible in law to give them narrower meaning or strict construction. The construction that will help in achieving the cause of the Act should be accepted and not the one which would result in deprivation of rights created under the Statute. In fact, the question of *locus standi* under the Act of 2010 had come up for consideration before the Tribunal in number of cases. In the case of *Kishan Lal Gera v. State of Haryana & Ors,* 2015 ALL (I) NGT REPORTER (2) (DELHI) 286 the Tribunal after considering even other judgments on the issue, held as under:

> **Issue in that case was:-**
> Whether the appellant has the locus standi to file the present appeal?
> 21. Section 16 of the Act of 2010 gives the statutory right to any 'Aggrieved Person' to prefer an appeal before the Tribunal. The expression 'Person Aggrieved' has neither been defined under the Act of 2010 nor in any of the Acts specified in Schedule I of the Act of 2010. Keeping in mind the object of the Act of 2010, its legislative scheme and the purpose enumerated in the Scheduled Acts, it can be concluded that the expression 'Aggrieved Person' has to be interpreted liberally.
> The concept of *locus standi* as applicable to the Civil or Constitutional jurisprudence cannot be *stricto sensu* applied to the interpretation of this expression under

the Act of 2010. The term 'Person Aggrieved' does not have to show any personal interest or damage or injury as the concept of personal injury would be applicable to Applicant invoking the jurisdiction of the Tribunal under Sections 15 and/or 17 of the Act of 2010, but it would not be true for a person invoking the jurisdiction of the Tribunal under Section 14 and/or Section 16 of the Act of 2010. In fact, this preposition need not detain us any further as a larger bench of the Tribunal has settled this principle in its various judgments. At best, the person has to show that he is directly or indirectly concerned with adverse environmental impacts which are likely to be caused due to grant of the Environmental Clearance by the competent authority.

22. It may be noticed that by coming into force of the Act of 2010, National Environmental Appellate Authority Act, 1997 was repealed. Under the provisions of that Act, any person aggrieved had a right to prefer an appeal against the orders to the Appellate Authority in terms of Section 11 which defines an 'Aggrieved Person' and provides that any person who is likely to be affected by the grant of the Environmental Clearance could prefer an appeal. However, every such definition is conspicuous by its absence in the provisions of Section 16 of the Act of 2010. Thus, it cannot be said that a person actually and really aggrieved should alone be permitted to prefer an appeal under the Act of 2010. It will be sufficient that a person states that the environment of the area would be adversely effected, the protection of which, is of his interest. Expression 'Aggrieved Person' must be given a wide connotation and the persons directly or indirectly affected or even interested should be permitted to ventilate their grievances in an appeal. (Refer:- *Sri Ranganathan v. Union of India,* (2014) ALL (I) NGT REPORTER (2) (SZ) 1 and *Mr. Vithal Gopichand Bhugersay v. Ganga K Head Sugar and Energy Ltd,.* (2014) ALL (I) NGT REPORTER (1) (SZ) 49.

23. 'Aggrieved Person' is one, who has a legal right to enforce a remedy. Such person must satisfy the ingredients as stated in the laws in force. Although the legal right must fall within the framework of the statute, but, that does not mean that the Tribunal would unduly restrict the meaning of this expression. It must receive a liberal construction in consonance with the object of the Act of 2010. We may also refer to the Judgment of a larger bench of the Tribunal in the case of *Goa Foundation v. Union of India*, (2013) ALL (I) NGT REPORTER (Delhi) 234, where the Tribunal examined the ambit and scope of this expression while referring to various judgments of the Supreme Court of

India. The relevant extract of the judgment reads as under:

> 25. The very significant expression that has been used by the legislature in Section 18 is 'any person aggrieved'. Such a person has a right to appeal to the Tribunal against any order, decision or direction issued by the authority concerned. 'Aggrieved person' in common parlance would be a person who has a legal right or a legal cause of action and is affected by such order, decision or direction. The word 'aggrieved person' thus cannot be confined within the bounds of a rigid formula. Its scope and meaning depends upon diverse facts and circumstances of each case, nature and extent of the Applicant's interest and the nature and extent of prejudice or injury suffered by him. P. Ramanatha Aiyar's *The Law Lexicon* supra describes this expression as 'when a person is given a right to raise a contest in a certain manner and his contention is negative, he is a person aggrieved' [*Ebrahim Aboodbakar v. Custodian General of Evacue Property*, AIR 1952 SC 319]. It also explains this expression as 'a person who has got a legal grievance i.e. a person wrongfully deprived of anything to which he is legally entitled to and not merely a person who has suffered some sort of disappointment'.
>
> 26. Aggrieved is a person who has suffered a legal grievance, against whom a decision has been pronounced or who has been refused something. This expression is very generic in its meaning and has to be construed with reference to the provisions of a statute and facts of a given case. It is not possible to give a meaning or define this expression with exactitude and precision. The Supreme Court, in the case of *Bar Council of Maharashtra v. M.V. Dabholkar and Others* AIR 1976 SC 242 held as under:-
>
> > "27. Where a right of appeal to Courts against an administrative or judicial decision is created by statute the right is invariably con fined to a person aggrieved or a person who claims to be aggrieved. The meaning of the words "a person aggrieved" may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved." Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private

legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the back ground of statutes which do not deal with property rights but deal with professional conduct and morality. The role of the Bar Council under the Advocates Act is comparable to the role of a guardian in professional ethics. The words "persons aggrieved" in Sections 37 and 38 of the Act are of wide import and should not be subjected to a restricted interpretation of possession or denial of legal rights or burdens or financial interests. The test is whether the words "person aggrieved" include "a person who has a genuine grievance because an order has been made which pre judicially affects his interests." It has, therefore, to be found out whether the Bar Council has a grievance in respect of an order or decision affecting the professional conduct and etiquette.

28. The pre-eminent question is: what are the interests of the Bar Council? The interests of the Bar Council are the maintenance of standards of professional conduct and etiquette. The Bar Council has no personal or pecuniary interest. The Bar Council has the statutory duty and interest to see that the rules laid down by the Bar Council of India in relation to professional conduct and etiquette are upheld and not violated. The Bar Council acts as the sentinel of professional code of conduct and is vitally interested in the rights and privileges of the advocates as well as the purity and dignity of the profession.

40. The point of view stated above rests upon the distinction between the two different capacities of the State Bar Council: an executive capacity, in which it acts as the prosecutor through its Executive Committee, and a quasi-judicial function, which it performs through its Disciplinary Committee. If we can make this distinction, as I think we can, there is no merger between the prosecutor and the Judge here. If one may illustrate from another sphere, when the State itself acts through its executive agencies to prosecute and then through its judicial wing to decide a case, there is no breach of a rule of natural justice. The prosecutor and the Judge could not be said to have the same personality or approach just because both of them represent different aspects or functions of the same State.

44. The short question is as to whether the State Bar Council is a 'person aggrieved' within the

meaning of Section 38 so that it has locus standi to appeal to this Court against a decision of the Disciplinary Tribunal of the Bar Council of India which, it claims, is embarrassingly erroneous and. if left unchallenged, may frustrate the high obligation of maintaining standards of probity and purity and canons of correct professional conduct among the members of the Bar on its rolls.

47. Even in England, so well-known a Parliamentary draftsman as Francis Bennion has recently pleaded in the Manchester Guardian against incomprehensible law forgetting 'that it is fundamentally important in a free society that the law should be readily ascertainable and reasonably clear, and that otherwise it is oppressive and deprives the citizen of one of his basic rights'. It is also needlessly expensive and wasteful. Reed Dickerson, the famous American Draftsman, said: It cost the Government and the public many millions of dollars annually'. The Renton Committee in England, has reported on drafting reform but it is unfortunate that India is unaware of this problem and in a post-Independence statute like the Advocates Act legislators should still get entangled in these drafting mystiques and judges forced to play a linguistic game when the country has an illiterate laity as consumers of law and the rule of law is basic to our Constitutional order."

27. In the case of *Maharaj Singh v. State of Uttar Pradesh* (1977)1 SCC 155, the Supreme Court observed that a legal injury creates a remedial right in the injured person. But the right to a remedy apart, a larger circle of persons can move the court for the protection or defence or enforcement of a civil right or to ward off or claim compensation for a civil wrong, even if they are not proprietarily or personally linked with the cause of action. The nexus between the lis and the plaintiff need not necessarily be personal, although it has to be more than a wayfarer's allergy to an unpalatable episode. Further in the case of *Dr. Duryodhan Sahu and Others v. Jitendra Kumar Mishra and Others* (1998) 7 SCC 270, the Supreme Court, held that although the meaning of the expression 'person aggrieved' may vary according to the context of the statute and the facts of the case, nevertheless normally, a person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or

wrongfully affected his title to something. In *Jasbhai Motibhai Desai v. Roshan Kumar*, AIR 1976 SC 578 the Court held that the expression 'aggrieved person' denotes an elastic, and to an extent, an elusive concept. It stated as follows:

> "It cannot be confined within the bounds of a rigid, exact, and comprehensive definition. At best, its features can be described in a broad tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him."

28. Section 16 of the NGT Act gives a right to any person to prefer an appeal. These expressions have to be considered widely and liberally. The person aggrieved, thus, can be a person who has no direct or personal interest in invoking the provisions of the Act or who can show before Tribunal that it affects the environment, and therefore, prays for issuance of directions within the contemplation of the provisions of Section 16 of the NGT Act.

24. The objection of the Respondents with reference to the judgments of the Tribunal which we have already referred, is, that a person (appellant) has to be an 'Aggrieved Person' who has suffered a legal injury, i.e., to say that he has been wrongly deprived of something. Further, it is averred by the Respondent that no specific averments have been made in the appeal in this regard and this contention is without any merit. Firstly, there are averments in the appeal in this regard and secondly, the appellant has taken a specific plea that being resident of the area, he is concerned with the protection of environment and ecology of the area which is affected by the unauthorized construction activities of the Respondent.

25. In light of the above dictums of the Tribunal, we may refer to the memorandum of appeal preferred by the appellant. The appellant has specifically stated that the Environmental Clearance for the project would have adverse impacts on the environment and ecology of the area. According to him, it would cause traffic jams and air pollution since the Super-Speciality Hospital has been established contrary to the laws in force. The maintenance of prescribed percentage of green area has not been complied with by the Project Proponent and other conditions of the Environmental Clearance have also been violated by him. According to the appellant, the Environmental Clearance has been

> granted arbitrarily and in violation to the Notification of 2006. The appellant claims to be a resident of that area and has a direct interest in the environment of the area. Furthermore, the appellant has been pursuing the cause of environment protection before various forums for a considerable time. Thus, we are of the considered opinion that the appellant is covered within the ambit of the term 'Aggrieved Person' and once he is an 'Aggrieved Person' he would have the *locus standi* to file this appeal.

The Tribunal was concerned with the *locus standi* of the Applicant as well as the 'person aggrieved'. After considering other judgments by the Tribunal on this issue, in the case of *Wilfred J. v. Ministry of Environment & Forests,* 2014 ALL (I) NGT REPORTER (2) (DELHI) the Tribunal held as under:

> 136. In this very judgment, the Tribunal emphasised that the cause of action must be construed and relate to environmental issues arising from the Scheduled Acts and 'such dispute' appearing in Section 14 of the NGT Act. Besides this, the Tribunal has to keep in mind that Section 14 of the NGT Act does not, in any manner, restrict the *locus standi* of the person who may file application relating to substantial question of environment, (including enforcement of a legal right in relation to the environment) which arises from the implementation of the specified acts in Schedule I of the NGT Act. Similarly, Section 16 uses the words "any person aggrieved" which again is a very generic term. Under Section 15 of the NGT Act, a person is expected to file an application who claims relief and compensation, restitution of property damaged for restitution of environment for such area or areas. Again restitution of environment may not be person specific but purpose specific. A person aggrieved may not necessarily be a person who has suffered a personal injury. Any person aggrieved can challenge an order granting Environment Clearance even though the Applicant might not have suffered personally. Section 14 gives a very wide meaning to the person seeking to invoke jurisdiction of the Tribunal under Section 14. At this stage, we may refer to the judgment of the Tribunal in the case of *Samata v. Union of India*, (2014) 1 All India NGT Reporter (South Zone) where the Court held as under:-

"29. Both under Section 11 of the NEAA Act,.1997 and Section 18 of the NGT Act, 2010 any person aggrieved by the grant of EC as shown above can maintain an appeal. The 'aggrieved person' as contemplated in the Act came up for interpretation before the Tribunal in a number of cases. An aggrieved person contemplated in the above provisions would refer to the substantial grievance as to denial of some personal, pecuniary or property right or imposing an obligation on a person. The grievance so ventilated should not be either fanciful or sentimental, but must be substantial. A person calling himself as an 'aggrieved' must have suffered a legal grievance that he has been wrongfully deprived of something or refused wrongfully. The aggrieved person can either be aggrieved either directly or indirectly. In so far as the environmental matters are concerned, it cannot be stated that the person really aggrieved should alone be permitted to initiate an action. It is not necessary that the person, who initiates action, is a resident of that particular area wherein the proposed industrial site is located. It is true that the appellants have not participated in the proceedings of the public hearing. It is true that it is necessary to scan the credentials of the appellants as to their intention and motive. Even assuming that the appellants have not participated in the proceedings of the public hearing, they would lose their right to challenge the approval or the EC. If the appellants come forward with a case apprehending damage and danger to environment and ecology if the project in question was not properly envisaged and did not satisfy the Principles of Sustainable Development and Precautionary Principles, they can maintain the appeal and be allowed to agitate as to the correctness of the study made in respect of ecology and environment. In the instant case, nothing substantial has been demonstrated in order to doubt the credentials of the appellants. What are all stated by the 3rd Respondent is that the appellants are residents of a different area though within the State and they are not aggrieved persons. The first appellant is a registered Non Governmental Organisation working in the field of Environment and the 2nd appellant is a social and environmental group with the objective of working for the welfare of the local communities and creating awareness on environmental issues and have filed the letter of authorisation issued by the respective bodies to initiate proceedings. Hence, they are to be termed as 'aggrieved persons' as envisaged under the above provisions, who can maintain the appeal and thus,

this question is answered in favour of the appellants."

137. Applying the rule of liberal construction as to who can approach the Tribunal under the environmental jurisprudence, a Bench of the Delhi High Court in the case of *Prafulla Samantra v. Ministry of Environment & Forests & Ors.* (2009) ILR 5 Delhi 821 held as under: -

"The world as we know is gravely imperilled by mankind's collective folly. Unconcern to environment has reached such damaging levels which threatens the very existence of life on this planet. If standing before a special tribunal, created to assess impact of projects and activities that impact, or pose potential threats to the environment or local communities, is construed narrowly, organizations working for the betterment of the environment whether in form of NGOs or otherwise would be effectively kept out of the discourse, that is so crucial an input in such proceedings. Such association of persons, as long as they work in the field of environment, possess a right to oppose and challenge all actions, whether of the State of private parties, that impair or potentially impair the environment. In cases where complaints, appeals, etc. are filed bona fide by public spirited interested persons, environmental activists or other such voluntary organizations working for the betterment of the community as a whole, they are to be construed as 'aggrieved persons' within the meaning of that expression under Section 11(2)(c) of the Environment (Protection) Act, 1986."

Reference can also be made to the judgment by the larger bench of the Tribunal in the case of *Dr. Arvind Gupta v. Union of India & Ors.*, O.A. No. 61 of 2012 decided on 10th December, 2015.

32. From the above judgments it is clear that *locus standi* of an Applicant cannot be given a strict construction under the environmental laws of our county. 'Environment' is not a subject which is person oriented but is society centric. The impact of environment is normally felt by a larger section of the society. Whenever environment is diluted or eroded the results are not person specific. If we were to adopt the reasoning given by the Respondents

then it would lead to undesirable results. The provisions of a statute must be examined in the light of the scheme of the Act and the scheme of both the enactments afore referred do not permit recourse to such narrower interpretation. The Applicant admittedly is a resident of Mumbai and by the oil spills the coasts of various beaches in Mumbai including Juhu, Raigad, Uttan in Bhayandar and Gorai beach have been adversely impacted. The Applicant has raised a very substantial question of environment. The question relates to the protection, restoration, restitution and damages on the strength of the Act of 1986 (which is a scheduled Act to the NGT) and the provisions of the Act of 2010. The question is the impact of oil spill on the marine ecology and environment, destruction of mangroves, its adverse impact on aquatic life, impact on fishermen and more importantly the impact of the sunken ship and cargo (60054 MT of coal lying in sea water being a continuous source of pollution in sea bed and its continuous effect on the shore). Such an important question of law relating to the environment would certainly be a question falling within the ambit and scope of Section 14 of the Act of 2010 and would arise from implementation of the Acts, particularly, the Act of 1986 stated in Schedule I of the Act of 2010. To conclude the Applicant has the *locus standi* to file the present application, he has raised substantial question relating to environment arising in relation to the implementation of Scheduled Acts. The prayers of the Applicant, as stated in the application and in the subsequent orders of the Tribunal, are the reliefs which the Tribunal, if satisfied, can grant

within the ambit and scope of the Act of 2010. Resultantly, issue no. 1 is answered against the Respondents.

Issue No. 2: Who is the owner of the ship and a person responsible and interested in terms of the relevant laws in force?

33. This issue has to be discussed under three different concepts.

(i) Who is the real owner of the ship?

(ii) If there is any ostensible owner of the ship?

(iii) And lastly, if there were persons or entities interested and responsible in relation to the ship in question, in terms of the law in force?

34. Once the first concept is answered in definite terms, still there would be need to consider and pronounce upon other two concepts as well. This would primarily be for the purpose that it is only then alone that responsibility and liability of the concerned respondent can be determined severally and/or co-jointly. As is evident from the record and the facts afore-noticed, Respondent no. 5 – Delta Group International was impleaded as the Respondent and stated to be the main Respondent in relation to ownership of the ship. However, vide order dated 22nd February, 2012, the name of this Respondent was deleted and Delta Shipping Marine Services S.A. was impleaded as the main Respondent. In relation to the ship and the occurrence, the first document placed on record was from Respondent no. 5, as originally impleaded. This affidavit was filed by the Managing Director of the original Respondent no. 5 which has an office in Doha, Qatar. In terms of this affidavit, it was declared that the Delta Group was not

owner of the ship but Delta Shipping Marine Services S.A. was the real owner of the ship. Along with this affidavit, Certificate of Registry issued by the Panama Registry confirming the same was placed on record. The certificate was issued on 13th April, 2011 and it recorded the name of the ship as 'Rak Carrier' and that of the owner as Delta Shipping Marine Services S.A. (100%). This was the certificate issued by the competent authority in Republica-De-Panama. The ship in its voyage from Indonesia to Dahej in Gujarat had also been insured by Respondent no. 9. There is no dispute to the fact that the ship was actually insured and there exists the policy of insurance of the ship. This insurance policy no. 024CT/27.04.2011 was issued by Respondent no. 9 for the ship 'RAK Carrier' and the name of the insurer as well as that of the owner was written as Delta Shipping Marine Services S.A. Under this issue, it is not necessary for us to discuss the details of the insurance policy. It is suffice to note that the policy was in favour of Respondent no. 5 on the same date i.e. 27th April, 2011. Bunker Blue Card certificate no. 2011/12 was issued in relation to the ship and the full name of the registered owner was also that of Respondent no. 5 with complete details as noticed above. This certificate noticed that the ship had a valid insurance during the period 28th April, 2011 to 27th April, 2012 and it was subject to the terms and conditions and up to the limit of liability as per the policy. The certificate certified that there is in force in respect of the above-named ship while in the above ownership, a policy of insurance satisfying the requirement of Article-7 of *the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* when and

where applicable. A Commercial and Brokerage Agreement was executed on 20th April, 2011 between Respondent no. 5 and Respondent no. 11 respectively. Respondent no. 5 had declared itself in the recitals of the agreement as owner of M.V. Rak Carrier, the ship. Respondent no. 11 was appointed as broker to find commercial contracts and any kind of contracts of affreightment for the employment of the ship subject to the conditions stated in the said Agreement. Another Agreement dated 28th May, 2011 was also executed between Delta Navigation WLL –Respondent no. 7, and Libra Shipping Services, Dubai (Charterers) who are not party to the present application. In this agreement Delta Navigation WLL-Respondent no. 7, which is a sister concern of Respondent no. 11, was disclosed to be the owner of 'M.V. Rak Carrier' and in the agreement it was recorded that the ship being tight, staunch and strong, and in every-way fitted for the voyage shall, with all convenient dispatch, sail and proceed to safe parts. It noticed that it was being engaged for voyage, to carry 60000 MT with 10% more or less at owner's option. This agreement had been signed by Respondent no. 7 on behalf of the owners of the ship and the Charterers had also signed the agreement. The rider clause of the Charter Party Agreement dated 28th May, 2011 also provided and described Respondent no. 7-Delta Navigation WLL, Doha, Qatar as head owner. Under this agreement, clause 'B' specifically provided that owners guarantee that the ship is entered with and insured for all risks including cargo, wreck removal, pollution damage and damage to fixed and floating objects with an international group, P&I club and will remain so for the duration of its

voyage and that all calls, including supplementary calls are fully paid up by owners to provide evidence on demand if requested by the charterers. Thus, the obligation to provide requisite information and documentation has laid both on Respondent no. 7 and Respondent no. 5.

35. Respondent no. 6 in its affidavit has clearly stated that Respondent no. 5 is the owner of the ship and, therefore, while applying the Polluter Pays Principle the entire liability both for the ship and cargo, would be upon the said owner of the ship.

Respondent no. 11 which is Delta Group International in its affidavit has stated that Rak Carrier is the ship and the owner is Delta Shipping Marine Services S.A. Delta Navigation WLL is a group company of the Delta Group International, though it is unrelated to Respondent no. 5. Respondent no. 11 has further filed some documents like TRIM and Stability Certificate, SOPEP Certificate, Statement of Compliance of International Anti Fouling Systems, Bunker Blue Card, Air Pollution Prevention Certificate all issued in Greece. The pollution certificate does not reflect the name of the owner of the ship though the certificates relate to the ship Rak Carrier. Similarly, the record of Anti-Fouling System also does not provide the name of the owner though it gives the name of the Ship. The other two certificates also contain similar content. The certificate in relation to Telecommunication, that was issued on 19th April, 2011 and was valid till October, did record both the name of the ship as well as the name of Respondent no. 5 as the owner of the ship. Another certificate issued by the Maritime Authority in Panama, also reflects

Respondent no. 5 as the owner, however the address indicated in this certificate is similar to that of Respondents no. 7 and 11 that is, Doha, Qatar. Respondent no. 7 that claims to be the sister concern and a part of Delta Group International has taken the same stand.

From the above documents and the facts put forward by the affidavits, it is clear that the registered and actual owner of the ship is Respondent no. 5, Delta Shipping Marine Services SA.

36. Having concluded that Respondent no. 5 is the actual and registered owner of the ship, now, the question that arises for the consideration of the Tribunal is whether any of the other Respondents are person interested or responsible in terms of the law in force and further for the determination of that purpose does the Tribunal need to apply the *Doctrine of Lifting the Corporate Veil*.

37. The diverse pleadings filed by the parties on record are sufficient indicator of the fact that other than Respondent no.5, there are entities which are directly or indirectly but substantially interested in the ship or its business. Respondent no.7 has taken a categorical stand that it had only executed a Charter Party Agreement on behalf of the owner and has no direct relationship with Respondent no.5 and the Ship. This position does not stand to reasoning. Respondent no.7 has signed a Charter Party Agreement making clear commitments in relation to the voyage, liabilities and other stipulations in relation to the ship. The Agreement has not been executed between Respondent no.5 and Libra Shipping Services, Dubai but it has been executed between Delta Navigation, WLL and Libra Shipping. The Agreement

has been signed in relation to and for the voyage of the ship, M.V. Rak Carrier. The agreement has been signed on behalf of the owners. The Agreement has been signed on behalf of owners, this would mean that the Agreement have been signed on behalf of the entity as described in the Agreement as owner that is Delta Navigation WLL and not Delta Shipping Marine Services (SA) that is Respondent no. 5. This Charter Party Agreement had number of clauses creating responsibilities and liabilities upon the parties, including the fixation of commission, right on gross amount of freightage. Besides this, it had number of rider clauses. These rider clauses are of some significance. In rider clause 87, while giving the ship description, the Agreement also describes who is the head owner. Under this clause, it is not the name of Respondent no.5 that was given but that of Respondent no.7, Delta Navigation WLL, though it had the same address of Al Sadd Street, Doha, Qatar. Furthermore, under this very clause and as afore-referred, the owner's liabilities in relation to the ship were stated which included the liability to pay different damages during the voyage and liability to furnish fittings, if required, in relation to the ship which had been insured through Respondent no.9. Clause 60 declared that ship is guaranteed, suitable for grab discharge and owners/masters to maintain the holds in good conditions throughout the voyages until the completion of discharge. Owners/masters to properly secure any and all fittings in the cargo holds, including manhole, covers throughout the period of voyage. No cargo is to be loaded in or top of deep tanks nor in tweendecks, nor bridge space nor in any other places not accessible for discharge payments of grabs

and/or Charterers I receivers bulldozers or other equipment for any reason attributable to the ship, including ship's stability or trim. The bulldozers and drivers to be arranged and paid for by receivers/charterers. Should nevertheless any cargo be loaded by ship in places not accessible to grab and/or charterers bulldozers or other equipment any time and/or dispatch money so lost and all extra expenses over and above normal grab discharge at Port of discharge to be for owner's account. Deep tanks, tunnels and all other provisions within ship's holds are to be adequately protected against damage by the stevedone's grabs/equipment, failing which owners to be responsible for all consequences. These clauses read in conjunction with other clauses of the charter agreement dated 28th May, 2011, seen in the light of the attendant circumstances, makes it clear that Respondent no.7 had an interest in the ship and its business particularly in relation to the voyage in question.

38. Respondent no.6 amongst others in Application, M.A. 129/2012 while giving the details with reference to the proceedings before the Tribunal has specifically stated that the charter party agreement clearly shows that the owner of the ship is Respondent no.7, Delta Navigation WLL and there is no document placed on record that the said ownership was changed during the voyage anytime till the accident off the coast of Bombay. Delta Navigation, WLL is a subsidiary company of Delta Group International, Qatar, which was originally Respondent no.5 in the application. Thus, according to Respondent no.6, Respondent no. 7 is interested in the ship and definitely in its business. The business interest extended upto

declaring itself to be owner of the ship and taking responsibilities for the voyage of the ship in question.

39. Respondent no. 11, Delta Group International, of which Respondent no.7 is a sister concern, had entered into Commercial and Brokerage Agreement dated 20th April, 2011. This Agreement had been signed by Respondent no.11 on the one hand and Delta Shipping Marine Services SA on the other. Respondent no.11 had taken unto itself the responsibilities of finding commercial contracts and any kind of contracts for affreightment in relation to the ship in question. It was to provide service of locating, negotiating, fixing and coordinating execution of commercial contracts and contracts of affreightment for which the ship can be used and employed. The commission was payable @ 3.5% of the gross income, actual to be created upon performance of the contract. This was for a period of two years. Qua any damage or loss that may be caused to the owner and/or any third parties during performance, the brokers were not to bear any liability. In terms of Clause 7 of the said Agreement the contract rights and obligations were not assignable. The dispute between the parties was to be settled as per arbitration in London in terms of Arbitration Act, 1996. Respondent no.6, amongst others has taken the stand that Respondent no.11 has acted as broker agent for the purported owner of the ship, Respondent no.5. Respondent no.11 has failed to produce the Agreement at the appropriate stage and prove the same in accordance with law. It is, therefore, averred that the documents produced by the Respondent no.11 are again a colourable exercise inasmuch as the entity was so involved with the other, it cannot

otherwise produce so many documents and information about the Respondent no.5 and its constitution. There is apparently a clear and definite relationship between Respondent no.5 and 11 and, therefore, they are part of the same group. The information by Respondent no.11 that the lawyers from Greece and India met with the Technical Manager, Coral and tried to push the insurance to deal with various issues, is an averment which is stated to be true to the personal knowledge of the Respondent no.11. This shows that they are acting collectively and collusively and were together responsible for the voyage of the ship. Respondent no.11 is also involved in the ownership of the ship, as is evident from the affidavit of Respondent no.12, the Indian agent (GAC Shipping) that they had received instructions from Mr. Mohammed Bakri of Delta Group International, WLL, informing the sinking of the ship demanding help and that the ship had run out of bunkers. In all these proceedings, including before the Indian Authorities, there is not even an averment that Respondent no.5 is the owner of the ship and these respondents, i.e., Respondent no.7 and Respondent no.11 have no interest.

In order to have more clear picture we must look into the collective role of Respondent no. 7 and 11 in the entire transactions and voyage. Respondent no. 7 had executed the charter party agreement while the commercial and brokerage agreement has been executed by Respondent no. 11. Respondent no. 7 has taken onto itself various responsibilities and obligations with regard to the ship and its voyage in question. Though Respondent no. 11 had signed a commercial and brokerage agreement and had stated that it will not

carry any responsibility or interest in the business of the ship but its conduct is to the contrary. It is undisputable before us that both Respondent no. 7 and 11 are sister concerns and have a common interest of management and business. Normally, a corporate body has three kinds of well known controls they are financial, management and business. It is not necessary that even in a given case all these 3 must co-exist. It is possible that one or 2 controls are so absolute in terms and practice that they will place dominant control on one company or other. The sister concerns normally would have common management control but in other cases and where some liability would be invited they may have common business interests. Keeping the structure of the case in view, common business control and business interest could bring into aid the Principle of *Lifting the Veil*. Once Veil is lifted and it comes to the light that 2 or more concerns have common management, common financial control and or common business control or business interest, the consequences in some specific laws could follow. Here, Mr. Md. Bakri of Delta Group International, Respondent no. 11 which was the erstwhile Respondent no. 5 (under the unamended petition) also worked on behalf of Respondent no. 7 effectively. Respondent no. 7 and 11 in any case are sister concerns and Mr. Md. Bakri acted on behalf of both of them. It is on record and Respondent no. 12 who acted on behalf of these Respondents and upon instructions from these Respondents has stated that on 19th and 21st July, 2011 it had received telephone calls from one Mr. Md. Bakri of Delta Group International informing about the ship that it had run out of bunkers and that the ship was

anchored at Mumbai Port enroute to Dahej, Gujarat. Respondent no. 12 has a sister concern that is in Qatar and it had contacted by Respondent no.11 requesting assistance for arranging certain supplies to the ship 'RAK Carrier' which was then in outer anchorage in Mumbai, and assistance was arranged. Not only this, having received further instructions from them it had also arranged for the residing and exit of the crew members, though purely on humanitarian grounds. As far as Respondent no. 12 is concerned it might have humanitarian grounds but Respondent no. 5, 7 and 11 had pure commercial interests in the ship and its activities. Respondent no. 11 also admitted in its own reply affidavit that the ship was owned by Respondent no. 5 while Delta Navigation WLL is a group company of Respondent no. 11. They claim that they are unrelated to Respondent no. 5 but the records and the affidavit before the Tribunal belie the same.

The Tribunal has to lift the veil to find out the exact common interest of these respondents in the ship and ships voyage and related activities. Apparently, some dispute is being raised that these Respondents 7 and 11 are unrelated to Respondent no. 5 but once their functional and business controls are examined minutely the real substance of their common interest surfaces particularly in relation to the voyage in question. Original respondent no. 5 in the application had filed an affidavit that it is not the owner of the ship and it was present Respondent no. 5 which is the owner of the ship. After the detailed arguments still erstwhile Respondent no. 5 of the unamended

petition was found to be necessary party and directed to be impleaded as Respondent no. 11.

If presently Respondent no. 5 is the owner of the ship in the normal course of business there would be no occasion for Respondent no. 7 to declare itself as an owner of the ship and create rights and obligations upon such documents directly affecting the voyage in question. The Delta Group of Companies is trying to withhold relevant information. Respondent no. 7 has referred to the management control of the Respondent no. 5 but for reason best known to it, it has withheld its own and Respondent no. 11's management control in all respects. This would go to show that even the conduct of Respondent no. 7 and 11 has not been fair on the one hand while on the other Respondent no. 5 has been playing hide and seek before the Tribunal and after definite documentation was placed before the Tribunal it opted to be proceeded against ex parte in the proceedings. Apparently, these companies have a corporate entity but in relation to the voyage in question, the position is entirely different, their business and financial interests are common and they have acted collectively, collusively and for and on behalf of each other including claiming of ownership interest in relation to the ship in question. The real entity for the purpose of business interest and responsibility is that of Respondent no. 5, 7 and 11 together. They cannot be permitted to create a camouflage to hide their actual *inter se* relationship and their common business interests and liability for the consequences arising therefrom. The improper conduct of these parties before the Tribunal renders it necessary for the Tribunal to lift

the corporate veil to penetrate though the untruthfulness, vileness and unfair conduct to see the truth and real involvement of the parties to the *lis.* Reference can be made to the Judgment of the Hon'ble Supreme Court of India in the case of *LIC v. Escorts, 1986 1 SCC 264*, where the Court held as under-

> 90. It was submitted that the thirteen Caparo Companies were thirteen companies in name only; they were but one and that one was an individual, Mr. Swraj Paul. One had only to pierce the corporate veil to discover Mr. Swraj Paul lurking behind. It was submitted that thirteen applications were made on behalf of thirteen companies in order to circumvent the scheme which prescribed a ceiling of one per cent on behalf of each non-resident of Indian nationality or origin of each company 60 per cent of whose shares were owned by non-residents of Indian nationality/origin. Our attention was drawn to the picturesque pronouncement of Lord Denning M.R. in Wallersteiner v. Moir 1974 3 All E.R. 217, and the decisions of this Court in Tata Engineering and Locomotive Company Ltd. v. State of Bihar [1964]6SCR885 , The Commissioner of Income Tax v. Meenakshi Mills[1967]63ITR609(SC) , and Workmen v. Associated Rubber Ltd. (1986)ILLJ142SC . While it is firmly established ever since Salomon v. A. Salomon & Co. Limited 1897 A.C. 22, was decided that a company has an independent and legal personality distinct from the individuals who are its members, it has since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are in certain exceptional circumstances. Pennington in his Company Law (Fourth Edition) states:
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> Four inroads have been made by the law on the principle of the separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The Government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the tax-payer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes. Taxation of Companies is a complex subject, and is outside the scope of this book. The reader who wishes to pursue

the subject is referred to the many standard text books on Corporation Tax, Income Tax, Capital Gains Tax and Capital Transfer Tax.

The other inroads on the principle of separate corporate personality have been made by two Section of the Companies Act, 1948, by judicial disregard of the principle where the protection of public interests is of paramount importance, or where the company has been formed to evade obligations imposed by the law, and by the courts implying in certain cases that a company is an agent or trustee for its members.

In Palmer's Company Law (Twenty-third Edition), the present position in England is stated and the occasions when the corporate veil may be lifted have been enumerated and classified into fourteen categories. Similarly in Gower's Company Law (Fourth Edition), a chapter is devoted to 'lifting the veil' and the various occasions when that may be done are discussed. In Tata Engineering and Locomotives Co. Ltd. (supra), the company wanted the corporate veil to be lifted so as to sustain the maintainability of the petition, filed by the company under Article 32 of the Constitution, by treating it as one filed by the shareholders of the company. The request of the company was turned down on the ground that it was not possible to treat the company as a citizen for the purposes of Article 19. In Commissioner of Income Tax. v. Meenakshi Mills (supra), the corporate veil was lifted and evasion of income tax prevented by paying regard to the economic realities behind the legal facade. In Workmen v. Association Rubber Industry (supra), resort was had to the principle of lifting the veil to prevent devices to avoid welfare legislation. It was emphasised that regard must be had to substance and not the form of a transaction. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc.

Reference can also be made to *TATA Engineering and Locomotive Company v. State of Bihar & Ors. 1964 6 SCR 885* where the Court held as under-

> 24.....However, in the course of time, the doctrine that the corporation or a company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.
> 25. But the question which we have to consider is whether, in the circumstances of the present petitions, we would be justified in acceding to the argument that the veil of the petitioning corporations should be lifted and it should be held that their shareholders who are Indian citizens should be permitted to invoke the protection of Art. 19, and on that basis, move this Court under Art. 32 to challenge the validity of the orders passed by the Sales-tax Officers in respect of transactions which, it is alleged, are not taxable. Mr. Palkhivala has very strongly urged before us that having regard to the fact that the controversy between the parties relates to the fundamental rights of citizens, we should not hesitate to look at the substance of the matter and disregard the doctrinaire approach which recognises the existence of companies as separate juristic or legal persons. If all the shareholders of the petitioning companies are Indian citizens, why should not the Court look at the substance of the matter and give the shareholders the right to challenge that the contravention of their fundamental rights should be prevented. He does not dispute that the shareholders cannot claim that the property of the companies is their own and cannot plead that the business of the companies is their business in the strict legal sense. The doctrine of lifting of the veil postulates the existence of dualism between the corporation or company on the one hand and its members or shareholders on the other. So, it is no good emphasising that technical aspect of the matter in

> dealing with the question as to whether the veil should be lifted or not. In support of his plea, he has invited our attention to the decision of the Privy Council in The English and Scottish Joint Co-operative Wholesale Society Ltd. v. Commissioner of Agricultural Income-tax, Assam (1916) A.C. 307, as well as the decision of the House of Lords in Daimler Company Ltd. v. Continental Tyre and Rubber Company (Great Britain) Ltd. (1916) A.C. 307.
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> 26. It is unnecessary to refer to the facts in these two cases and the principles enunciated by them, because it is not disputed by the respondents that some exceptions have been recognised to the rule that a corporation or a company has a juristic or legal separate entity. The doctrine of the lifting of the veil has been applied in the words of Palmer in five categories of cases : where companies are in the relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes, death duties and stamps, particularly where the question of the "controlling interest" is in issue; in the law relating to exchange control; and in the law relating to trading with the enemy where the test of control is adopted (Palmer's Company Law 20th Ed. p. 136). In some of these cases, judicial decisions have no doubt lifted the veil and considered the substance of the matter.

(Reference can also be made to another Judgment of the Hon'ble Supreme Court of India in the case of *Shubra Mukherjee & Anr v. Bharat Cooking Coal Ltd and Ors. 2000 3 SCC 312*)

40. In the present case controlling interest, real intention of the parties, their conduct and common business interests are to be examined to find the truth and reality of the transaction. For that purpose the Tribunal has to lift the veil, look into the real facts as afore-stated and then come to the real conclusion.

41. In light of the above, the management facet of the company cannot be permitted to place a curtain upon the reality of its functional and business controls. It should come with true facts and not be permitted to frustrate the determination of the real issue and misguide the Tribunal in that pretext for ulterior benefits. In a recent Judgment of the Hon'ble Supreme Court of India in the case of State of *Rajasthan v. Gotan Lime Stone Khanji Udhyog ltd & Ors. Civil Appeal 434 of 2016* decided on 20.01.2016 the Court took the view that "Principle of *Lifting the Veil* as a extension to the distinction of the corporate personalities could be invoked where the protection of public interest is of paramount importance and corporate entity is an attempt to evade the legal obligation and lifting the veil is necessary to prevent a device to avoid welfare legislation." Having weighed the balances the Hon'ble Supreme Court of India lifted the veil and granted the requisite relief.

42. In the present case also we are concerned with the larger public and environmental interest. The responsibility that will be fixed upon the Respondents cannot be permitted to be defeated by using the tools of manipulative management and business interests. The contention raised by Respondent no. 11 that the Tribunal should not lift the corporate veil in fact raises a serious suspicion in the mind of the Tribunal as what is there for these Respondents to hide if they were genuine, separate legal corporate entities operating strictly in their own business interest and fully independent of each other factually and legally. The facts and law as afore-referred to so clearly show that this plea has been taken primarily to hide the truth from

the Tribunal and avoid liability that may arise in the facts of the present case. The direct involvement of these Respondents in the transaction in question is fully substantiated by documentary evidence, affidavit of the parties and the conduct of the concerned Respondents, furthermore, the present circumstances clearly indicate that these Respondents have acted together in the voyage in question and the sinking of the ship. Their collective efforts in not responding to the need of the hour when the ship was in dire need of mechanical and human help. Respondent no. 5 and Respondent no.7 commanded to go on with its voyage. The ship which certainly was not sea worthy was directed to complete its voyage, thus, exposing it to an inherent danger of sinking. The inter-relationship between these respondents clearly shows corporate relationship demonstrating commonality of commercial management and financial involvement in the voyage in question.

43. In view of this discussion, we have no hesitation in concluding that Respondent no. 5 is the actual and registered owner of the ship, however, Respondent no. 7 and 11 have common interests of business and finance in the ship and the voyage in question. They have effectively participated in the activity commencing from the voyage of the ship to its sinking and dumping in the continental shelf near Mumbai Coast. Both these Respondents are effectively responsible for the business of the ship and particularly the voyage from Indonesia to Dahej in Gujarat. Respondent no. 7, in fact, has voluntarily disclosed itself to be the owner or at least a person who has ownership interest in the ship. The said Respondent will be

bound by its admission which was not subjected to any change during the voyage. The owner, charterer and the interested persons all incur liabilities under the different Conventions and the law in force. The Charter Party Agreement dated 28th May, 2011 is a binding document and the said Respondent no. 7 would be estopped from pleading to the contrary. Respondent no. 6 admittedly is the owner of the consignment. He through Respondent no. 11, has chartered the ship for carriage of the consignment in Dahej in Gujarat. It was carrying 60054 MT of coal which is still lying in the bed of the sea. This is a continuous source of pollution and the said respondent has taken no steps either to lift the coal or take any preventive steps to stop the pollution from the consignment now for years. Thus, Respondent no. 6 is responsible and liable for the consequences resulting from sinking of the consignment in question. Resultantly, we answer this issue accordingly. However, we would be discussing the liability of each of these Respondents under the relevant issue.

Issue No. 3: Which of the Respondents are liable and/or responsible, if so, how and to what extent, within the ambit and scope of Sections 14, 15 and 17 read with Section 20 of the National Green Tribunal Act, 2010?

44. The undisputed facts which emerge from the record are that the ship in question was on its voyage from Indonesia to Dahej in Gujarat carrying 60054 MT of coal cargo and 290 tonnes of fuel oil and 50 tonnes of diesel. The ship sank due to excessive ingress of water and the generators of the ship failing to operate due to heavy flooding.

The ship sank about 20 Nautical Miles off the coast of Mumbai in the morning of 4th August, 2011. The Crew Members were rescued. This incident resulted in massive oil spill which spread over to the coastal shore of Mumbai at Juhu Beach, Raigad District, Dadar and Alibaug, Uttan in Bhayandar and Gorai beach. There are three components of water and environmental pollution. Firstly, the sunk ship itself, secondly, the cargo in the ship and lastly, the oil spill. Different statutory laws and international conventions would be attracted. In other words, laws of India in the form of different statutes and International Law in the form of conventions would apply to the different stages of the case in hand. The conventions attracted in the present case are of two kinds. One to which India had become a signatory prior to the date of occurrence and the other to which it became a signatory post the date of incident. In terms of Article-253 of the Constitution of India, legislation is to give effect to international agreements. Article-253 opens with a non-obstante clause that is irrespective of the articles regulating the relation between the Union and the States in the field of legislation in terms of this Article, the Parliament has the power to make any laws for the whole or any part of the territory of India for implementing any treaty/agreement or conventions with any other country or countries or any decision made in any international conference, association or other body. In terms of the well enunciated principles of acceptance and application of international treaties, it is an accepted canon that the international treaty to which India or any country is a signatory, if not ratified or adopted legislatively by the country then it may not be enforceable in

absolute terms as law of that land. However, if that country is a signatory to an international treaty and its authorities had approved the decision to amend the law in that regard and the same has been enacted then it will be binding, enforceable in absolute terms of law. Still, if the country is a signatory to such law and the treaty is signed and accepted by the country but law in that behalf has not yet been enacted, in that event the essence or the spirit of the convention would have to be accepted and enforced, though every part of the convention may not be enforceable as law. Article-18 of *the Vienna Convention on the Law of Treaties, 1969* clearly states the above decision and in fact obliges a State to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty. It is also stated that a State may record itself as having given its consent to the text of the treaty by signature in defined circumstances noted by Article-12, that is, where the treaty provides that signature shall have that effect, or where it is otherwise established that the negotiating states were agreed that signature appears from the full powers of its representative or was expressed during the negotiations. However, the signature has additional meaning in that in such cases and pending ratification, acceptance or approval, a State must refrain from acts which would defeat the object and purpose of the treaty and until such time as its intentions with regard to the treaty have been made clear. (*Reference: International Law, MALCOLM N SHAW, 6th Edn.*)

The International Convention on Civil Liability for Bunker Oil Pollution is a convention to which India became a signatory on 10th June, 2015 and the Union Cabinet approved accession thereof. However, the Act of 1958 has yet not been amended. At this stage, Amendment Merchant Shipping Bill, 2015 is only proposed. In terms of this, Article 1 of this Convention defines "Ship", as any seagoing ship and seaborne craft, of any type whatsoever. The convention defines 'person', 'ship owner' and 'registered owner' as separate terms. 'Bunker Oil' has been defined to mean, 'any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil'. 'Incident' means 'any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage'.

'Pollution damage' means: '(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and (b) the costs of preventive measures and further loss or damage caused by preventive measures'.

This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a State Party, and

(ii) in the Exclusive Economic Zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 Nautical Miles from the baseline from which the breadth of its territorial sea is measured;

(b) to preventive measures, wherever taken, to prevent or minimize such damage.

45. Article -3 talks about the liability of the ship owner. It says that except as provided in paragraphs 3 and 4, the shipowner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship, provided that, if an incident consists of a series of occurrences having the same origin, the liability shall attach to the shipowner at the time of the first of such occurrences. Where more than one person is liable in accordance with paragraph 1, their liability shall be joint and several. Paragraphs 3 and 4 of Article-3 carve out the exceptions which we are not concerned with in the present case, as admittedly, none of the exceptions apply to the present case. The claim for compensation for damage caused to the environment by pollution shall be made against the shipowner, otherwise than in accordance with this Convention. Article-4 provides “Exclusions”. Article-9 deals with jurisdiction and

states that where an incident has caused pollution damage in the territory, including the territorial sea, or in an area referred to in Article 2(a)(ii) of one or more States Parties, or preventive measures have been taken to prevent or minimise pollution damage in such territory, including the territorial sea, or in such area, actions for compensation against the shipowner, insurer or other person providing security for the shipowner's liability may be brought only in the courts of such State Parties.

International Convention on Civil Liability for Oil Pollution Damage is the other Convention with which we would be concerned. India is not only a signatory to this notification but the Act of 1958 was amended in 1968 to incorporate the provisions of this Convention into the law of land by inserting Chapter-XB in the Act. However, this Convention is applicable primarily to the cargo ship carrying oil exclusively or which are oil tankers.

International Convention for the Prevention of Pollution from Ships, 1973, as modified by the *Protocol of 1978 (MARPOL)* is relevant. India is a signatory to this Convention and in fact has amended the Act of 1958 by incorporating the contents of this convention by enacting Chapter-XIA in the Act of 1958. This convention as such is not a liability fixing convention. It primarily covers prevention of pollution of marine environment by ships from operational and incidental causes and has been updated by amendments through the years. Since this Convention finds its place in the Indian law as afore-stated, we would have to primarily rely and refer to Chapter-XIA of the Act of 1958 which applies to this case and contemplates the provisions of

pollution by oil in terms of Section 356A of the Act of 1958. The provisions of Chapter-XIA which are relevant for the purposes of this case are Section 356-B which defines 'cargo' to include blast and ship's stores and fuel as well. The Convention means the *Convention of 1973* and as amended by Protocol of 1978 as above indicated. These provisions also contemplate issuance of international pollution, prevention certificate that will be in consonance with the protocol which have been acceded to in India. 'Ship' means a ship of any type, whatsoever, operating in the marine environment and includes hydrofoil boas, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms. All Indian and foreign ships are expected to obtain and possess pollution prevention certificate from the prescribed forum. In terms of Section 356G, a surveyor or any person authorised in this behalf may go, at any reasonable time, on board an oil tanker or other ship to which any of the provisions of this Part apply, for the purposes of (a) ensuring that the prohibitions, restrictions and obligations imposed by or under this part are complied with; (b) satisfying himself about the adequacy of the measures taken to prevent pollution; (c) ascertaining the circumstances relating to an alleged discharge of a substance which is subject to control by the convention from the oil tanker or other ship in contravention of the provisions of this part; (d) inspect any record required to be maintained on board; and (e) checking the validity of the International Pollution Prevention Certificate.

46. The surveyor may obtain records through the master of the ship which would be admissible in terms of Section 356G of this Act.

Section-356J of Chapter-XIA is of great significance. In terms of this provision, the Central Government is vested with the powers to give a notice to variety of persons specified in the section if it is satisfied that: (a) oil or noxious liquid substance is escaping or is likely to escape from a tanker, a ship other than a tanker or any off-shore installation; (b) the oil or noxious liquid substance so escaped or likely to escape is causing or threatens to cause pollution in any part of the coast or in the coastal waters of India. It can also require a person to whom such notice is served to take action in relation to the purposes stated therein and even prescribe the removal. Notwithstanding anything, contained in sub-section (2), the Central Government is also vested with the power, in case of grave emergency, to proceed to take such measures as may be deemed necessary and any measures so taken shall be deemed to have been taken under section 356K. The scheme of this chapter clearly shows that in consonance with the said international convention, the Act provides for the power to issue a notice, issuance of directions for preventing the pollution, to take measures for prevention and control of pollution itself in the case of emergency and even to the said extent, the Central Government could issue directions to the ship to render services, if the situation so demands in terms of Section 356L. It will be useful at this stage to refer to language of the Sections 356 (J), (K) and (L) which read as follows:

> "**356J. Power to give notice to owner, etc. of polluting ship.**—(1) Where the Central Government is satisfied that-
>
> (a) [oil or noxious liquid substance] is escaping or is likely to escape from a tanker, a ship other than a tanker or any off-shore installation; and

(b) the [oil or noxious substance] so escaped or likely to escape is causing or threatens to cause pollution of any part of coasts or coastal waters of India,

it may, for the purpose of minimising the pollution already caused, or, for preventing the pollution threatened to be caused, require--

(i) the owner, agent, master or character of the tanker,

(ii) the owner, agent, master or charterer of the ship other than a tanker,

(iii) the owner, agent, master charterer or operator of a mobile off-shore installation,

(iv) the owner, operator, lessee or licensee of off-shore installation of any other type, or all or any of them, by notice served on him or as the case may be on them, to take such action in relation to the tanker, ship other than a tanker, mobile off-shore installation, or, as the case may be, off-shore installation of any other type or its cargo or in relation to both, as may be specified in such notice.

(2) Without prejudice to the generality of sub-section (1), the notice issued under that sub-section may require the person or person on whom such notice is served to take action relating to any or all of the following matters, namely;-

(a) action for preventing the escape of oil from the tanker, ship other than a tanker, mobile off-shore installation or off-shore installation of any other type;

(b) action for removing oil from the tanker, ship other than a tanker, mobile off-shore installation or off-shore installation of any other type in such manner, if any, and to such place, if any, as may be specified in the notice:

(c) action for removal of the tanker, ship other than a tanker, mobile off-shore installation or off-shore installation of any other type to a place, if any, as may be specified in the notice;

(d) action for removal of the oil slicks on the surface of the sea in such manner, if any, as may be specified in the notice.

(e) action to disperse the [oil or noxious liquid substance] slicks on the surface of the sea in such manner, if any, as may be specified in the notice.

(3) The Central Government may, by any notice issued under sub-section (1), prohibit the removal--

(a) of the tanker, ship other than a tanker, mobile off-shore installation or off-shore installation of any other type, from a place specified in the notice;

(b) from the tanker, ship other than a tanker, mobile off-shore installation or off-shore

installation of any other type, of any cargo or stores as may be specified in the notice,

except with its previous permission and upon such conditions, if any, as may be specified in the notice.

(4) Notwithstanding anything contained in sub-section (2), the Central Government may, if it is of the opinion that the pollution caused or likely to be caused has or may present a grave emergency, proceed to take such measures as may be deemed necessary and any measures so taken shall be deemed to have been taken under section 356K.

356K. Powers to take measures for preventing or containing [oil or noxious liquid substance] pollution-(1) Where any person fails to comply, or fails to comply in part, with any notice served on him under section 356J, the Central Government may, whether or not such person is convicted of an offence under this Part by reason of his having so failed to comply, cause such action to be taken as it may deem necessary for--

(i) carrying out the directives given in the notice issued under section 356J; and

(ii) containing the pollution already caused or preventing the pollution threatened to be caused, of coastal waters or, as the case may be, of any part of the coast of India by oil escaped or threatening to escape from the tanker, a ship other than a tanker, a mobile oil-shore installation or off-shore installation of any other type.

(2) Subject to the provisions of Part XB, any expenditure or liability incurred by the Central Government in, or by reason of, the exercise of powers under sub-section(1) in relation to any tanker, ship other than a tanker, mobile off-shore installation or off-shore installation of any other type in respect of which a notice had been issued under section 356J, or its cargo of oil that had escaped or was discharged into the sea, shall be a debt due to the Central Government by the person or persons on whom the notice was served and may be recovered from that person, or as the case may be, from all or any of those persons and shall be a charge upon all or any tanker, ship other than a tanker, mobile off-shore installation or off-shore installation of any other type owned by that person or persons which may be detained by the Central Government until the amount is paid.

Provided that provisions of Part XB of this Act shall not apply to measures taken in respect of any off-shore installation which is not a ship within the meaning of this Act except that in the event of pollution damage caused by any such off-shore installation the person who is liable for the damage may claim exoneration from any liability if he proves that such damage--

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) was wholly caused by an act or omission done with intent to cause that damage by any other person; or

(c) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in exercise of its functions in that behalf.

356L. Power of the Central Government to give directions to certain ships to render certain services—(1) Where for the purposes of taking any measures under sub-section (1) of section 356K, services of any Indian ship become necessary for--

(i) lightening or transporting any cargo or equipment from or to the polluting ship; or

(ii) providing any assistance to any other ship or equipment engaged in rendering services under clause(i),

the Central Government may, if it deems it necessary so to do, direct, by an order in writing, the owner of any Indian ship, tug, barge or any other equipment to provide such services or assistance as may be specified in that order.

(2) The owner of any ship, tug, barge or any other equipment with respect to which an order under sub-section (1) has been made shall be entitled to tariff rates of freight and charter hire, at reasonable rates having regard to current market conditions.

Provided that where tariff rates of freight are not fixed or where there is any dispute about reasonable rate of charter hire, the freight or, as the case may be, charter hire, shall be paid at such rates as may be fixed by the Director-General by an order in writing.

(3) Where in pursuance of the proviso to sub-section (2), the Director-General makes any order fixing rates of freight or charter hire, he shall determine reasonability of such rates of freight or charter hire by examining such witnesses, documents and accounts as he may deem necessary."

47. If any person fails to take action as required in the notice or to comply with the order issued under Section 356L, such person or offender could be penalised with imprisonment which may extend to

six months or a fine of Rs. 10 lakhs or as prescribed under Section 436 and the schedule attached thereto.

The other relevant convention is *the UN Convention on the Law of the Sea (UNCLOS)*. Article-211 of this convention requires that States acting through the competent organisation or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from ships and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of Coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary. It also requires that the States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from ships flying their flag or of their registry.

The provisions relevant for the present case and which are required to be examined by the Tribunal can be usefully reproduced at this stage. The relevant clauses 210, 211(5), 219, 221 and 235 read as under:

> "Article 210: Pollution by dumping:
>
> 1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping.
> 2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.
> 3. Such laws, regulations and measures shall ensure that dumping is not carried out without

the permission of the competent authorities of States.

4. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.
5. Dumping within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping after due consideration of the matter with other States which by reason of their geographical situation may be adversely affected thereby.
6. National laws, regulations and measures shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards.

Article 211: Pollution from ships:

5. Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from ships conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

Article 219: Measures relating to seaworthiness of ships to avoid pollution:

Subject to section 7, States which, upon request or on their own initiative, have ascertained that a ship within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of ships and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the ship from sailing. Such States may permit the ship to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, shall permit the ship to continue immediately.

Article 221: Measures to avoid pollution arising from maritime casualties:

1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences. 2. For the purposes of this article, "maritime casualty" means a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo.

Article 235: Responsibility and liability:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. 3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

48. India is a signatory of this Convention and in fact in furtherance to this Convention, the Indian Parliament enacted the Act of 1976. This was an enactment to provide for matters relating to territorial

waters, continental shelf, exclusive economic zone and other maritime zones. Importantly, this Act came into force with all the provisions on 15th January, 1977. Section-2 of this Act talks about "limit" in relation to the territorial waters, continental shelf, the exclusive economic zone or any other maritime zone of India, and means the limit of such waters, shelf or zone with reference to the mainland of India as well as the individual or composite group or groups of islands constituting part of the Indian territory. In terms of Section-3(1), the sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the airspace over such waters. According to Section-3(2), the limit of the territorial waters is the line every point of which is at a distance of 12 Nautical Miles from the nearest point of the appropriate baseline. Section-4 permits the use of Indian territory water without prejudice to the provisions of any other law for the time being in force, all foreign ships (other than warships including submarines and other underwater vehicles) shall enjoy the right of innocent passage through the territorial waters in terms of Section-4. The innocent passage is innocent so long as it is not prejudicial to the peace or good order or security of India. The Contiguous Zone of India is an area beyond and adjacent to the territorial waters, and the limits of contiguous zone is the line every point of which is at a distance of 24 Nautical Miles from the nearest point of the baseline referred to in Subsection (2) of Section 3.

49. In terms of Section-6, the Continental Shelf of India comprises the seabed and subsoil of the submarine areas that extend beyond the

limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 Nautical Miles from the baseline referred to in sub-section (2) of section 3 where the outer edge of the continental margin does not extend up to that distance.

Section-6(2) clearly states that India has, and has always had full and exclusive sovereign rights in respect of its continental shelf. Without prejudice to the generality of the provisions of sub-section (2), the Union has in the Continental Shelf, -

> (a) sovereign rights for the purposes of exploration, exploitation, conservation and management of all resources;
> (b) exclusive rights and jurisdiction for the construction, maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the continental shelf or for the convenience of shipping or for any other purpose;
> (c) exclusive jurisdiction to authorise, regulate and control scientific research; and
> (d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution.

50. Section-7 deals with Exclusive Economic Zone. The Exclusive Economic Zone of India is an area beyond and adjacent to the territorial waters, and the limit of such zone is 200 Nautical Miles from the baseline referred to in sub-Section 2 of Section-3 of this Act. Even in the Exclusive Economic Zone, in terms of Section-7(4), India has:

> (a) sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents;

(b) exclusive rights and jurisdiction for the construction, maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the zone or for the convenience of shipping or for any other purpose;
(c) exclusive jurisdiction to authorize, regulate and control scientific research;
(d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution; and
(e) such other rights as are recognised by International Law.

All these limits under this Act are alterable. The Government of India having regard to international law and state practice may alter these limits in consonance with the procedure prescribed under these very sections.

From the language of the above provisions, it is clear that all distances are to be measured from the baseline. All the limits of the territorial waters, the contiguous zone, the continental shelf, the exclusive economic zone are to be measured from the baseline i.e. the line which starts from the shore of land in Indian Territory. The other important factor is that for the Continental Shelf, Exclusive Economic Zone the rights that are to be exercised by the Government of India are much larger in their ambit and scope than the right exercised in the Contiguous Zone though in the territorial waters there is complete sovereignty of Government of India. But fact of the matter is that the Continental Shelf, Exclusive Economic Zone would in any event overlap the limits of Contiguous Zone. The rights in relation to this zone are rights of some importance and significance, particularly, in the case of the present act where they have to be brought into service to prevent and control of marine pollution.

Another convention which will be relevant is the *Nairobi Wreck Removal Convention, 2007*. This convention has been ratified by the Indian Government on June, 2015, however, it has so far not become part of the enacted law of land. This convention is primarily found on the premise that all States are conscious of the facts that wrecks, if not removed, may pose hazards to navigation or the marine environment or so far as that there was need to adopt uniform international rules and procedure to ensure the prompt and effective removal of wrecks and payment of compensation for the costs therein involved and also recognizing the benefits to be gained through uniformity in legal regimes governing responsibility and liability for removal of hazardous wrecks, noticing the importance of UNCLOS signed in Montego Bay, Jamaica on 10th December, 1982, when this Convention was enacted.

Article-1 of this convention defines various expressions, convention area, ship, maritime casualty, wreck, hazard, related interests, removal, registered owner, operator of the ship, affected states, state of the ship's registry, organization, and secretary general. These are some of the important definitions which would require attention for proper appreciation of the matters in issue. They have been defined as under:

> "Convention area" means the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 Nautical Miles from the

baselines from which the breadth of its territorial sea is measured.

"Ship" means a seagoing ship of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and Wreck Removal Convention Act 2011 (c. 8) Schedule — Wreck Removal Convention 11 floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources.

"Maritime casualty" means a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo.

"Wreck", following upon a maritime casualty, means:

(a) a sunken or stranded ship; or

(b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or

(c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or

(d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

"Hazard" means any condition or threat that:

(a) poses a danger or impediment to navigation; or

(b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

"Related interests" means the interests of a coastal State directly affected or threatened by a wreck, such as:

(a) maritime coastal, port and estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned;

(b) tourist attractions and other economic interests of the area concerned;

(c) the health of the coastal population and the wellbeing of the area concerned, including conservation of marine living resources and of wildlife; and

(d) offshore and underwater infrastructure.

"Removal" means any form of prevention, mitigation or elimination of the hazard created by a wreck. "Remove", "removed" and "removing" shall be construed accordingly.

"Registered owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship at the time of the maritime casualty. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the operator of the ship, "registered owner" shall mean such company.

"Operator of the ship" means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended.

"Affected State" means the State in whose Convention area the wreck is located. Wreck Removal Convention Act 2011 (c. 8) Schedule — Wreck Removal Convention 12.
"State of the ship's registry" means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly.
"Organization" means the International Maritime Organization.
"Secretary-General" means the Secretary-General of the Organization."

In light of the above definition Article, Article-2 deals with objectives and general principles. A State party may take measures in accordance with this convention in relation to the removal of a wreck which poses a hazard in the convention area. Such measures have to be proportionate to the hazards and what is reasonably necessary to remove the wreck and all are expected to co-operate including the State parties under Article-2. The convention is applicable to wrecks in convention area. Specific exclusions are provided but none of these exclusions are of any consequences for our purpose. Article-5 provides that a State party shall require the master and the operator of a ship

flying its flag to report to the Affected State without delay when that ship has been involved in a maritime casualty resulting in a wreck. The details of ship along with details of hazards are to be provided. While determining the hazards, the factors as stated under the Article-6 are to be taken into consideration. These determinative factors are with regard to type, size and construction of wreck, depth of water, proximity of shipping routes or established traffic lanes, nature and quantity of the wreck's cargo, submarine topography of the area, prevailing meteorological and hydrographical conditions, acoustic and magnetic profiles of the wreck; proximity of offshore installations, pipelines, telecommunications cables and similar structures; and any other circumstances that might necessitate the removal of the wreck.

51. The affected State shall use all practicable means, including the good offices of States and organizations, to warn mariners and the States concerned of the nature and location of the wreck. All measures to facilitate the removal of the wreck are required to be taken by the affected states in accordance with the procedure laid. The registered owner in terms of Article-10 of this convention would be liable for the cost of locating, marking and removing the wreck unless the exceptions are proved. The settlement of disputes under Article-15 has to be through negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice including Part XV of the UNCLOS, 1982, which shall apply *mutatis mutandis*. Article-16 provides that nothing in this convention shall

be to the prejudice of the rights and obligation of any state under the UNCLOS, 1982 and under the customary international law of the sea.

This convention is a clear indicator of understanding the requirements in relation to removal of wreck resulting of accidents or otherwise. In light of this convention, it is not expected of any Nation to cause damage by way of a wreck or otherwise of ships or other materials including cargo in the territorial or even for that matter exclusive economic zone of any other country. It would apparently amount to breach of the convention and disrespect to the set international environmental regime. This convention has a primary concern towards the wreck's removal and its resultant hazards thereof. As we have already noticed, India has ratified this convention, however, it has not become part of the enacted law of the land. Still this convention has to be respected and the wreck which is apparently hazardous or polluting should be and has to be removed. The whole purpose is to protect the marine environment and to ensure that the wreck is not permitted to cause havoc and pollute the marine environment indefinitely.

The *BASEL Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* deals with protocol, liability and compensation. The management of hazardous waste has been on the international environmental agenda and it was indicated as one of the three priority areas in the United Nations Environment Program (for short, 'UNEP') on environmental law. Overreaching objectives of *BASEL Convention* are to protect human

health and environment against adverse effects of hazardous wastes. Its scope of application gives wide range of definition of waste as hazardous waste, based on their article, composition and characteristics.

52. This convention does not have a direct application on the subject matter of the present petition but the information provided is more valuable. Thus, indirectly, this is also a relevant Convention. Under Annexure-VIII of the Convention, the wastes named in this annexure are characterised as hazardous under Article-1, para-1A of this Convention. Metal and metal bearing wastes have been considered to be hazardous. Metal based waste consisting of alloys of: Antimony, Arsenic, Beryllium, Cadmium, Lead, Mercury, Selenium, Tellurium, Thallium; Waste having as constituents or contaminants, excluding metal waste in massive form of: Antimony; antimony compounds, Beryllium; beryllium compounds, Cadmium; cadmium compounds, Lead; lead compounds, Selenium; selenium compounds, Tellurium; tellurium compounds and Wastes having as constituents or contaminants any of: Arsenic; arsenic compounds, Mercury; mercury compounds, Thallium; thallium compounds. Wastes having as constituents any of the Metal carbonyls, Hexavalent chromium compounds are treated as hazardous wastes in the Schedules of this Convention.

53. The Convention primarily provides the details of the hazardous substances which when dumped in water or at other places can degrade the marine environment. Therefore, there is a need to control

and prevent such pollution and wherever necessary, even the removal of such material from the sea etc.

54. This specifies the management of hazardous waste by taking the measures contemplated in the Convention. The Convention primarily is meant for control of trans-boundary movement of hazardous waste and their disposal. It requires the States to take necessary measures to ensure that the management of the hazardous waste and other waste including their trans-boundary movement and disposal, would be consistent with the protection of human health and the environment, whatever the place of disposal. The convention defines hazardous waste of different kinds and categories in terms of its Schedule. The wastes are substances or objects which are disposed of or which are intended to be disposed of or which are required to be disposed of by the provisions of the national law.

55. The *Convention on Biological Diversity* conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components and its importance for evolution and for maintaining life sustaining system of the biosphere also realising that the conservation of biological diversity is a common concern of the mankind and that States have sovereign rights over their own biological resources and also keeping in mind that biological diversity is being significantly reduced by certain human activities, the fundamental requirement for the conservation of bio-diversity is the in-situ conservation of the ecosystems and natural

habitats and the maintenance and recovery of viable populations and of species in their natural surroundings, that the contracting parties opted for with the formation of this convention. This Convention was ratified by India on 18th February, 1994. The Indian Parliament while enacting the Bio-Diversity Act, 2002 in its Preamble noticed the Convention on 29th December, 1993. The main objective of this Convention is the sustainable use of the components and fair and equitable use of benefits arising out of the utilisation of genetic resources. The principle of this Convention was adopted in the Act of 2002. Article 2 of this Convention defines bio-diversity as follows-

> "biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of eco-systems;

This definition is identical to Section 2 (b) of the Act of 2002. Article 9, while dealing with ex situ Conservation, states the measures that could be taken for the conservation of biological diversity. Article 10 requires sustainable use of components for biological diversity. The underlying feature of both the Convention and the Act, is to conserve biological diversity and prevent its abuse at different levels. The Act even provides for penal consequences if there is violation of the provisions contained under Section 3, 4 and 6 of the Act. The board authorities and the committees were constituted primarily with the intention of regulating and conserving the biological diversity of the country.

56. Right to Clean and Decent Environment is a fundamental right as enshrined in Article-21 of the Constitution of India. Right to life is a fundamental right which now has been expanded to give complete protection to right for clean environment. The constitutional scheme in relation to environment has multi-fold dimensions. On one hand, Article-21 gives complete and absolute right to the citizens, and on the other hand Article-51A(g) imposes a fundamental duty upon citizens and every person to protect the environment and ecology and lastly Article-48A mandates the State by placing upon it a duty under the Directive Principles of State policy to protect and improve the environment and safeguard forest and wildlife. Besides all these, the judicial pronouncement by the Supreme Court of India which in terms of Article-141 of the Constitution are the law of land have given new dimensions to the environmental jurisprudence and commanded the State to protect the environment and to ensure decent and clean environment for its citizens.

57. The Act of 1958 was enacted with the objective to foster the development and to ensure the efficient maintenance of the Indian Mercantile Marine Department in a manner best suited to serve the national interests and for that purpose for establishing the National Shipping Board and to provide for the registration, certification, safety and security of Indian ships and generally to amend and consolidate the law relating to merchant shipping. This was, as already indicated by various International Conventions, followed by different amendments in this Act of 1958. Chapter XB of the Act of 1958 deals with civil liability for oil pollution damage and applies to every Indian

and Foreign ship while it is at a port or place in India or within the territorial waters of India or any marine areas adjacent thereto over which India has exclusive jurisdiction in regard to control of marine pollution under the Act of 1976. However, this Chapter is only applicable to the ships which are carrying oil in bulk as cargo. Chapter XIA of the Act of 1958 deals with the provisions relating to containment of pollution of the sea by oil. Under this chapter cargo includes ballast and ship's stores and fuel and it refers to the *International Convention for the Prevention of Pollution from Ships, 1973*. 'Ship' means a ship of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms. The obtaining of pollution certificate is mandatory. As already discussed under Section 356 (J - L), the Central Government has the power to issue notice/directions and even to take measures itself for prevention and control of pollution and for removal of pollutants. Under the provision of Section 356 (J) it is the owner, agent, master or charterer of tanker or charterer of ship and even a operator of mobile off-shore installation who are liable to be served with a notice in accordance with the provisions of the Section 356(J and K) and consequences thereof. This obviously means that the application of the Act in relation to prevention, containment and removal of pollutant is not only applicable to the owner of the ship but also applicable to the persons like agent, master or charterer. All of them are jointly and severally liable for compliance and in the event of default therewith, for punitive action. At this stage it will be

appropriate to refer to Section 71 which falls under Chapter V of the Act of 1958. This Chapter primarily deals with the registration of the Indian Ships, procedure, transfer, alteration, national character and miscellaneous provisions. Section 71 creates liability of the owner and it reads as follows.

> 71. Liability of owners.—Where any person is beneficially interested otherwise than by way of mortgage in any ship or share in a ship registered in the name of some other person as owner, the person so interested shall, as well as the registered owner, be subject to all the pecuniary penalties imposed by this or any other Act on the owners of ships or shares therein, so nevertheless that proceedings for the enforcement of any such penalties may be taken against both or either of the said parties with or without joining the other of them.

58. Section 71 clearly postulates that the owner necessarily does not have to be the registered owner but it could be any person where any person is beneficially interested otherwise than by way of mortgage in a ship or a share in the ship registered in the name of any other person the person so interested shall, as well as registered owner, be subject to pecuniary penalties imposed under the Act. In other words the liabilities and penalties arising under the Act are not confined to the registered owner. The Legislature in its wisdom has used very wide terms for fixation of liability under the provisions of the Act. This provision therefore would have to be construed liberally and given an expanded meaning rather than a narrower or restricted meaning. It is not only the pecuniary penalties imposed under this Act that would apply to such a person but even under other Acts the liability could be imposed. The concept of joint and several liabilities and even without co-joining of all of them is permitted under this provision.

The Act of 1986 as already noticed in its definition of the word 'environment' includes water, air and land and the interrelationship which exists among human beings, plants, micro organisms and other creatures.

59. 'Environmental pollutant' means any solid, liquid or gaseous substance present in such quantity as may be, or tend to be, injurious to the environment. 'Hazardous substance' means any substance or preparation which by reason of its chemical or physico-chemical properties is liable to cause harm to human beings, other living creatures, plants or micro organisms. As is evident, an explanation of very wide magnitude has been used in this Act with the purpose to protect the environment and ecology in all spheres. Section 3 empowers the Central Government to take such measures as it deems necessary to protect and improve the environment. Under Section 5, the Central Government is vested with the power of issuing directions for the purpose of protecting or taking remedial measures for such protection and they could extend even to the extent of closing the industries and directing stoppage of water or electricity supply.

60. Now, lastly under this head we would deal with relevant provisions of the Act of 2010. The Act primarily aims to provide effective and expeditious environmental justice related to protection of environment and conservation of forest and other natural resources. The Act defines the word 'Environment' similarly in terms of the Act of 1986. It defines the terms 'Environment', 'hazardous substances' and 'person' as follows.

(c) "environment" includes water, air and land and the inter-relationship, which exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property;

(f) "hazardous substance" means any substance or preparation which is defined as hazardous substance in the Environment (Protection) Act, 1986 (29 of 1986), and exceeding such quantity as specified or may be specified by the Central Government under the Public Liability Insurance Act, 1991 (6 of 1991);

(j) "person" includes-
(i) an individual,
(ii) a Hindu undivided family,
(iii) a company,
(iv) a firm,
(v) an association of persons or a body of individuals, whether incorporated or not,
(vi) trustee of a trust,
(vii) a local authority, and
(viii) every artificial juridical person, not falling within any of the preceding sub-clauses;

61. Under Section 17 the liability to pay relief or compensation for such death, injury or damage under that provision is of the 'person responsible'. We have referred to these provisions primarily to show the persons who would become liable within the ambit and scope of the provisions of the Act of 2010. The definition of 'hazardous substances' is again a very wide definition and would attract action if there is any injury to human beings, living beings or to the environment. The 'person responsible' is again a term of wide connotation capable of receiving liberal construction. A person who has carried on an activity which has resulted in pollution would become liable whatever be his relationship with the property, activity, ship or factory etc. So far as he is responsible for carrying on that activity to any extent, the liability would be co-extensive.

62. We have already under the previous issue held that Respondent no. 5, 7 and 11 are the registered owners/ owners and/or persons interested in the ship and its commercial activities. The report submitted by the Mercantile Marine Department, Mumbai under the order of the DG Shipping India, had stated therein that being the owner, Respondent no. 5 is responsible for the incident and consequences thereupon lying upon the owner of the ship. Under the provisions of the Act of 1958 it is the 'person interested' and in terms of Section 356J read with Section 71 the agent, charterer, master and even the operator of a mobile off-shore installation are liable or responsible. Under the *BASEL Convention* the person 'includes' any natural and legal person. Other Conventions clearly state and give a very wide responsibility upon the various persons including the ship owner, agent, charterer and the person responsible for managing the ship and even the persons who have commercial interests in the ship. All these persons are liable and cannot avoid their liability merely on the ground of insufficiency of clear documentary evidence. The Conventions and the Acts afore-referred require that the marine environment should be protected and wherever necessary even the wreck should be removed along with the cargo as a whole. Various documents have been placed on record by different parties, to establish a clear connection of the position under these Conventions and laws, and would place liability on the Respondents for making good the loss of environment and ecology particularly the marine.

63. Undisputedly, the beaches were seriously polluted by oil spill, mangroves were destroyed and so was the aquatic life. The sunken ship in the sea and the cargo are a continuous source of pollution. The Convention requires it and it ought to be removed from the sea. It is in fact strange that Respondent no. 6 being the owner of the consignment cargo, made no efforts to remove the cargo from the sunken ship or to take preventive steps to ensure that the cargo does not cause pollution. The coal contains hazardous substances as even clarified in the *BASEL Convention*. It is an undisputed scientific proposition that coal contains elements of antimony, cadmium, arsenic, mercury, lead, etc. The report by the Annamalai University also establishes the pollutants contained in the coal which cause pollution. The ship itself can be a source of regular pollution which we shall discuss under a different head. Hereafter, the fact of the matter remains that Respondent no. 5, 7 and 11 are liable and responsible directly for the sinking of the ship and the cargo, oil spill and resultant pollution arising therefrom. Respondent no. 6 is liable for cargo pollution and has completely failed in taking any preventive and precautionary measures to prevent the pollution resulting from the coal. The insurance company on the terms of its policy, is also liable; however it is contended by them that at best they are liable for the claims of reimbursement and have no liability for direct payment.

64. Consequently, we hold that Respondent no. 9, as an insurer, is liable under its policy for the damage, degradation and pollution of the marine environment caused by oil spill, the sunken ship and its cargo. The policy also states that the liability is under the 'pay to be paid'

clause. The liability to pay for the claims in terms of the policy and the attendant circumstances is unquestionable. It is equally certain that the liability is not primary liability but is the liability on account of reimbursement. The Bunker Convention as aforereferred, in terms of Article 9 creates a liability on the insurer. The liability is to be controlled by the terms of the policy *stricto sensu*. To that extent, the question relating to determination of liability would squarely fall within the jurisdiction of the Tribunal but the disputes between the insured and the insurer arising out of the policy including mode and methodology of payment would squarely fall outside this Tribunal's jurisdiction. Thus, we leave determination of consequential questions open, to be determined by the forum of proper jurisdiction under the Romanian law. The insured and insurer both are free to take up these matters, if they so desire, in accordance with law before the competent forum.

As already noticed, the insurance policy dated 27th April, 2011 had the validity period upto 27th April, 2012. As on the date of the accident, the ship was insured in all respects. It was a P&I Insurance subject to the policy's terms and conditions. The insurance in terms of Clause 9 covered pollution risks and fines. Under Clause 11, the maximum limit of the claim was also stated. What was excluded has specifically been provided under Clause 20. It was terrorism and the matters related to terrorism. All other liabilities were secured under the Policy. Other exclusions provided under the policy also do not apply to the present case. Under Article 12(2), the insurance was subject to procurement of prescribed certificates, which the Insurance

Company must and ought to have examined prior to the issuance of the policy. The policy specifically dealt with the claim on account of wreck removal even if the period of the policy is expanded or is under three months' notice period. The various clauses of this policy read in conjunction with Article 9 of the Bunker Convention, undoubtedly create liability in relation to the incident itself and the pollution caused by oil spill, ship and the cargo, even presently lying in the seabed. It also is responsible for the compensation that would have to be awarded amongst these even for removal of the wreck. Determination of liability, in relation to environment and pollution of marine environment, would be well within the jurisdiction of this Tribunal.

65. Respondent no. 10 and 12 do not have any personal liability, Respondent no. 10 was only appointed to receive the claims, if any, and forward it to Respondent no. 9 for settlement. As such Respondent no. 10 is not the person interested or liable in terms of the above law. Similarly, Respondent no. 12 has acted on humanitarian grounds and at the behest of Respondent no. 11, that too only for providing bunkers while the ship was in difficulty and about to sink. Further, by providing accommodation and passage to the crew members Respondent no. 12 has rendered assistance purely on humanitarian grounds. This participation by Respondent no. 10 and 12 does not bring them within the ambit and scope of personal liability as per the law afore-noticed. They are the persons against whom the Tribunal cannot pass any decree for default or payment of compensation.

66. The various conventions that we have referred to and their various clauses clearly show that although obligation lay upon the Respondents to ensure the prevention of pollution and damage to the marine environment, yet they failed to take precautionary measures and did not even ensure the seaworthiness of the ship. The Conventions are required to be respected and implemented not only by the Member States, but also by the entities from any State, particularly those dealing in commercial activity of transportation through sea. The Respondents have failed to discharge their obligation and are, therefore, liable under the Precautionary Principle.

Thus, to conclude this issue we hold that Respondent no. 5, 6, 7 and 11 would be primarily liable and responsible for facing the consequences of the accident and for taking remedial measures and for payment of environmental compensation for the pollution resulting therefrom.

Issue No. 4: Whether the Tribunal has jurisdiction to entertain and decide the present case and whether or not the provisions of the Merchant Shipping Act, 1958 oust the jurisdiction of this Tribunal?

67. In order to provide a complete and comprehensive answer to this issue, it is necessary for us to examine the expressions 'sovereignty', 'sovereign rights' and 'sovereign functions'. The expressions which appear in different conventions and the laws in force are relevant for the present case. The Conventions and the Acts referred to these expressions differently and in different contexts, such as that of territorial jurisdiction as well as enforcement of law. Thus, proper

understanding of these expressions would be necessary before applying them to the facts of the given case. Sovereignty is a quality of right. It is a bundle of rights. It depends on facts and circumstances of each case. Ordinarily, it is the supreme power which governs the body politic or society which constitutes the states and this power is independent of the particular form of government, whether monarchical, autocratic or democratic. 'Sovereignty' and 'acts of State' are two different concepts. The former vests in a person or body which is independent and supreme both externally and internally whereas latter may be an act done by a delegate of sovereign within the limits of the power vested in him which cannot be questioned in a Municipal Court. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions and the Constitution is supreme in Indian democracy. The exercise of Sovereignty amounts to the exercise of all rights that a sovereign exercises over its subjects and territories, of which the exercise of penal jurisdiction under the criminal law is an important part. In an area in which a country exercises Sovereignty, its law will prevail over other laws in case of a conflict between the two. Though, it is difficult to define Sovereignty with exactitude, but the courts have admitted to explain the term in its fullest sense. We may refer to some of the judgments where the meaning of the word 'Sovereignty' has been explained in its context.

68. Sovereignty, means "supremacy in respect of power, dominion or rank; supreme dominion authority or rule. Sovereignty is the right to govern. The term sovereignty as applied to states implies "supreme,

absolute, uncontrollable power by which any state is governed, and which resides within itself, whether residing in a single individual or number of individuals, or in the whole body of the people. Sovereignty according to its normal legal connotation is the supreme power which govern the body politic, or society which constitutes the state and the power is independent of the particular form of government whether monarchical, autocratic or democratic, *Govindrao v. State of Madhya Pradesh, AIR 1982 SC1201*.

Sovereignty is the supreme, absolute and uncontrollable power by which any independent state is governed; supreme political authority, paramount control of the constitution and frame of government and its administration; the self sufficient source of political power from which all specific political powers are derived; the international independence of a State combined with the right and power of regulating its internal affairs without foreign dictation; also a political society or State which is sovereign and independent, *Black's Law Dictionary, 5th Edn.,p1252*.

69. The term "sovereign" is difficult to define. It is the exercise of sovereign power which gives States sufficient authority to enact any law, subject to limitations of the Constitution to discharge their functions. The Indian State, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to

constitutional limitations, *Synthetics and Chemicals Ltd. v. State of UP, AIR1990 SC 1927;(1990) 1SCC 109: (1989) Supp 1SCR623 (Constitution of India, Preamble).*

70. According to Laski in *A Grammar of Politics, 1957 Reprint, Chap.-II, p. 50*: the legal aspect of sovereignty is best examined by a statement of the form given to it by John Austin. In every legal analysis of the State, he argued, it is first of all necessary to discover in the given society that definite superior to which habitual obedience is rendered by the mass of men. That superior must not itself obey any higher authority. When we discover the authority which gives commands habitually obeyed, itself not receiving them, we have the sovereign power in the State. In an independent political community that sovereign is determinate and absolute. Its will is illimitable because, if it could be constrained to act, it would cease to be supreme, since it would then be subject to the constraining power. Its will is indivisible because, if power over certain functions or persons is absolutely and irrevocably entrusted to a given body, the sovereign then ceases to enjoy universal supremacy and therefore ceases by definition to be sovereign. *Sardar Govindrao v. State of Madhya Pradesh, AIR1982 SC 1201 (1204): (1982) 2 SCC 414: (1982) 3 SCR 729. [C.P. & Berar Revocation of Land Revenue Exemption Act, 37 of (1948), s. 5(3)(ii)].*

71. Sovereignty has been defined as “the supreme authority” in an independent political society. It is essential, indivisible and illimitable. However, it is now considered and accepted as both divisible and

limitable, and we must recognise that it should be so. Sovereignty is limited externally by the possibility of a general resistance. Internal sovereignty is paramount power over all actions, within, and is limited by the nature of the power itself, *Union of India v. Sukumar Sengupta, AIR1990 SC 1692 (1701): 1990 Supp SCC 545*.

"It is well to distinguish the senses in which the word sovereignty is used. In the ordinary popular sense it means Supremacy, the right to demand obedience. Although, the idea of actual power is not absent, the prominent idea is that of some sort of title to exercise control. An ordinary layman would call that person (or body of persons) Sovereign in a State who is obeyed because he is acknowledged to stand at the top., whose will must be expected to prevail, who can get his own way, and make others go his, because such is the practice of the country. Etymologically, the word of course means merely superiority, and familiar usage applies it in monarchies to the monarch, because he stands first in the State be his real power great or small." *James Bryce, Studies in History and Jurisprudence, 504-05(1901).*

72. Sovereignty means supremacy in respect of power, dominion or rank; supreme dominion authority or rule. It implies supreme, absolute, uncontrollable power, by which any state is governed, *Sardar Govindrao v. State of M.P., AIR 1982 SC201, 1204(C.P. & Berar Revocation of Land Revenue Exemption Act (37 of 1948). S. 5(3)(ii).*

Sovereignty, Politic, Body Politic. A people whom province hath cast together into one island or country are in effect one great body politic,

consisting of the head and members, in imitation of the body natural, as is excellently set forth in the statute of appeals, made 24 H 8 c. 12, which styles the King as the supreme head, and the people a body politic (these are the very words), compact of all sorts and degrees of men, divided into spirituality and temporality. And this body never dies. *Sir Robert Atkyns, LCB, Trial of Sir Edw. Hales (1686),11How. St. Tr. 1204*.

All Government rest mainly on public opinion, and to that of his own subjects every wise sovereign will look. The opinion of his subjects will force a sovereign to do his duty, and by that opinion will he be exalted or depressed in the politics of the world. *Lord kenyond, Trial of John Vint and others, (1799) 27 How. St. Tr. 640.*

(references: Dr. Shakil Ahmad Khan, P Ramanatha Aiyar's, the Law Lexicon, 3rd Edn., 2012, Lexis Nexis Butterworths Wadhwa, Nagpur, Wharton's Law Lexicon, 15th Edn. 2009, Universal Law Publishing Co., and Sumeet Malik, The Law Lexicon with Maxims, 1st Edn. 2016, Eastern Book Company)

73. The Supreme Court in the case of *Agricultural Produce Market Committee v. Ashok Harikum, (2000) 8 SCC 61* held that defence of the country raising armed forces making peace or war, foreign affairs, power to acquire and retain territory, are functions, which are indicative of external Sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil Court inasmuch as the State is immune in such matters. It is also clear that every Government functions need not be sovereign. State activities are

multifarious from the primal sovereign power, which exclusively inalienably could be exercised by the sovereign alone, to all the welfare activities, which would be undertaken by any private person. Welfare activity undertaken by the State is not sovereign function of the State. The expression of 'sovereign rights' is not as of now does not appear to have been defined or its meaning explained. Sovereign is a person or body or State in which independent and supreme authority is vested; a chief ruler with supreme power. One who has supremacy or rank above or authority over others, the recognised supreme rule of a people or country under monarchical government system.

74. 'Right', it is a legally protected interest. With the removal of the protection by statute, the right ceases to exist, *Mithilesh Kumari v. Prem Behari Khare, (1989) 2 SCC 95*. In other words, it is a liberty of doing or possessing something consistently with law. It is an interest recognised and protected by moral or legal rules. However, a definition has been drawn between a right and a legal right. A right is an averment of an entitlement arising out of legal rules. A legal right may be defined as an advantage or benefit conferred upon a person by a rule of law, *Shanti Kumar R. Canji v. Home Insurance Co. of New York (1974) 2 SCC 387*. In a strict sense, legal rights are correlative of legal duties and are defined as interests which the law protects by imposing corresponding duties on others. But in a generic sense, the word 'right' is used to mean an immunity from the legal power of another.

75. To put it clearly, sovereignty bestows full rights, or supreme authority, on a country within its territorial waters, which stretches to

12 Nautical Miles. Sovereign rights in an Exclusive Economic Zone, which are much further out to sea, "no longer concerns all of activities, but only some of them". Sovereign rights are not rights deriving from sovereignty but rights of specific functional purpose. The phrase 'sovereign rights' in Article-56 of UNCLOS suggests Cyprus rights are exclusive, not preferential over other States.

76. From the analysis of the above, it is clear that these expressions have to be understood in their correct perspective and that perspective has to have a nexus to and relation with the reference in which they are used. In a very limited sense, they could appear to have overlapping meanings but when examined with reference to a situation or the facts or the language of the document, they are to be construed with clarity.

77. Now, we shall deal with the conventions in so far as they are relevant for the question of jurisdiction. Firstly, we may refer to *the International Convention on Civil Liability for Bunker Oil Pollution Damage-2001*. This Convention as already noticed, is providing that State shall take all measures necessary to prevent and reduce pollution of marine environment. Further, it provides that, with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the further development of relevant rules of international law. It recognises the importance of establishing strict liability for all forms of oil pollution which is linked to an appropriate limitation of the level of that liability. Article-2 provides for application

of the Convention that pollution damage caused to the territorial sea. While Article-2(A)(ii) deals with the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 Nautical Miles from the baselines from which the breadth of its territorial sea is measured. Once these two clauses of the article are read together, unless otherwise is specifically provided in the law of the country or under this Convention itself, the pollution damage caused either in the territorial waters or to the limit of the exclusive economic zone are actionable. Preventive measures, compensation and damage for pollution could be provided in terms of this Convention in the Courts or Tribunals of the country where the damage has occurred. Even if all other laws were silent, in relation to a given state, still this Convention would have ample application for invoking the jurisdiction of a Court or Tribunal in accordance with the law on this account, for pollution of marine environment. Similarly, if we read Article-8 and Article-3 of the Civil Liability on Oil Pollution Damage-1969, as amended to be 1992, it also reflects similar situation. It provides that where an accident has caused pollution damage and territory including territorial sea or an area referred to in Article-2 of one or more contracting States or preventive measures have been taken to prevent or minimise such pollution damage and action for compensation may only be provided in Courts of such contracting State of States. Article-3 and Article-2 of 1969 Convention

both of which was amended by 1992 Convention, Article-3 provides that pollution damage caused in the territorial sea and in exclusive economic zone of the contracting state would be the area covered under the jurisdiction. It is identical to the earlier Convention and provides that it would not extend more than 200 Nautical Miles from the baseline from it the breath is to be measured. Thus, the effect of this Convention is also the same and even a pollution or damage done within that area i.e. the exclusive economic zone would be actionable.

Under *the International Convention for Prevention of Pollution from Ships, 1973 (MARPOL)*, a ship has to fly the flag of a party, certificates to be obtained and inspections to be provided. The ship has to be seaworthy and it must adhere to other terms and conditions provided under this Convention. Article-4 of this Convention provides that any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established, therefor, under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law.

78. Article-9 of *the International Convention on Civil Liability for Bunker Oil Pollution Damage-2001* provides that where an incident has caused pollution damage in the territory, including the territorial sea, or in an area referred to in Article 2(a)(ii) of one or more States Parties, or

preventive measures have been taken to prevent or minimise pollution damage in such territory, including the territorial sea, or in such area, actions for compensation against the shipowner, insurer or other person providing security for the shipowner's liability may be brought only in the courts of any such States Parties.

The jurisdiction in terms of Article-9 of this Convention has to be construed in light of the international law in force at the time of application.

Cumulative reading of the above Conventions, show that these Conventions are not intended to primarily interfere with or affect the sovereignty of the State but to take appropriate remedies and actions in relation to the territorial seas and even in respect of Exclusive Economic Zone. Furthermore, these Conventions show that protections, actions and remedies available including that of protection of marine environment, claim of damages and compensation are not restricted to the territorial waters of the State over which it exercises sovereignty. The Exclusive Economic Zone is also covered for specific purposes stated therein and protection of marine environment in that zone is specifically stated and covered.

79. Thus, it will not be appropriate to state that in relation to marine environment and pollution being caused in the exclusive economic zone the concerned State or contracting party is without remedy and has no control whatsoever. The laws of the State would come into play, except where their application is excluded or they are in conflict with the Convention.

The Conventions have referred to all the three zones, namely, Territorial Sea Waters, Continental Shelf and Exclusive Economic Zone. Of course, the extent of control and application of law to these respective zones would depend upon the facts of a given case and the law applicable. The most important enactment that needs to be deliberated with some minuteness is the Act of 1976. Various provisions of this Act, we have already discussed above. However, at the cost of repetition, it needs to be noticed that it was with the intent to achieve a robust legal framework specifying the nature, scope of, exclusive rights, jurisdiction and control in relation to various maritime zones that this Act was brought into force. Section 3 (1) deals with 'Sovereignty' over territorial waters. Over the territorial waters, sovereignty of India extends completely. It extends to 12 Nautical Miles from the nearest point of appropriate baseline. Contiguous Zone of India is an area beyond and adjacent to territorial waters and extends upto 24 Nautical Miles from the point of baseline. Continental Shelf of India comprises the seabed and subsoil of submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 Nautical Miles from the baseline. The Central Government would have full and exclusive sovereign rights in respect of its continental shelf without prejudice to the generality of the provisions in relation to the purpose and matters specifically incorporated under sub-section-3 of Section-6. Exclusive Economic Zone of India is an area beyond and adjacent to the territorial waters and the limit of such zone is 200 Nautical

Miles from the baseline referred to in sub-section -2 of Section-3. Over this zone also, the Government of India exercises sovereign rights, exclusive rights and exclusive jurisdiction to and for the purposes stated in sub-section-4 of Section-7. Two main features of these provisions are: firstly, that the limits stated under the respective sections are liable to change or extension, subject to issuance of appropriate notification by the competent authority and after such notification, the limits are extended by the Parliament of India. Secondly, under Sections 6 and 7 the sovereign rights of India provide for exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution. This can be achieved only in accordance with law. No act or privilege either under the International Conventions or the domestic law can be exercised except in accordance with law. In other words, the rights of the Indian Government in terms of Section 6(3)(d) and 7(4)(d) can be achieved only with the help and aid of the laws in force in that behalf. By the very necessary implication, the environmental laws with regard to marine environment and to prevent and control marine pollution would come into play and would aid the means to achieve the purpose and the right protected under these provisions of the Conventions.

80. Sovereign right is a recognised legal right and has to be exercised in accordance with law. This right cannot be rendered in-effective and un-executable on a plea which otherwise is contrary to the spirit of the statute and the International Conventions in force. So far as Section-3 is concerned, all the environmental laws would automatically become applicable as it is a zone within the Indian

sovereignty. Sub-section-4 (e) of Section-7 further strengthens this view that the rights which are recognised under International law or International Convention would become part of the sovereign rights of the State that is the very object and purpose of this statute.

We may also refer to the provisions of the Act of 1958 to indicate the jurisdiction to which the foreign ships will be subject to in the coastal waters of India. Section 352B provides that every ship while it is at a port or place in India or within the territorial waters of India or any marine area adjacent thereto over which India has or may hereafter have exclusive jurisdiction in regard to control of marine pollution under the Act of 1976 or any other law for the time being in force, civil liability of oil pollution under Chapter-XB of the Act would be applicable.

81. Furthermore, in terms of Section-356B of the Act of 1958, the 'coastal waters' means any part of the territorial waters of India, or any marine areas adjacent thereto over which India has, or, may hereafter have, exclusive jurisdiction in regard to control of marine pollution under the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976 (80 of 1976) or any other law for the time being in force would be squarely covered under Chapter-XIA for the purpose of prevention and containment of pollution of the sea by oil.

The cumulative reading of both these provisions clearly shows that a foreign ship will be subject to Indian jurisdiction if it is or the incident has occurred in any of the zones afore-stated. The provisions

of the Act of 1958 would be appropriate and would operate because they by virtue of their very enactment become operative in relation to that area. There is nothing in the Act to say that the Act of 1976 has excluded the application of this Act; in fact both these Acts are complementary to each other and operate in their respective fields. Both the Acts of 1958 and 1976 would have to be construed and applied harmoniously.

82. Some of the Respondents before us had argued with vehemence that the environmental laws including the National Green Tribunal Act would not be applicable to any area beyond the territorial waters of India, as the Central Government has not issued a notification extending the operation of the Act of 1986 and the Act of 2010 in terms of sub-section-7 of Section-7. We find no substance in this submission. Firstly, sub-section-7 of Section-7 operates only in relation to the Exclusive Economic Zone and no other zones i.e. the Continental Shelf and Contiguous Zone of sea waters. The present ship admittedly was 20 Nautical Miles from the baseline of coastal area in Mumbai, where she sank. This location falls within the ambit and scope of Contiguous Zone. In that zone, sovereign rights can be exercised though for a limited purpose. Even under Section 6 and 7, the sovereign rights are specifically enforceable inasmuch as India has exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution.

83. This sovereign right is exclusive in terms of Act of 1976. The International Conventions specifically stipulate that such right of

State is protected even in Exclusive Economic Zone. Marine pollution is a subject of definite dimensions with diverse impacts. One incident of oil spill or pollution that results from the sinking of a ship may affect number of countries simultaneously. Depending upon the location and geographical limitations, that is the precise reason that various conventions while giving complete freedom to the State to exercise its sovereign rights within that area, also limits the scope thereof specifically providing for protection against maritime pollution.

Section 3 of the Act of 1986, read with the provisions of Section 356J of the Act of 1958 would also provide jurisdiction and make a ship, its Agent, Master liable for following the directions as may be issued in relation to a ship for marine pollution in the Territorial Waters, the Continental Shelf, the Exclusive Economic Zone and other Maritime Zones, and these notices were as a matter of fact issued by DG Shipping. This itself could bring the matter within the jurisdiction of the Central Government and consequently providing jurisdiction to the Tribunal. We may also notice here that the ship sank in the Contiguous Zone which has overlapping limits with the Continental Shelf and Exclusive Economic Zone, as all of them have to be measured from the baseline in terms of sub Section 2 of Section 3 of the Act of 1976. Once there is overlapping of an area; under Section 6(3)(d) and Section 7(4)(d) exercise of sovereign rights for preservation and protection of marine environment and to prevent marine pollution is mandated and it being of exclusive jurisdiction to India would require no specific Notification in terms of sub section 7 of Section 7 and sub section 6 of Section 6 in relation to the environmental laws

including the Act of 2010. These laws *ipso facto* would become operative by virtue of these provisions and the International Conventions. Furthermore, there is no conflict between International Conventions and law of the land rather they are complementary to each other insofar as achieving the object of protecting the marine environment is concerned. Thus, in our considered view, the lack of specific Notification would not render the environmental laws ineffective and inapplicable in face of the constitutional law, statutory provisions and International Conventions.

84. The Indian Constitution is supreme. Part III of the Constitution relating to Fundamental Rights is the paramount chapter of the Indian Constitution. The golden triangle of Article 14, 19 and 21 has been held to be the basic structure of the Constitution. Article 21 has been expanded so as to include the right to clean and decent environment. This right is an integral part of right to life. The protection against marine pollution and protection of coastal areas is part of the environment of the country. As we have already discussed the Act of 1986, that defines the word 'environment' in widest possible terms. Once it has been held that right to clean and decent environment is part of right to life then the constitutional duties, Directive Principles and Citizen's duties qua the environment would equally apply to the protection of marine environment as well. Under Article 1 of the Constitution, the territory of India shall comprise the territories of the States, the Union territories and such other territories as may be acquired. The Territorial Waters, the Contiguous Zone and the Exclusive Economic Zone shall be part of Indian

Territory, of course with certain limitations. Article 297 (3) authorizes the Parliament to specify from time to time the limits of the Territorial Waters, the Continental Shelf, the Exclusive Economic Zone, and other maritime zones of India etc. The Constitution of India does not define these terms. It is the only the Act of 1976, which explains these limits. Since the right to clean and decent environment is enshrined in the Indian Constitution itself, thus its protection in terms of Constitutional law would equally apply automatically. The exercise of this right and protection of the environment would equally apply in the areas where there is Indian sovereignty and/or it has sovereign rights read with International Conventions.

It needs to be specified here that the Court and Tribunal can look into the provisions of International Treaties and Conventions, and particularly when, they are not in conflict with the law of the land. Once we extend this principle to the facts and circumstances of the case, then it can in no way be stated that all the conventions afore-referred, do not bring the cause within the jurisdiction of the Government and consequently that of the Tribunal. Sovereign rights are to be exercised in accordance with both International Conventions and Statutory Provisions. The Supreme Court in the case of *Aban Loyd Chiles Offshore Ltd. v. Union of India,* (2008) 11 SCC 439 has held as under:

> "100. The question whether the Courts can look into the provisions of the international treaties/conventions is no longer res integra. This Court in *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey* has held that even in the absence of municipal law, the treaties/conventions can be looked into and enforced if they are not in conflict with the

municipal law. It was further held that the same may not be looked into but can also be used to interpret municipal laws so as to bring them in consonance with international law.

101. However, in the event where they do not run into such conflict, the sovereignty and the integrity of the republic and the supremacy of the constituted legislatures in making the laws may not be subject to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The Court held as under:

> "5. ...The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid confrontation with the comity of Nations or the well established principles of International law. But if conflict is inevitable, the latter must yield."

102. In *Vishaka and Ors. v. State of Rajasthan and Ors.*, this Court considered the question as to what would be the position in law if there was no law for effective enforcement. It was held as under:

> "14. ...The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them...."

103. Our municipal law, i.e., Maritime Zones Act, 1976 is not in conflict with the international law, rather the same is in consonance with UNCLOS, 1982.

85. In support of the argument, reliance has also been placed on the case of *Republic of Italy* (supra). In that case, the Supreme Court had observed that enactments like Indian Penal Code and Code of

Criminal Procedure would not automatically apply to the Contiguous Zone and Exclusive Economic Zone and that it would require a Notification. That position of law can hardly be disputed, but in the present case we are not concerned with any law which does not itself form part of the Act of 1976 and International Conventions. Once it is an integral part of that Statute and Convention the restriction would be rendered ineffective.

86. The judgment of the Supreme Court would not be of any benefit to the respective respondents. Not only is the case specifically covered under the Statute and the Convention but even under the general principles of law, Act of 1986, Act of 2010 and the Constitution of India. The case would squarely fall within the ambit and scope of the jurisdiction of the Tribunal.

87. Coming to the other leg of the argument, in relation to jurisdiction the contention is that as the proceedings under the Act of 1958 had been initiated by issuance of notice in terms of Section 356J of the Act of 1958 and a FIR under Section 7, 8, 9 of the Act of 1986 and under Sections 43 and 45A of the Act of 1974 had been registered with the Yellow Gate Police Station, Mumbai, the jurisdiction of the Tribunal shall stand ousted. This argument is again without any substance. Chapter XIA deals with prevention and containment of pollution of the sea by oil and this is a very limited and specific jurisdiction vested in the Central Government. The Indian Coast Guard had issued a notice under Section 356J of the Act of 1958 which is primarily concerned with containment of accidental pollution. In this behalf, preventive

steps were taken and other ships, bodies and authorities were directed to help in saving the crew and avoiding the environmental pollution. As already noticed, a number of ships had been called to help in rescue operation, prevention and control of the pollution. So the exercise of jurisdiction under the Act of 1958 stood exhausted when measures were taken to prevent further continuation of oil spills and other ships were called upon to help and when the crew was rescued and other preventive steps were taken. In this behalf, the coastal authorities were even summoned to help in the operation and a sum of rupees more than rupees three crores as already stated, was incurred by the Indian Coast Guard for which they have prayed for refund and/or reimbursement thereof. This jurisdiction under the Act of 1958 is not relatable to compensation and damage caused to the environment, more particularly, when it is a continuing offence of causing pollution and damage, even in future. The degradation and damage to the environment and ecology more particularly in the marine environment is a matter which would be squarely covered under the jurisdiction of this Tribunal. As of now, it has not even culminated in filing of challan before the Court of competent jurisdiction. We are informed that none of the parties had challenged the said FIR including owner of that ship.

It is a settled position in law that there could be concurrent proceedings initiated and continued under different laws unless and until they are hit by the Principle of Double Jeopardy and/or are specifically barred under a statute. However, in the present case, the jurisdiction of this Tribunal under Sections 15 & 17 of the Act of 2010

is independent of any other proceedings. In exercise of the powers vested in the Tribunal, directions could be issued for preventing and controlling of pollution and removal of the pollutants spread by the ship and its cargo as well as direct payment of environmental compensation. In fact, the proceeding under the Act of 1958 has been carried out by the Central Government in exercise of the statutory provisions but it does not include judicial proceedings pending before a Court or Tribunal. Similarly, the pendency of investigation with respect to lodging of FIR would again not be an obstacle in institution and continuation of the proceedings before this Tribunal. It is a settled principle of law that under the independent jurisdiction where criminal proceedings are initiated, civil proceedings, even on the same cause of action are not excluded or barred. It is more so when the civil proceedings are proceeded with under a special statute relating to the subject in question. All these three Acts operate in different fields and have no conflict. Once different Acts operate in their own field there cannot be stated to be multiplicity of litigation. The criminal offences committed under Sections 7, 8 & 9 of the Act of 1986 and/or under Section 43 & 45A of the Act of 1974 would not divest the Boards or forums or the Tribunal under the provisions of the same Acts from carrying out civil proceedings for compensation, restoration and restitution. These are independent proceedings. These three enactments operate in their own sphere and the proceedings in accordance with law can be initiated, continued and brought to their logical end. The Respondents could hardly take the plea of multiplicity of litigation for two reasons. Firstly, this is no ground in

the eye of law as, when the law permits initiation and continuation of proceedings, such proceedings will have to be continued. Secondly, even from their own conduct none of the Respondents can take this plea as a matter of right inasmuch as it is a plea in equity and not in law. The Respondents have not come to the Tribunal with clean hands and none of the proceedings overlap with the proceedings and judgments of the Tribunal. The issues before the Tribunal are completely distinct and different. Even the proceedings taken and the direction issued under 356 J and K of the Act of 1958 would come to the aid of continuation of these proceedings, as they have suggested that pollution was caused by oil spill as well as by the ship and the cargo. The presentation prepared by the DG Shipping and the Annamalai University have also established contribution of pollution and damage on the part of the Respondents. Thus, we decide this issue in favour of the Applicant and against the Respondents.

88. The violation of the directions issued under Section 356 J and K of the Act of 1958, results in penal consequences and that is in accordance with the provisions of Section 436 of the said Act. None of the Respondents had ever objected to the jurisdiction of the Indian Government to issue directions under Section 356 J and in fact they conceded thereto and so would be liable for the consequences that would flow therefrom.

Issue No. 5: Whether the Ship, M.V. RAK Carrier was seaworthy at the commencement of the voyage and remained so, till its arrival at about 20 Nautical Miles off the coast of Mumbai where it sank on 4th August, 2011?

89. From the record before the Tribunal, it appears that the ship in question sailed with cargo of 60054 MT of coal on 14th June, 2011 from Indonesia to Dahej in Gujarat. The Respondents have stated that the ship had registry certificate, insurance, telecommunication certificate, trim and stability certificate, SOPEP certificate, statement of compliance of International Anti Fouling Systems, Bunker Blue Card. Some of these documents have been placed on record by Respondent no. 11. In accordance with these documents, the ship was registered with the Republic of Panama and was flying the flag of Panama itself. The ship was registered and satisfied the requirements of the provisions of the Act of 1958 in that behalf. In the Commercial and Brokerage Agreement, which was entered into between Respondents no. 5 and 11, Respondent no. 5 has made a declaration under clause-VII of the agreement that it was obliged to keep the ship in a fit and seaworthy state through their operational manager as well as their technical manager and team throughout the voyage and whatever engagements/assessments are made under the said agreement by Respondent no. 11. This agreement had been signed between Respondents no. 5 and 11. This is what has been relied upon by the Respondents to demonstrate that the ship in question was seaworthy. However, these facts stand denied by the incident and the accident investigation report. The ship in fact was facing technical and mechanical problems since 29th July, 2011 as it remained anchored off Mumbai coast and did not carry on with its voyage to Dahej in Gujarat. According to Respondent no. 12, they had been approached through their sister concern in Qatar to provide bunkers and other

assistance and mechanical help to the ship as it was in some serious difficulties and unable to sail. Respondent no. 12 then had provided the bunker and other help to the ship to make it seaworthy. However, these efforts failed to bring the desired results and the ship sank on 4th August, 2011. The condition of the ship in terms of engine maintenance and bunker was so below the required standards that it faced fear of sinking and even the crew members of the ship had to be rescued by the Indian Coast Guard in such an emergency situation. Not only this, as already stated even other ships were called to aid with saving of the ship and its crew. However, ultimately, only the crew could be saved. We would now revert to the inspection reports that have been placed on record. The D.G. Shipping, Government of India had directed and appointed an inspection team to inspect the ship through Mercantile Marine Department to know the exact condition of the ship and the possibility of it covering the last part of the voyage. The Mercantile Marine Department, Mumbai had submitted its report after conducting physical inspection of the ship on the morning of 4th August, 2011. According to this report, the anchorage area was 20 miles from Mumbai coast. As per the facts recorded in this report, the ship was built in the year 1984 at Hitachi Zosen Corp. Ariake, Nagasu, Japan. With a deadweight 63695, engine power 15400 BHP, service speed 14 knots. On 14th June, 2011, the ship sailed from port Lubuk Tutung, Indonesia for port Dahej, India and was loaded with 60054 MT cargo of coal in bulk. Ship arrived on 21st June and sailed on 24th June, 2011 after receiving bunkers, store, some spares. It is reported that to avoid unexpected pollution no

attempts were made to pump out ballast from no. 1 DBT port and startboard or no. 2 DBT startboard tanks, ship sailed through Malacca Strait in same condition of stability with trim down by head about 1.7 meters. On 27th June, 2011, it entered Bay of Bengal. On 29th June, 2011 water was seen in no. 1 cargo hold from aft hatch entrance above the cargo in level with 12-13th rung of ladder. Water from no. 1 DBT port and startboard was pumped out which was filled in time and again at varying levels, but the reason of water filling in DB tanks could not be traced. Ship had frequent engine stoppages and black outs due to technical snags in the generators, boilers and other auxiliary machineries during her passage in Bay of Bengal and also on her next leg of voyage up to Mumbai. While ship was off Colombo, the urgent message about ingress of water in no. 1 cargo hold was sent by the master to managers on 5th July, 2011 and request for supply of heavy duty submersible pump was made. However, the company did not arrange for the same and advised the ship to continue the voyage. The source of ingress of water in DBT and cargo hold could not be found. Ship experienced SW monsoon weather around the south coast of Sri Lanka and in the Arabian Sea. From 5th July onward the ship experienced frequent break down of the main engine. On 18th July, around 2300 hrs Chief Engineer reported to the master that he could not transfer diesel oil from DB tank to service tank. Service tank had around 6 ton which was not enough to complete the voyage to reach the destination, Dahej. The message was conveyed to the fleet manager of the company who advised them to call the Mumbai port. The Master informed the port and VTMS and

gave reason for the call. The remaining part of the report is necessary to be referred to at this stage which is as under:

> "On 19th July vessel dropped anchor around 0900LT in "B" anchorage of Mumbai outer harbour. On this date there was water also seen in no. 2 cargo hold. Vessel asked for supply of D.O. also some provisions and spares for generator and 2 submersible pumps to pump out the water from hold no. 1 and 2. This was the important item which vessel required to pump out water from cargo holds.
> On 24th July supply boat "ALBATROSS 19" approached the vessel for replenishment of bunkers but could not do so due to very rough weather, hence the supply was deferred till weather subsides. On 29th July supply boat arrived again and transfer of bunker was arranged by connection of long hose (150m). 30 MT of D.O., 25MT of FW, Generator spares and small submersible pump was supplied. But this small submersible pump served no purpose.
> After replenishment bunkers E/R was given due notice to prepare engine and C/O was asked to heave up anchor to proceed to Dahej. After 20 minutes of having heaved up anchor the C/E reported to Master that there was some problem in generator and would take some time to rectify it. C/O was then asked again to drop anchor.
> Master reported the matter to company stating that ship could not sail till she is seaworthy and it was not possible to continue to voyage to Gulf of Khambhat with one generator, as it was not safe to drift somewhere in Gulf of Khambhat during monsoon. The Owner representatives asked him not to sail if it was not safe and stay at Mumbai till repairing of generator.
> After repair on 1st August generator started working but the ship could not sail because of water in Hold no. 1 & also in Hold no. 2 which increased the forward draft. Water from cargo holds through coal cargo could not be pumped out through hold bilge pumps, so Master called the Owner for urgent supply of big size submersible pumps.
> Due to continuous ingress of water in forward cargo hold and double bottom tanks, the forward freeboard had reduced so much that continuous solid seas was shipping on deck, particularly on port side which broke fuel oil filling pipe to forward fuel oil tanks (port and stbd.)
> By 3rd August the trim to forward increased more as ingress of water continued adding water in forward cofferdam as well fuel oil tank. The water from holds and these tanks could not be pumped out by bilge and

ballast pumps. All these happenings were reported the Master that supply boat has been arranged which shall leave the port at 2300hrs and reach the ship by 0300hours on 04th August.

Master called up the technical superintendent who was in Mumbai since 4th August 2011 and apprised him of the situation on phone that the forecastle bulwark was almost submerged in water.

As the situation appeared out of control and grave, the Master called Owner, Managers & Superintendent informing them that he will have to call up Mumbai port and its VTMS for assistance.

Master called VTMS for assistance around 0700 on 4 August 2011 and in a quick response VTMS briefed Navy. Immediately after receiving the distress signal from the ship, Coastguard, Navy Helicopters and boats were deployed for rescue operations.

With joint rescue operation by Indian Navy, Coast Guard, merchant vessel M.V. Stella and towing vessel Smit Lumba and 30 crew members of ship which included 21 Indonesians, 6 Jordanians, and 2 Romanians were brought safely ashore from sinking vessel MV RAK CARRIER.

There was oil leak reported from sunken ship, the coast guard ship Samudra Prahar on patrol immediately responded and used dispersant to neutralize the oil spill. Later the pollution by her oil was reported up to 7miles and to some beaches of Mumbai."

90. This report noticed that apparently there was no loss of life but pollution was reported. This preliminary enquiry had been prepared while taking into consideration the DG Shipping guidelines and instruction to Surveyors, applicable IMO resolution and guidelines on casualty investigation. During the inquiry, the investigation team recorded the statement of master, officers and the marine casualty report was prepared with the assistance of the master. A significant observation made by the inspecting team was that no sufficient time was allowed for briefing and familiarising of the joining crew with regard to the ship specific operation of her equipment, machineries and to check the condition of various compartments and the system of

ballast, bilge, bunker, etc. This shows that the owner of the ship withheld the information available to them and even failed to ensure that the crew management and master inspect the ship in its entirety and he did not provide them with complete information about the ship. In this report, even the photographs were taken of the ship, the ships and the helicopters were called for rescue purposes. The photographs on record show the ship was in such unsustainable condition that even the boat that had approached to supply the diesel oil could not do so because of heavy water inside the ship and due to heavy swell boat had to return. On 29th July, 2011, the supply boat Albatross 19 again came with 150 mtrs of hose, generator spare parts and fresh water. The boat supplied 30 MT of DO, 25 MT of FW and spare parts. The boat also supplied one small plastic submersible pump. After the boat cast off, the ship heaved up anchor and proceeded to sea. After some time, the Chief Engineer reported to the master that there was some problem in the generator, so the master dropped the anchor once again, to rectify the defect. The Master informed the company wherein the company advised the master to proceed only on one generator and repair the second generator en-route to Dahej. Master expressed apprehensions for proceeding on one generator and decided to continue at anchorage till the other generator was repaired. On 30th July, 2011 the water level in cargo hold no. 2 was same as of no. 1 cargo hold, above the cargo level. On 31st July, 2011, there was water seen in no. 3 cargo hold too, slightly above the cargo level. There was water flooded in forward cofferdam too. There was water ingress suspected in no. 1 fuel oil tanks through

this pipe. Photographs were taken by the investigation agent clarifying the situation. On 3rd August, 2011, the master again desperately asked to supply high capacity submersible pumps. The owner's representative who was in Mumbai, replied that boat with pumps will start from port at 2300 hrs and will reach by 0300 hrs on 4th August, 2011. On 3rd August, 2011, at around 2000 hrs high level alarm sounded in ballast pump room for no. 1 fuel oil tanks forward. On 4th August, 2011, at about 0530 hrs, Chief Officer called the master to the wheelhouse to see the situation. Master found the forecastle bulwark almost submerged in water. The master called the owner once again and asked for whereabout of the boat with pumps and conveyed to him that situation had worsened considerably. The master instructed the Chief Engineer to start the ballast pump and bilge pump, after starting the pumps for 10 to 30 minutes, the pumps did not take any suction. The master briefed owners and the managers about the grave situation and informed them that he shall be calling Mumbai VTS for help. On 4th August, 2011, master called Mumbai VTS for assistance around 0700 hrs. In response to distress call from ship the Mumbai VTS called Indian Navy to rescue the crew. Indian Navy called the master and informed that a tug boat *Smit Lumba* will proceed to them. Master asked the tug to come and help in pumping out water from hold no. 1, 2 and 3 and if tug can cut the anchor chain of the ship and tow her to safe location. Tug master replied that the tug will be able to reach only by 0100 hrs. The Navy helicopters came at about 0830 hrs and master decided to reduce the number of crew from the ship. 15 to 16 crews were sent ashore by the

helicopter. Around 0930 hrs progressive flooding of hold no. 3 & 4 started and hold no. 3 was full of water. Till that time, tug had not arrived. Thus, the helicopter rescued the remaining last group of master, Chief Officer and 3rd engineer also to the Naval base. The photographs have been placed on record to show the Navy helicopter rescuing the crew of the sinking ship.

91. In this background, it would be useful to refer to the observations, conclusions and the recommendations in the report, which read as under:

> **"Observations:**
>
> - After taking over from the previous owner proper maintenance of the machineries, hull, and cargo holds, ballast tanks have not been carried out properly. It appears from the statements of the ship's personals that after vessel's class have been suspended by the Lloyds, the vessel was either not classed or was classed with a non-IACS member. This shows that there was a lack of maintenance taken place during the change of the ownership of the vessel.
> - There are indications that statutory surveys of the vessel were carried out in a biased manner by the surveyor of the recognised organization who holds a senior management designation in manager's office to whom the document of compliance is issued. The name of the Auditor to RO is spelled differently on DOC, SMC and ISSC.
> - After takeover of vessel and on joining of sailing crew there were numbers of deficiencies and defect on deck and engine reported to the representative of owner/manager on board but no effort were made to r rectify them.
> - Vessel after berthing at Lubuk Tutung Port, two Diesel generators were not working. While carrying out repair ship staff found that there were no spares available to carry out repairs of the machineries, which means after taking over the vessel, owner have not put enough effort to supply adequate spares on board before here

commercial deployment. Vessel was sailing on high seas and the technical snags were not reported to the concerned authorities.

- Based on the statements received from the ship staff during sailing, it is understood that the auxiliary boiler also had frequent water tubes cracks, several times which were frequently welded and repaired by the ship staff. From time to time Chief Engineer informed the same to the owner through the master but necessary action were not taken by the owner.
- It appears from the above mentioned points that from the beginning of the taking over of the vessel, proper care and maintenance were not taken by the owner. There was shortage of spare and equipments to deal with contingencies.
- There was no sufficient time allowed for briefing and familiarize of joining crew with regard to ship specific operation of her equipment, machineries and to check condition of various compartment and system of ballast, bilge, bunker, etc.

Conclusion:

- Water ingress to various ballast tanks, Cargo holds and fuel oil tanks which was noticed by the ship staff and necessary pumping out arrangement were carried out with whatever pumps available on board, which was not sufficient enough to tackle the distress situation arisen on board even though ingress of water had been detected in time the contingency plan to deal with ingress of water was not effectively implemented.
- Master neither asked any help from shore not considered. Even master did not consider heaving up of anchor and heave to weather, in order to reach the site of damaged pipe and repair the same. As the diameter of the broker pipe was 6 inches and ship staff was unaware of the status (open/shut position) of isolating/filling valves. The high level alarm for fuel oil tank sounded in the ballast control room indicates the ingress of water in tank either by flooding from forward cofferdam bulkhead or the filling pipe.
- While vessel was sinking Maritime Assistance Service (MAS) was not intimated as required by the international regulations.
- At the time of sinking, vessel had large amount of bunkers and ship's officers failed to discharge

their duties as required by SOPEP PLAN in preventing the oil pollution of sea.

- There was no risk assessment at the first instance of finding water in no. 1 cargo hold and no. 1 DBT port and starboard.
- Chief Officer and Second Engineer are the maintenance officers for deck and engine machineries respectively of the ship and they failed to take effective measures during contingency period as machineries were not maintained properly. Poor loading, non-follow up of sequence and delayed de-ballasting was the cause of vessel sailing down by head and because the vessel was down by head it was not possible to take suction from the fuel.
- Poor monitoring of cargo hold bilges and ballast tank sounding was an important cause of accident. Also the senior staff made no effort to trace the origin of water ingress in cargo holds and the filling of DBTs.
- Watch keeping officers second officer and third officer and watch keeping engineer third engineer and fourth engineer were observed to be negligent and did not maintain their proper watch. Duty officer failed to bring to the notice of master/chief officer about not shifting the loading crane to other cargo holds as per loading sequence. Continued loading at forward holds caused the vessel to complete cargo with 70 cm trim by head.
- Poor housekeeping by the ship staff and poor maintenance of the vessel, not complying with the previous class requirements and not engaging well reputed classification later on, proves to be the main cause of the casualty. It is understood although the vessel had a valid safety management systems implemented on board; still is observed the system has failed to achieve its goal.
- Technical failure of main engine, auxiliary engine and machineries was an important contributing factor of accident.
- Heavy weather condition added to flooding of ship compartments and causing sinking.

Recommendation:

- **Risk Assessment**: Risk assessment is a continuous process and must be reviewed if the circumstances change or there are indications that there exists greater risk than initially assumed. Failure of equipment is an indication

that the risk assessment did not identify all factors and safety barriers were insufficient. Hazard identification, risk assessment with severity and probability of occurrence must be evaluated and preventive application of controls to be decided and implemented. Later the risk assessment must be reviewed and updated, if necessary. The controls may be applied either to reduce the likelihood of occurrence of an adverse event, or to reduce the severity of the consequences.

- **Risk Management Log**: It is recommended to maintain a "Risk Management Log" on board which shall include risk name and description, likelihood, severity, priority, and mitigation/contingency plans, and any metrics defined for tracking the risk dependencies. The risk rating and priority should be determined.
- **Master's overriding Authority – ISM Element 5**: This ship's master in the event of any interference from the external sources should not hesitate to use his overriding authority for safety of crew, ship and environment protection provided, under the Safety Management System. As it was noticed by the crews that no. 1 and then no. 2 hold flooded with water on 3rd August, 2011 but master ordered abandon ship on 4th August, 2011 endangering life of crew by keeping them on board when vessel was un-seaworthy.
- **Training on critical operations and emergencies – ISM Element 6**: The organisation is recommended to impart training to all crew of its fleet on emergency drills and other critical operations which contributed to this incident and review their safety manual accordingly. High freeboard, watertight integrity and a good stability are indispensable safety factors for the work. Crew of specialised vessels need to be fully familiarized with the vessel they are operating.
- **Age of Vessel**: It is recommended that vessel more than 25 years in age calling Indian ports should be classed with IACS (International association of classification societies).
- **STABILITY OF VESSEL:** The Master shall ensure that the conditions of stability, hull strength, draft and trim of the vessel at sea and on arrival/departure at/from port and during loading/unloading cargo and bunkering, have been worked out, to secure safety of the vessel. He shall confirm the safety of the vessel by

proper GM, stress and other factors as being within appropriate limits.

- **WATERTIGHT INTEGRITY:** The importance of keeping various opening viz, hatch entrance, stores and mast house doors, air pipes, sounding pipes, vent, valves etc closed when at sea and severe consequences resulting due to non compliance must be a part of drills and training onboard. This should be made a part of emergency preparedness procedures.
  Appropriate measures must be taken to ensure the early detection of any ingress of water into working order prior to each departure port. High freeboard, watertight integrity and a good stability are indispensable safety factors and must be maintained.

- **MAINTENANCE OF THE SHIP AND EQUIPMENT - ISM ELEMENT 10:** The Company should establish that the ship is maintained in conformity with the provisions of the planned maintenance system established by the safety management system of the company.
  The Company should ensure that inspections are held at appropriate intervals; any non-conformity is reported, with its possible cause.
  Appropriate corrective action should be taken and records of these activities are maintained.
  The ship staff should identify the procedures in case of sudden operational failure of ship's equipment and machinery, which may result in hazardous situations.
- **SVDR: CHAP-5, SOLAS Regulation 20:** A vessel's VDR (voyage data recorder) where fitted must be considered "Critical Equipment". Ships Owners/Managers must develop documents and guidance on operation, maintenance and requirement for retaining of Voyage Data always in connection with abnormal situations to assist in casualty investigation. This would assist Owners and Flag State administration in investigation and prevent further incidents from happening by promulgating recommendations based on findings of the incident. Ships staff should make all efforts to remove the hard disk from VDR and carry along before abandoning the vessel.
- **SAFETY CULTURE:** The Management is recommended to encourage a genuine safety culture on board ships and ashore which is the best safeguard against accidents. Awareness

and constant vigilance on the part of all those involved and the establishment of safety as a permanent and natural feature of organizational decision-making will manage risks well.

- **ADDITIONAL SAFETY MEASURES FOR BULK CARRIER:** The Bulk Carriers built before 1 July 1999 shall comply with SOLAS Chapter XII Regulation 9 for bilge well water level alarm audible and visible on navigational bridge.

92. The findings recorded in this report cast a shadow of suspicion on the genuineness of the certificates issued prior to commencement of the voyage. In fact, the report categorically records that in all possibility, the surveyors and certification in the ship was done in a biased manner. It was stated to be de-class when inspected. After purchase, the ship condition of class was imposed with 7 numbers of deficiencies on record. These findings are indicative of a fact that all was not well with the ship prior to commencement of the voyage. The genuineness of the documents was subject to doubt. Thereafter, during the voyage at Singapore and till the time it reached about 20 Nautical Miles off the shore of Mumbai coast, it had number of technical and mechanical problems. In fact, the ship had entered the Contiguous zone of Indian waters on 19th July, 2011 from that date till it approached the VTMS on 4th August, 2011. Still, no effort was made to get in touch with the official authority for appropriate remedial measures and to ensure that the ship did not sink. Various requests were made to the owner of the ship by the master to send help by ships including bunker, oil and more importantly the pumps, high revolution pumps to ensure that the water which was entering the ship could be removed but no help was sent in time. Assurance was given that small ship had started with requisite help. Respondent

no. 12 which provided the bunkers and other help like providing diesel etc was doing so on humanitarian grounds and no steps were taken keeping in view the requirements of the ship. The master of the ship made desperate call for help to the owners which was met with no response and ultimately the master had to get in touch with VTMS which then deployed Indian Navy helicopters and it was only with extraordinary, efficient and timely steps taken by VTMS with the help of other ships and Indian Navy that every crew of the ship could be saved. Crew was lifted in batches. The owner of the ship as well as the charterer ensured that ship did not receive proper mechanical and technical assistance during its voyage. Even after Singapore, every time the master was directed to continue with the voyage without even repairing the pumps. One of which had become non-functional. Denial of appropriate repairs seen in the light of the conduct of the owner of the ship and other interested parties makes it obvious that they never cared to save the ship as their intention was to probably let the ship sink in Indian waters and to let remain there indefinitely.

The two diesel generators were not working after it started its voyage from Lubuk Tutung port and it was even found that no spare was available to carry out repairs of the machines. The owner had not put enough effort to supply the adequate spares on board before her commercial deployment. Ship was sailing on high seas and technical snag was not reported to the concerned authorities. After taking over the ship, no efforts were made to rectify the defects, after taking over the ship was not classed with a known IACS member. These deficiencies and non-performance clearly points out that from the

beginning of taking over of ship proper care and maintenance were not taken by the owner. In the conclusions, the report points out serious deficiencies even during the voyage ultimately leading to the sinking of the ship.

93. The manner in which the events have unfolded themselves and the contents of the report clearly makes out a case against the Respondents on the doctrine of *res ipsa loquitur*. It is a doctrine that belongs to the field of law of torts. It is attracted where the events and happening speaks for itself and no other proof of negligence is required beyond the accident itself. The condition of the ship, role of the owner, persistent demands of the master of the ship to the owner and other interested persons and the role played by the VTMS, Indian Navy and other ships clearly makes out the case of negligence and shows the intent of the Respondents no. 5, 7 and 11 to let the ship sink rather than to take the burden of incurring huge expenditure on repairing the same and ensuring its voyage back home.

94. The cumulative effect of the documentary evidence before us is that there were no fair intentions of these Respondents to save the ship as permitting the ship to sink with cargo was a more economical option than taking out the ship, towing it and removing the cargo. It is the case where economic interests have certainly prevailed over environmental interest. Another aspect which needs to be discussed at this stage is that besides the provisions of Act of 1958, Article 219 of the *UN Convention on Law of the Sea* deals with measures relating to seaworthiness of ship to avoid pollution. A State which, upon

request or on their own initiative, has ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatening damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and thereupon after removal of deficiencies can be permitted to sail. In the normal course of business, if the master and management of the ship had informed the authorities at Singapore on 19th July, 2011 and subsequently from its location near Mumbai, the correct position in regard to the ship, then the authorities would have inspected the ship and found out the deficiencies. At that stage, the ship was not about to sink. It is evident from the record that such approach was adopted by the Respondents to avoid investigative aspect by the competent authority as well as the penal consequences. No appropriate remedial measures were taken by the Respondents. In fact, Respondent no. 5, 7 and 11 commanded the master not to get in touch with the requisite authorities and to continue with its voyage until the master exercised the threat and actually informed the authorities on 4th August, 2011. The Articles that we have referred to in the Conventions even also make it obligatory upon the ship owner and all others concerned to sail a ship only when it is seaworthy and would not cause marine environmental pollution. In terms of the Regulation-10 of *the International Convention for Safety of Life at Sea, 1974(SOLAS)*, it is evident that a certificate 'Cargo Ship Safety Construction Certificate

shall be issued after survey of hull, machinery and equipment of cargo ships. Cargo certificate appears to have been issued without compliance of the Convention as the deficiencies pointed out in the report belies the stand taken by the Respondents that the ship was seaworthy. No effort has been made by the concerned Respondents to place on record the Safety Management Certificate as required under the Convention.

95. Similarly, Voyage Date Recorder System-Certificate of Compliance (Regulation V/18.8, SOLAS 1974), International Oil Pollution Prevention Certificate (Regulation 7, Annex-I, MARPOL) and Document of Compliance (Regulation IX/4, SOLAS 1974; ISM Code Para-13,) have not been placed on record. The contention on behalf of the ship owner and persons interested that they were not able to collect the record is again untenable. Under the Convention and the law in force, the certificates are to be kept on the Deck which will be the last portion of the ship to sink. The ship was in serious trouble since 19th July, 2011 and they had more than ample time to collect all their records.

Respondent no. 11 has placed the copies of most of the certificates on record before the Tribunal, but did not even make an effort to place these documents before the inspecting authorities at the relevant time nor did they offer any plausible explanation in that behalf. It must be noticed, that on the basis of the documents produced, statements recorded and upon physical inspection, the inspection report has specifically recorded a finding that the

documents of seaworthiness in relation to the ship were issued with a biased mind. (*emphasis supplied*).

96. To ensure seaworthiness is the obligation of all the persons responsible for the voyage of the ship. To provide seaworthy ship before beginning of the voyage is an absolute obligation of the carrier, and could not be discarded by show of due diligence. The implied warranty was stated in *Steel v. State Line Steamship Company* by Lord Blackburn as an obligation "not merely that they should do their best to make the ship fit, but the ship should really be fit". The only relevance of the standards of the reasonably prudent owner is to ask whether, if he had known of the defect (my emphasis), he would have taken steps to rectify it. Normally, seaworthiness is divided into three components; i) physical condition of the ship and its equipments, ii) the competence and efficiency of the crew and master and iii) the adequacy of stores and documentation. This was so explained by Justice Cresswell in "*Papera Traders Co. Ltd. v. Hyundai Merchant Marine Co. Ltd*. (2002) 1 Lloyd's Rep. 719. [*Reference: The carriage of Goods by Sea Conventions – A comparative study of Seaworthiness and the list of exclusions*]

97. In the present case, all the three components have been specifically found to be deficient and/or even non-performing. Much less to say that they in fact failed to take remedial and rectifiable steps within a reasonable time, in fact, not till the ship sank. Thus, we conclude that the ship was not seaworthy at the time of commencement and continuation of the voyage.

Issue No. 6: Whether on 4th August, 2011 the Ship while it sank or immediately thereafter caused pollution by oil spill or otherwise? Further, whether the sunk ship even presently lying in the 'Contiguous Zone' along with its cargo, has caused in the past and is a continuous source of pollution at that site to the sea, aquatic life and/or to the shore itself?

98. At the cost of repetition, we may notice the undisputed and admitted facts. The ship was on voyage from Indonesia to Dahej, Gujarat. It was carrying more than 60054 MT coal in its holds. The Ship contained 290 MT of oil and 50 tonnes of diesel oil. It is further undisputed that it developed mechanical defects even at Singapore and thereafter. It reached the off shore Mumbai coast on 19th July, 2011. Facing mechanical and technical defects, a distress call was made in the morning of 4th August, 2011. Few hours thereafter the ship sank. When the ship sank, there was serious oil spill in the entire area and on 5th August, 2011. Thin/broken sheen of oil of approximately 200m in breadth extending towards south easterly direction upto 2.5 Nautical Miles with every passing day, it was increasing in width and distance and gradually it reached the shore of Mumbai. It affected various beaches amongst others, including Juhu, Madh, and Marve. It is proved on record that there was continuous leakage of approximately 2-2.5 T oil moving ENE-ESE direction upto 7 Nautical Miles from the sunken ship on 7th August, 2011. The Coast Guard team comprising of 30 enrolled personnel alongwith 70 workers of Brihan Mumbai Municipal Corporation started the cleanup operation at all the five beaches. The quantum of oil spill and diesel was very high and intense. The Respondent no. 12 had also sent oil

and diesel to the ship. As per the master, he was unable to transfer the oil from one section to another because the pumps were not working effectively. The inflow of water into the ship was increasing with the passage of time on the one hand, while on the other, oil spill and leakage from the ship was also increasing at a very rapid speed.

99. During the first few hours, oil was leaking at the rate of 1–2 tonnes per hour and on August 12, 2011 according to the Applicant, the rate of oil spill was 7 to 8 tonnes per day as per the information of coast guard. The oil spill has caused various kinds of pollution. It had affected the water, aquatic life, the mangroves on the coast and it even affected the human health and marine environment in the coastal area. It cannot be disputed that such a heavy layer of oil in the water has affected the mangroves and other living beings at the shore. It is one of the three sources of pollution and in fact the pollution resulting from the sunken ship and pollution resulting from the cargo are the other two causes of pollution. We have mentioned above the pollution resulting from the oil spill. The ship contains various metallic parts, wooden and PVC material and paint coatings, grease & oil, wood and most importantly asbestos. Each one of them is a source of water pollution. It is bound to affect the aquatic life and the sea water itself. It may be that it would not do so immediately but over a period of time. It is a scientifically established fact that the ship with all its infrastructure is likely to be a continuous pollutant of the marine environment.

D.G. Shipping had written different emails with regard to oil pollution on the coast of Mumbai caused by the incident of 4th August, 2011. It is on record that M/s. Libra Shipping Services which had signed the Charter Party Agreement with Respondent no. 7, in the mails had stated that due to escape or due to discharge of oil from the ship, the same was found floating around the beaches and bay, river, channels, creek and water ways within the coastal line waters of India. This had resulted in deleterious impact on fauna and flora in the area and eco-system as a whole. It also cause unlawful nuisance in and around the public place including but not limited to the beaches, bay river channels, water way and creek within the coastal water of India. On record it has also been pointed out that a Monsoon Advisory, 2009 was issued to the ship, drawing their attention which in turn stated that in the event of release of oil or hazardous substance or other wastes from the ship specified in *the International Convention on Prevention of Pollution at Sea (MARPOL)*, 1973-78 and other relevant Conventions as applicable the master shall immediately report all such incidents to the concerned authorities, Indian Coast Guard, Maritime State Board. These authorities were required to send the first report on marine casualty on pollution incident to DG Commencer Mumbai. In other words, if the appropriate reports were sent by the master of the ship to the authorities, the extent of pollution could have certainly been controlled in a timely manner, if not entirely prevented. The oil could have been transferred to other ships thus preventing and controlling the marine pollution.

In co-ordination with Maharashtra Pollution Control Board, National Environmental Engineering Research Institute had conducted an environmental assessment of Mumbai oil spill from the ship in question. In this report, firstly, it was specified that the report was based upon a survey conducted by this institute. The methodology of assessment had been explained in the report. It refers to selective sampling, random sampling, systematic sampling, shoreline Sediment Monitoring and Assessment Methodology, etc. Beach fauna and coastal flora assessment was also done during the study. It noticed short term impact on sediments. Methodology of remote sensing also adopted. This detailed study also related to each of the beaches afore-stated. The report concluded that the cost of damage incurred as a result of the sinking of the ship and the oil spill was huge. Especially the evaluation of the cost of environmental damage comprehend the technical factors like type of oil, physical, biological of economic characteristic of the coast, weather and sea conditions, spill amount, time and year of spill, response methodology and effectiveness are to be taken into consideration. The damage assessment could be ecological, social and economic. Then the report proceeded further to say that the damage mentioned in the report cannot be equated in rupee term due to the fact that there are many indirect damages which are intangible. Studies have also shown that effects of oil spill can have wide ranging impacts that can lead to long lasting environmental disasters. The oil spill may impact the environment by physical, smothering organism, chemical toxicity,

ecological changes, indirect effects. Besides all these, the oil spill particularly at the beaches can also adversely affect the tourism.

100. We may, at the cost of repetition, now again refer to the Report of NEERI-2013 and the other studies on the subject. The MV RAK Carrier, which sank nearly 20 Nautical Miles off the Mumbai coast on 4th August, 2011, due to water ingress, was carrying 340 tonnes of Bunker oil (290 tonnes of Furnace Fuel Oil and 50 tonnes of Low Sulfur High Flash High Speed Diesel (LSHFHSD) oil) at the time of accident. As per the NEERI Report the spillage of fuel oil from was reported on 6th August, 2011 from sunken vessel [NEERI (2013), Environmental Assessment of Mumbai Oil Spill from MV RAK Carrier, Final Report 42pp]. The continuous trail of the oil leak from the vessel was observed up to 12 Nautical Miles, being very thick oil up to 1 nautical mile, thick layer of oil up to 2 Nautical Miles and there after only oil sheen was seen till 12 Nautical Miles, during initial period of accident. Though prearrangement were made to combat oil spill, considerable amount reached shoreline of Bandra, Gorai, 5-6 km stretch of Alibaug coast, along Juhu beach where large oil patches were observed. The spilled fuel oil also traveled to different other coast line of the Mumbai Metropolitan region (MMR) and nearby areas like Madh, Aksa beach etc. On 7th August, 2011 as well, continuous trail of spilled oil was observed up to 12 Nautical Miles, very thick layer up to 1 nautical mile and thick layer up to 2 Nautical Miles and thin layer or oil sheen thereafter along 12 Nautical Miles. On 8th August 2011 oil trail was observed up to 5 to 8 Nautical Miles as compared to 12 Nautical Miles earlier. The tar balls were observed at the mouth of the

estuary near Alibaug as at Dadar and Bandra bandstand silvery patches of oil sheen were seen. Oil leakage continued next day with fresh oil and tar balls reported at Gorai and Juhu beach. Signs of spilled oil were also seen at INS Kunjali, Colaba, and about five Nautical Miles from Mahalaxmi temple.

101. The NEERI Report further points out that the multidate visualization of oil spread areas procured from National Remote Sensing Centre (NRSC) Hyderabad was used to understand local dynamics and spatial distribution of spilled oil along the nearest coastline. On 9th August 2011, continuous band (Green) of oil was seen distributed through 18 o 43'21"N, 72 o 16'04"E to 19 o 04'11"N, 72 o 35'28"E, drifting toward entire shoreline of Mumbai. On 10th August continuous slick (Red) was seen drifting towards Juhu and other southern coastlines of Mumbai (18 o 42'39"N, 72 o 14'45"E to 19 o 08'57"N, 72 o 34'15"E). Some broken patches (Red) were also seen heading towards Gorai, Madh and Aksa beaches (19 o 10'23"N, 72 o 34'32"E to 19 o 17'41"N, 72 o 39'59"E). On 11th August 2011 two patches of slick (Blue) were drifted from the sunken ship – one towards southern coastline i.e towards beaches of Alibaug (18 o 44'03"N, 72 o 19'59"E to 18 o 39'54"N, 72 o 29'30"E) and the other towards coastline of Juhu, Dadar areas (18 o 55'23"N, 72 o 32'47"E to 19 o 06'53"N, 72 o 42'36"E). On the day of 13th August 2011, more oil slicks (Sky blue) drifted towards shoreline into broken patches towards Alibaug coastline (18 o 40'26"N, 72 o 15'18"E to 18 o 39'58"N, 72 o 24'05"E) and some comparatively smaller patches headed in the direction of Juhu beaches (19 o 06'16"N, 72 o 41'49"E to 19 o

05’25”N, 72 o 43’09”E). Three patches (Maroon) were seen on 16th August 2011, two headed towards Juhu (18 o 40’48”N, 72 o 14’18”E to 18 o 45’42”N, 72 o 22’39”E) and southern part of Mumbai (18 o 51’39”N, 72 o 29’32”E to 18 o 57’28”N, 72 o 32’56”E) and the third showed movement towards Alibuag region (19 o 05’36”N, 72 o 37’38”E to 19 o 08’10”N, 72 o 38’59”E).

102. According to the NEERI Report, the impact of oil spill on different regions varied depending upon the locations in close vicinity of oil spill as well as extent of spread. Juhu, Gorai, Aksa and Madh were distinctly impacted, while Marve and Alibaug beaches show comparatively less impact. Oil slick movement indicate that though it was closer to south Mumbai locations such as Colaba, Navy Nagar etc, the impact was not high. The open sandy beaches of Juhu were severely impacted from the oil spill. Thick patches were seen along the shoreline, with high density of tar balls in various area of beach. Oil soaked debris was also seen accumulated in patches along the stretch of Juhu beach. The stretch of 5.80 km. was severely affected due to spilled oil along the Juhu beach.

103. On the basis of assessment of the oil spill condition the NEERI observed that even after a month of incident, shiny oil spots were prominently visible together with oil soaked debris along the coastline of Juhu beach. Madh Sandy beaches of about 2.60 km showed patches of oil along the shoreline with tar balls. After a month, tar ball aggregates were seen along the beach, but no visible oil was seen near inter tidal zone and on bed rock of the Madh island. About 2.0 Km

stretch of sandy beach of Aksa showed high level impact of oil spill. Oil sheen on accumulated water along with high density of tar balls were seen along the entire shoreline. Tar ball aggregates and large oil clumps were visible even after one month. The entire stretch of 1.90 km of Gorai Beach had high level impact with Tar ball clumps and melted tar balls. Tar balls were clearly visible along the sandy coastline of Gorai. Even after a month some patches of melted oil mixed with the sand were also seen in this area. Marve beach was least impacted and only few tar balls were seen during assessment. The entire stretch of 5.40 km of Alibaug beach, comprising of sandy beaches, lower areas of water (during low tide) as also non-sandy area like bedrocks were impacted, however the impact was not severe.

104. A critical assessment of the NEERI 2013 Report reveals that the NEERI Team, which was assigned the job of assessing the environmental impacts of the Oil Spill from the MV RAK has, unfortunately, shown total negligence to the work assigned to it. Except for reporting the geographical coordinates of the spread of the oil spill, the team has not even bothered to calculate the total area where the oil spill spread after the accident, which could have been done quite easily from the satellite data available with the team. Leaving aside the data on impact on the aquatic community vis-à- vis the oil spill, even the basic data regarding the plant and animal community of the affected area are lacking in the report. Even though the Report has been prepared and submitted in April, 2013, the discussion is frozen in time to September, 2011; it does not deliberate on anything post-September, 2011. It seems the team was only

interested in knowing whether the oil spill touches the coast line or not and nothing else. Under these circumstances, inorder to know whether the oil spill has any impact on the marine community and if yes , to what extent, we are left only with one choice, that is to take help from studies made in other parts of the world in respect of similar cases.

105. Sanders et al (1980) conducted an exhaustive study spread over several years on the impact of oil spill caused by the barge 'Florida' that ran aground early in the morning of September 16, 1969 on a rocky shoal off Fassett's Point, West Falmouth, Massachusetts, and spilled 50,000 to 700,000 liters of Number 2 fuel oil into Buzzards Bay. The oil spread over more than 1000 acres, including four miles of coastline [see Sanders et al (1980) Anatomy of an oil spill: long-term effects from the grounding of the barge Florida off West Falmouth, Massachusetts; J. Marine Research 38(2): 265 –381]. As per their study within twelve hours after the spill, marine animals began to die in great numbers. Mortality was most severe close to the accident site and least and of shortest duration at the more distant offshore stations. Faunal changes matched in intensity and duration the gradient of pollution by #2 fuel oil from the Florida, but were only occasionally related to granulometry of the sediments. The fauna in Wild Harbor River was unstable in density, diversity, and composition. Fluctuations in composition were successional. After more than five years the fauna there had only slightly recovered. Even if the fauna began to recover in diversity and density, the animals continued to suffer the ill effects of the oil; Physiological and behavioral disorders

caused by the oil resulted in impairment of growth and reproduction, and in death.

106. Loya & Rinkevich (1980) reviewed the research studies conducted during 1975 – 1980 on the impact of oil pollution on the coral reef communities [Loya & Rinkevich (1980), Effects of Oil Pollution on Coral Reef Communities Marine Ecology - Progress Series 3: 167-180]. According to them oil pollution should be considered not only with a view toward short-term but also chronic effects. However, little attention is given to what happens with the oil once it is out of sight. Community structure and species abundances of marine organisms may change for long periods of time following a single oil spill and perhaps even more so in areas subjected to chronic oil pollution. Thus, 12 years after the 'Tampico Maru' accident, abundances of certain species were still different from previous abundances (Mitchell et al., 1970), and 11 years after a spill caused by the wreck of a tanker in Casco Bay, Maine, residues of hydrocarbons which could be traced to the tanker were still present at the wreck site (Mayo et al., 1974). Loya & Rinkevich (1980) conclude that there is growing evidence to show the detrimental influence of oil pollution on coral-reef communities. According to them laboratory experiments and long-term field studies in the Red Sea witness detrimental effects of oil pollution on reef corals, such as complete lack of colonization by hermatypic corals in reef areas chronically polluted by oil, decrease in colony viability, damage to the reproductive system of corals (smaller number of breeding colonies, decrease in number of ovaria per polyp, fewer planulae per coral head

and premature planulae shedding), lower life expectancy of planulae and abnormal behavioural responses of planulae and corals. Other detrimental effects on reef corals caused by crude oil, mainly reported from the Caribbean, included lower growth rates, direct damage to tissues, thinning of cell layers and disruption of cell structure damage to tactile stimuli and normal feeding mechanisms, excessive mucus secretion leading to enhanced bacterial growth and eventual coral destruction [see Loya & Rinkevich (1980) Effects of Oil Pollution on Coral Reef Communities Marine Ecology - Progress Series 3: 167-180].

107. Matkin et al (2008) studied the impact of the oil spill on the killer whale population. The oil spill was caused by running aground of the supertanker 'Exxon Valdez' on March 24, 1989, on Bligh Reef in northeastern Prince William Sound, Alaska, spilling 42 million liters of crude oil, the largest oil spill in USA history [Matkin et al (2008) Ongoing population-level impacts on killer whales Orcinus orca following the 'Exxon Valdez' oil spill in Prince William Sound, Alaska Marine Ecology Progress Series Vol. 356: 269–281; doi: 10.3354/meps07273]. Storms and currents drove the oil through the western portion of the Sound and westward to Kodiak Island and the Alaska Peninsula, nearly 900 km from the spill site. According to them one resident pod (a group of individuals from a single female) the AB Pod, and one transient population, the AT1 Group, suffered losses of 33 and 41%, respectively, in the year following the spill. Sixteen years after 1989, AB Pod had not recovered to pre-spill numbers. Moreover, its rate of increase was significantly less than that of other resident pods that did not decline at the time of the spill. The results

of this study underscored 3 key aspects of killer whale behavior and ecology that leave them highly vulnerable to natural or anthropogenic disasters such as oil spills. First, free-ranging killer whales do not or cannot detect or avoid crude oil sheens at the water's surface and are thus susceptible to inhalation of vapors and/or oil, skin contact, and, especially in the case of mammal-eating transients, to ingestion. Second, it is clear that resident killer whale pods, even under optimal conditions, may take decades to recover from the impacts of an oil spill or other disturbance, particularly if reproductive females and/or juvenile females are lost. Third, in a small, isolated and threatened population like AT1, a major environmental perturbation can greatly hasten the decline toward extinction.

108. From the above discussed cases, it becomes quite apparent that oil spill has significant negative impacts on the marine ecology, particularly on the aquatic community. Impact of immediate nature includes the mortality of different animal species, both microscopic and macroscopic invertebrates like mollusks, arthropods, echinoderms, etc. and vertebrates, especially fish. Long term impacts include the change in the community structure caused mainly by changes in physiological and biological behavior of different species in the community due to differential impact of the oil spill.

109. It may be noted that not only the spilled oil, that spreads over the water surface and also forms tar balls, affects the aquatic community, even the dispersants used for controlling the oil spills have been shown to be harmful for the organisms living in the area.

As per NEERI Report around 7390 liters of Oil Spill Dispersant (OSD) and 1500 liters of Type-III OSD were used during the oil spill control operation, which continued from 8th August till 23 August, 2011. The use of oil dispersants is a controversial countermeasure in the effort to minimize the impact of oil spills. The risk of ecological effects depends on whether oil dispersion increases or decreases the exposure of aquatic species to the toxic components of oil. For example Ramachandran et al (2004) have reported an increase in exposure of fish to hydrocarbons with dispersion for all the three oils used by them for their experiment. They opined that the risk of Polycyclic Aromatic Hydrocarbons' (PAH) toxicity to pelagic species of fish, especially to sensitive life stages such as eggs and larvae, is enhanced by chemical dispersion. [Ramachandran et al (2004), Oil dispersant increases PAH uptake by fish exposed to crude oil Ecotoxicology and Environmental Safety, 59: 300–308].

110. From the above analytical examination of the various studies, it is evident that the Report of NEERI-2013 requires a critical analysis as the assessment in this Report lacks complete discussion and appropriate conclusions. Thus, it will not be possible for the Tribunal to wholly rely upon the Report of NEERI-2013. The other studies and reports cumulatively and clearly show that the oil spill has caused serious damage and degradation to the marine environment. The loss is not what has been actually suffered so far but it would have adverse impacts even in the future as well.

Ship:

111. The Head of the Department of Marine Science, Annamalai University, Tamil Nadu had also submitted two reports i.e. Interim Report and Final Report in furtherance to the order of the Tribunal which primarily dealt with pollution resulting from ship itself and the cargo (coal). When the matter was being heard, the Tribunal on 8th July, 2013 passed the following order:

> "During the course of the hearing, Learned counsel appearing for the parties pray for further time to answer the following:-
>
> a) Whether the sunk ship per se with its components excluding the fuel oil is likely to cause water pollution.
>
> b) Whether the coal in a heavy quantity in the sea water would cause water pollution or not.
>
> c) If the both above questions are answered in the affirmative even then does the resulting pollution loses its impact because of huge quantity of water (sea water).
>
> d) Whether India is a party to any international treaties that deals with sinking or abandonment of ships in the high seas or the territorial water of any country.
>
> In the meanwhile Notice also be issued to the Department of Marine Science, Anna Malai University, Chennai and to head of its Department to be present on the next date of hearing and submit a Report on the above questions to this Tribunal. Registry to issue Notice to the said University today itself by email fax and telephonically. Ministry of Shipping to file its Affidavit within two weeks from today. List on 01st August, 2013."

112. In furtherance to the above order, initially an interim report was submitted and thereafter a final report. It provided an answer to the above question. It was stated that, if the duration was short, then the chemical substances in the ship would have a lesser pollution impact. However, referring to *The International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL)*, it was stated that cases of pollution from noxious liquid substances, harmful substances and

garbage from ships would cause pollution. One negative side, the sunken ship contains metallic parts, which over the years may become corroded to the point where they are liable to start leaking toxic substances. Some of these toxic substances, such as mercury, are not biodegradable and can cause contamination of the food chain in the ocean. It was also noticed that ship wrecks and waste dumping into the Ocean are among the sources of marine pollution.

113. Studies have shown that it can also have irreversible effects on marine eco-system. Data from oil spills and laboratory research indicate that the egg and larva forms of many species are especially sensitive to petroleum hydrocarbons, even in an extremely small quantity and at low concentration and that the impact on many life stages of numerous species, especially birds and fur-bearing marine mammals such as seals, sea lions, and sea otters, can be severe. And long term exposure to low concentrations can sometimes be as harmful as acute, short term exposure to higher concentrations. Some 75% of sunken wrecks date back to the Second World War; their metal structures are ageing and their metal plates are deteriorating, thus threatening to release their contents into the ocean due to the effects of corrosion. The mechanism of steel and iron rates of corrosion in under-water wrecks are reasonably well understood (*MacLeod, 2002*). Corrosion will affect the marine growth by reducing the level of dissolved oxygen, which in turn affects the salinity and water temperature.

114. Besides what we have stated above, one of the adverse impacts of the sunk ship is release of asbestos from the ship with the passage of time. This would be consumed by the fishes and other species in the sea water which will have a double disadvantage. Firstly, it would harm such species themselves and secondly, it will then travel in the food chain reaching human beings. Having dealt with the pollution resulting from the ship and oil spill, now let us also examine the adverse impacts of the ship's cargo on the marine environment.

In this regard, it may be noticed that in furtherance to the order of the Tribunal dated 8th July, 2013, the two reports submitted by Annamalai University also dealt with the pollution resulting from 60054 MT of coal in the ship, which is now lying on the seabed since 4th August, 2011. The ship in question was chartered by Respondent no. 6. Admittedly, Respondent no. 6 is the owner of the consignment. Reports submitted by Annamalai University show that coal is a heterogeneous material and varies widely in texture and content of water, carbon, organic compounds and mineral impurities. Its constituents include potential toxicants such as polycyclic aromatic hydrocarbons (PAHs) and trace metals/metalloids. When sufficient quantity of coal is present in the marine environment, it will certainly have physical impact on organisms, similar to those of other suspended or deposited sediments. Coal often contains a wide range of pollutants including antimony, arsenic, mercury, lead and other elements that are toxic even at low concentration. There is every possibility that the pollution effects may be dissipated in the long run due to the presence of large quantum of sea water. The pollution

effect gets diluted with increasing distance from the sunken ship. However, local damage to biodiversity, to endangered critical habitats nearer to the sunken site is inevitable at the time of accident and this includes physical damage also. It is also stated in the report that in the present case, the ship was carrying 60054MT of coal, mined from Indonesia and the coal is assumed to be of the bituminous type with higher heat content, containing several inorganic and inorganic chemicals including toxic ones. Many of these chemicals may disperse or leach from coal spilled by the ship upon contact with water. There are studies referred in the report which are inconclusive. It is also stated that physical effects of coal can have more immediate effect on the biota than any potential toxic effects. Though toxicological effects of coal have received little attention and this aspect needs research intervention on biological response to coal especially at higher levels of biological organization.

115. At this stage, we may also refer to the impact of dumping of coal on the marine environment based on different studies and conventions.

116. A Panama-flagged cargo ship named MV RAK Carrier sank nearly 20 Nautical Miles off the Mumbai coast on 4th August, 2011, due to water ingress. The geographical position of the sunken ship is 18o 46'29"N, 72o 29'19"E.

117. The 1982 United Nations Convention on the Law of the Sea (Article 1.1.4) defines marine pollution as "*the introduction by man, directly or indirectly, of substances or energy into the marine*

environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities". The ship sinking accident is said to have led to the pollution of the marine environment on three counts: (a) Dumping of the cargo on the ship, i.e., coal in to the sea; (b) Release of the Fuel oil stored on board and the resultant oil spill and (c) wreckage of the ship itself, which contained different materials used in its fabrication, i.e., metallic parts, asbestos, wooden and PVC material and paint coatings.

118. Coal, a naturally occurring combustible solid, is one of the most important and abundant energy sources of the world. From its introduction 4,000 years ago as a fuel for heating and cooking, to its 19th and 20th century use in generating electricity and as a chemical feedstock , coal, along with oil and natural gas, has remained an important source of energy. Coal is a heterogeneous material and different forms vary in their physical and chemical properties.

119. The American Standards Association (ASA) and the American Society for Testing Materials (ASTM) has established four coal classes or ranks—anthracite, bituminous, sub-bituminous, and lignite-based on fixed-carbon content and heating value measured in British thermal units per pound (Btu/lb). Anthracite, a hard black coal that burns with little flame and smoke, has the highest fixed-carbon

content, 86–98%, and a heating value of 13,500–15,600 Btu/lb. Bituminous coal has 46–86% fixed-carbon content and a heating value of 11,000–15,000 Btu/lb. It is the most abundant economically recoverable coal globally and the main fuel burned in steam turbine-powered electric generating plants. Sub-bituminous coal has 46–60% fixed-carbon content and a heating value of 8,300 – 13,000 Btu/lb. The fourth class, lignite, a soft brownish-black coal, has also 46–60% fixed-carbon content, but the lowest heating value, 5,500 – 8,300 Btu/lb.

120. Coal has been traded by sea at least since Roman times. Transport of coal by sea (including international trade) is dominated by hard coals, bituminous types in particular. The latter are used for electricity generation ('thermal' or 'steam' coal) and for industrial processes, particularly the manufacture of steel ('coking' coal). Anthracite is the least abundant of the world's coal stocks and consequently represents only a very small part of world trade in coal, despite its high energetic and economic value. From a chemical standpoint, coal is a heterogeneous mixture of carbon and organic compounds, with a certain amount of inorganic material in the form of moisture and mineral impurities. The composition of a bituminous coal by percentage is roughly: carbon, 75 – 90; hydrogen, 4.5 – 5.5; nitrogen, 1 – 1.5; sulfur, 1 – 2; oxygen, 5 – 20; ash, 2 – 10; and moisture, 1 – 10. In addition to its predominant elemental building block, carbon, coal contains a multitude of inorganic constituents that may greatly affect its behaviour in, and interactions with, the environment. These chemical properties not only affect the behaviour

of a specific type of coal in its intended use, but also significantly determine its behaviour in the environment.

121. With the decrease of the global oil resources, coal has become more attractive for electricity production and accordingly its maritime transport has increased significantly over the years. Concomitant with increase in its maritime transport, risk of collier accidents and sinking of large quantities of unburnt coal into the marine habitat has increased. Presence of such huge quantities of coal on the sea bed and its impact on the marine ecology vis-à-vis marine pollution has attained great importance as such accidents are bound to affect the economic resources of a country. Knowing how coal behaves when immersed in seawater could indeed provide much useful information to implement accurate emergency responses. The coal under transportation generally has a particle size of 0 – 50mm. The ways in which trace elements are bound within different minerals in product coal mean that the surface area available for leaching is dependent on the particle size distribution. Furthermore, fine particles of coal are likely to float and/or form 'froth' on the surface, therefore the particle size distribution is also likely to indicate the percentage of coal that may initially be entrained in local currents and removed from a bulk carrier accident site [**Lucas & Planner (2012), Grounded or submerged bulk carrier: The potential for leaching of coal trace elements to seawater, Marine Pollution Bulletin 64 (2012) 1012–1017**]. Coal particle sizes <0.25 mm formed 'froth' on the seawater surface. These size fractions are likely to be entrained by local currents and transported away from a grounded/submerged bulk

carrier, particularly with a hull breach. Results also indicate that all coal particles <0.5 mm, are likely to be suspended and would be particularly susceptible to transport by ocean currents. The mass of coal that floats means that approximately 15.5% of the cargo may be potentially lost to ocean currents. The negative impact of fine particles of coal on fish growth is consistent with the response of marine fish to increased suspended sediments which is thought to be caused by visual impairment leading to reduced prey capture success and increased foraging time and energy expenditure. Post mortem investigation on the coal-exposed fish by Berry et al (2016) revealed coal in the alimentary tracts, which was mistakenly ingested and could have physically blocked normal feeding and digestion contributing to starvation and debilitation. In addition, suspended coal affect the fish respiration by clogging the gills filaments [**Berry *et al.* (2016), Simulated coal spill causes mortality and growth inhibition in tropical marine organisms. *Sci. Rep.*6, 25894; doi: 10.1038/srep25894**].

122. As coal settles out of suspension onto the sea bed, its most direct effect is likely to be smothering of animals and plants. Deposition of coal on the sea bed is bound to cause changes in the physical environment, particularly the character of the substratum, and give rise to indirect effects on benthic organisms. These may include infilling of rocky crevices that act as important habitats for benthic organisms such as crabs and lobsters [**Shelton (1973), Some effects of dumped solid wastes on marine life and fisheries: in *North Sea Science*, NATO North Sea Conference, Scotland**

(Goldberg, ed.) MIT Press, 415–436] and reduced sediment stability due to the relatively high erodibility of coal particles, making the sediment less suitable for animals to live in.

123. Unburnt coal can be a significant source of acidity, salinity, trace metals, hydrocarbons, chemical oxygen demand and, potentially, macronutrients to aquatic environments, which pose potential hazards to aquatic organisms [**Cheam et al. (2000), Local impacts of coal mines and power plants across Canada. II. Metals, organics and toxicity in sediments. *Water Quality Research Journal of Canada* 35, 609–631**]. A fraction of these compounds may be leached from coal upon contact with water, such as during open storage or after spillage into the aquatic environment. In the marine environment, significant impacts of acidic leachates are unlikely, due to the vast buffering capacity of seawater bicarbonate. While coal-generated salinity may not be important for the marine environment from a mass-loading perspective, the elemental composition of coal pile runoff may differ from sea water.

124. As a decomposition product of ancient plants, coal contains virtually every element found in living plant tissues, including trace metals. Metals may be present as dissolved salts in pore waters, as metallo-organic compounds, or as mineral impurities [e.g., iron in pyrite, Iron sulphide (FeS), and zinc in sphalerite, Zinc sulphide (ZnS)]. Many studies have indicated links between the minerals present in coal and the concentration of particular trace elements [see **Ward (2002), Analysis and significance of mineral matter in coal**

seams. ***International Journal of Coal Geology*** **50, 135–168**]. For example, Arsenic (As), Cadmium (Cd), Lead (Pb), Mercury (Hg), Antimony (Sb), Selenium (Se), Thallium (Tl) and Zinc (Zn) are often associated with sulphides and, therefore, show strong correlations with, for example, pyrite content of coal. Chromium and a number of other elements tend to associate with aluminosilicates, and strontium and barium are often found in the presence of carbonates and aluminophosphate minerals. Trace elements in coal of major concern include Arsenic (As), Boron (B), Cadmium (Cd), Mercury (Hg), Molybdenum (Mo), Lead (Pb), Selenium (Se), Sulphur (S), while those of minor concern include Chromium (Cr) Copper (Cu) Nickel (Ni) Vanadium (V) Zinc (Zn) Fluorine (F), Chlorine (Cl). No leaching from coal to seawater was observed for Se, Hg, Sn and Cr. There was net removal of As, B and V from seawater, that is, these elements were adsorbed to the coal resulting in a lower concentration in seawater. Leaching from coal to seawater was observed for Cd, Cu, Pb, Mn, Mo, Ni and Zn [**Lucas & Planner (2012) Grounded or submerged bulk carrier: The potential for leaching of coal trace elements to seawater, Marine Pollution Bulletin 64: 1012–1017**].

125. Unburnt coal contains uranium (U) and thorium (Th), and a variety of radioactive isotopes from the natural decay series of ^{238}U, ^{235}U and ^{232}Th, along with traces of ^{40}K. Concentrations of Th and U for most types of coal show a range of 0.5–10 ppm and 0.5–20 ppm, respectively [**Swaine 1990),** ***Trace Elements in Coal.*** **London: Butterworths].** There are no explicit studies in the literature on the aqueous leachability of radioactivity from unburnt coal, such as from

storage piles, but it is reasonable to assume that the released radioactivity will be lower than in fly ash, where the entire coal matrix is destroyed. McDonald et al. (1992), conducting a nationwide survey of radioactivity in coastal U.K. sediments, found a 710-fold concentration of ^{238}U relative to sea water in sediments at a site receiving coal spoils from a local colliery. Concentration factors for ^{210}Pb (Lead) and ^{210}Po (Polonium) were approximately 1900, compared with 300–650 for a nearby, coal-free sediment sample. Given that concentrations of radioactive elements in coal are of a similar order of magnitude as in soil or shale, and assuming a similarly low bioavailability, biological effects from the traces of radioactivity in coal can be considered highly unlikely [**Ahrens & Morrisey (2005), Biological Effects of Unburnt Coal in the Marine Environment, in: *Oceanography and Marine Biology: an Annual Review* (Gibson et al Editors) 43: 69-122**].There is, however, little published evidence demonstrating direct toxic effects of unburnt coal to marine organisms and communities. This paucity of evidence seems to uphold the hypothesis that unburnt coal is an ecotoxicologically relatively inert substance [**Chapman et al. (1996) Coal and deodorizer residues in marine sediments — contaminants or pollutants? *Environmental Toxicology and Chemistry* 15: 638–642**]. Given the extensive compositional heterogeneity of coal and the diversity of weathering and exposure conditions, it seems improbable that coal as a whole can be labelled as 'toxicologically benign'.

126. As the previous discussion has shown, coal contains a plethora of compounds that may be leached upon contact with water and that

have the potential to cause toxic effects to aquatic biota. The amount of material that is leachable crucially depends on the coal type, mineral impurities and leaching conditions. For example, the majority of inorganic impurities are typically present as particulate minerals, discrete from the coal macerals (Ward 2002). Whether potentially toxic components of coal actually exert a negative impact on aquatic biota is determined by their bioavailability and the concentration they attain in the receiving environment. Thus, even though trace metals may be leached from coal piles, their concentrations after dilution by large volumes of water, such as coastal seas, may become negligible compared with other sources. Furthermore, formation of insoluble salts upon contact with sea water, complexation by dissolved organic matter in sea water or in coal leachates, adsorption onto particle surfaces, or redox reactions that result in changes of speciation or solubility may render metals leached from coal biologically unavailable. Metals and metalloids that are readily soluble under low pH conditions, such as Cd, Cu, Pb, Zn and As may become insoluble upon contact and dilution of leachates with alkaline sea water. On the other hand, particle-bound metals and metalloids that are soluble under alkaline conditions, such as Cr and Se, may become solubilised upon contact with sea water. No leaching from coal to seawater was observed for Se, Hg, Sn and Cr. There was net removal of As, B and V from seawater, that is, these elements were adsorbed to the coal resulting in a lower concentration in seawater. Leaching from coal to seawater was observed for Cd, Cu, Pb, Mn, Mo, Ni and Zn.

[**Jaffrennou et al (2007) Simulations of accidental coal immersion; Marine Pollution Bulletin 54: 1932–1939**].

127. The majority of the organic carbon in coal is believed to exist in the form of large, 5- or 6-membered rings of aromatic molecules and aromaticity increases with rank or coalification. Among the aromatic compounds, polycyclic aromatic hydrocarbons (PAHs) are of particular environmental interest, because they can be mutagenic or can exert narcotic toxicity when present in bioavailable form. Studies of aquatic sediment contamination in the state of Washington (U.S.) have found high PAH concentrations within a few kilometres of industrial facilities or river systems draining coal-bearing strata [**Barrick & Prahl (1987), Hydrocarbon geochemistry of the Puget Sound region: III. Polycyclic aromatic hydrocarbons in sediments. *Estuarine Coastal and Shelf Science* 25: 175–191**]. PAHs that commonly occur in measurable concentrations in coal leachates include naphthalene, phenanthrene, chrysene, fluoranthene and pyrene. Because PAHs are poorly water soluble and highly hydrophobic, they have a high affinity for particles, and especially for the hydrophobic domains of organic matter or condensed forms of carbon [**Bucheli & Gustafsson (2000), Quantification of the soot-water distribution coefficient of PAHs provides mechanistic basis for enhanced sorption observations. *Environmental Science and Technology* 34: 5144–5151**]. According to Chapman et al (1996) coal appears to be a contaminant rather than a pollutant in aquatic sediments; that is, constituents such as PAHs do not readily leach, are not bioavailable, and do not adversely affect exposed biota.

However, the presence of coal can, if undetected, result in highly variable PAH measurements in sediments and in unrealistically high TOC concentrations.[**Chapman et al (1996) Coal and Deodorizer Residues in Marine Sediments – Contaminants or Pollutants? Environmental Toxicology and Chemistry, Vol. 15, No. 5: 638–642**].

128. Coal particles may bind and stabilise PAHs either by incorporation into the solid coal matrix or by strong adsorption to surfaces that probably act quite similarly to activated carbon [**Ghosh et al. (2001), Particle-scale investigation of PAH desorption kinetics and thermodynamics from sediment. *Environmental Science and Technology* 35: 3468–3475**]. The presence of coal in aquatic sediments can therefore result in elevated and highly variable PAH and total organic carbon (TOC) concentrations to which equilibrium partition theory does not apply. In a study of freshwater fishes, Carlson et al. (1979) observed that rainbow trout and fathead minnows (*Pimephales promelas*) exposed to centrifuged coal leachates for 3–24 wk showed no increased mortality, no diminished growth and no pronounced PAH bioaccumulation. However, a lower spawning success was observed in fathead minnows during 2–4 wk exposures [see **Ahrens & Morrisey (2005) Biological Effects of Unburnt Coal in the Marine Environment, in: *Oceanography and Marine Biology: an Annual Review* (Gibson et al Editors) 43: 69-122**].

129. Concerning the organic matter dissolved from coal into seawater, it was shown that the presence of coal induces an increase in the

organic matter content in seawater, which leads to an oxidative degradation of organic matter, and hence to the consumption of oxygen [**Johnson & Bustin (2006), The fate of coal dust in the marine environment. International Journal of Coal Geology 68: 57–69**]. Thus, an accidental immersion of coal in seawater could lead to anoxic conditions, which could be detrimental to the local benthic flora and fauna. Jaffrennou et al (2007) during their experiments observed that, whenever coal was immersed into seawater, the seawater fluorescence intensity increased two- or threefold, which corresponded to a humic acid release from coal into seawater which could reach 2 mg/L, while natural seawater contains only 0.85 mg/L humic acids. They further opined that although the concentration of humic acids during their experiments was not high enough to induce anoxic conditions, in case of a massive accidental coal immersion, concentrations of humic acids could become sufficient to induce anoxic conditions [**Jaffrennou et al (2007), Simulations of accidental coal immersion; Marine Pollution Bulletin 54: 1932–1939**]. According to Sanchez (2014) the PAHs, studies demonstrate that "Sampling, analysis, and interpretation of PAHs in sediments from such sources as coal remain problematic" (Chapman et al, 1996). However, recent studies show that the amounts released by coal into the seawater are too low to be detectable (Jaffrennou et al., 2007). Therefore it is not likely that they will have any significant impact on the ecosystem. [**Sanchez (2014), Coal as a marine pollutant, *World Maritime University* (Malmo, Sweden) *Dissertations* Paper 479**].

130. From the foregoing discussion it is apparent that the unburnt coal, when accidentally dumped in large quantities in to the sea, does have some negative impact on the marine ecosystem. (a) It directly affects the marine community by smothering the individuals coming underneath the dump. (b) Fine coal particles remain suspended in the water column and thus affect the respiratory as other metabolic activities of the animals living in the area. (c) Suspension of the fine coal particles in the sea water affects the entry of the solar radiation and hence the photosynthetic activity of the marine plant community. (d) Release of chemical constituents of the coal in to the sea water affects the chemical equilibrium of the water, which in turn is bound to have impact on the community structure of the marine organisms.

Besides the above studies, a study had been undertaken in relation to the contamination resulting from coal ship that sunk in 1891 near Victoria, British Columbia. Studies in 2009 and 2012, for instance, indicated that the sunken vessel remains to this day a source of poly-cyclic aromatic hydrocarbons (PAHs) and other pollutants. In a 2009 literature review, researchers at the University of Vienna observed that PAHs from unburnt coal may be an important source of aquatic contamination, but they concluded that the issue has "not been well studied". Studies have also shown that oxidizing coal particles reduce the oxygen available for clams, mussels, barnacles and crab larvae, with damage reverberating up the food chain. In fact, the bottom-dwelling invertebrates affected by coal dust make up a large share of the seasonal food for salmon and herring.

The sea creatures are more likely to be affected by physical changes to their environment, such as by dredging, than by oxygen depletion.

131. A study in Canada found that coal in the water can be a source of acidity, salinity, trace metals, hydrocarbons, chemical oxygen demand and potentially, macro-nutrients. Studies have also shown that materials in coal can react with seawater to produce "localized ocean acidification". All these factors pose potential hazards to aquatic organisms, such as by increasing the risk of invasive species taking hold, as a 1996 study found.

132. The presence of coal which contains heavy metals capable of acidic reaction in the sea water is hazardous to the environment. The studies have also concluded that it can harm the flora and fauna living on the sea bottom. In other words, the damage and resultant pollutant pollution will not only affect life in the sea, at the sea bottom and the shore but would also harm the marine environment by getting it introduced in the food chain. The effects of these pollutants are likely to increase with the passage of time and it is not in the interest of the environment that the ship and the cargo should be permitted to lie in the sea bottom indefinitely. This pollution has two aspects. First is the damage that has already been done due to oil spill, sunken ship and cargo and the other is that it is a continuous source of pollution for times to come. Thus on the one hand, it would require orders in relation to the pollution already caused and on the other it calls for preventive and precautionary

measures for controlling the pollution of marine environment futuristically.

In light of the above detailed discussion, we conclude the issue that there was definite pollution of marine environment by oil spill. The sunken ship alongwith its cargo caused pollution and is a continuous source of marine pollution. It needs to be removed from the seabed of the Contiguous Zone of the Indian water at the earliest.

Issue No. 7: What compensation, damages and which of the Respondents are liable to pay for causing pollution and degradation of marine environment in terms of Sections 15 and 17 read with Section 20 of the National Green Tribunal Act, 2010?

133. Article-235 of *the United Nations Convention on the Law of the Sea* provides that the States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief, in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. The States shall co-operate in the implementation of existing international law. This Article, clearly, provides the ambit and scope of fulfilment of international obligation in relation to protection and preservation of marine environment as well as for providing compensation for marine environmental pollution effectively and expeditiously. This object has been incorporated in Indian laws, under the Acts of 1958 and 1976. As far as the legal system in India is

concerned, the Act of 2010 squarely applies to the situation at hand. The provisions of the Act of 2010 are very unambiguous and clearly demonstrate the legislative intent for providing of compensation expeditiously and effectively. Section-17 provides that where any damage to any property or environment has resulted from an accident or the adverse impact of an activity or operation or process, under any enactment specified in Schedule-I, the person responsible shall be liable to pay such compensation for such injury or damage as may be determined by the Tribunal. The Act of 1986 is a Scheduled Act under the Act of 2010. Section-15 provides for relief and compensation to the victims of pollution and other environmental damage arising under enactments in Schedule-I as well as restitution of property damaged and for restitution of the environmental damage caused as a result of the polluting activity or accident. Sub-section-3 of Section-17 mandates that the Tribunal shall in case of an accident apply the Principle of No Fault. Section-20 states that the Tribunal shall, while passing an order, apply the principles of Sustainable Development, the Precautionary Principle and the Polluter Pays Principle. In other words, these accepted principles of environmental jurisprudence have statutory application to the decision of cases, by the Tribunal. The payment of compensation for damage caused as a result of the oil spill is, dependent to a large extent upon the legal regime applicable within the country in which the incident or damage occurs. We are really not concerned in the present case with the payment of compensation. It is sufficient to say that the Principle of Strict Liability or No Fault Liability would place onus on Respondents no. 5, 7 and 11 in relation

to the oil spill and pollution caused by sinking of the ship. While in relation to the cargo, Respondent no. 6 is responsible for the pollution caused by it as it is the owner of the said cargo. From the evidence on record, it is clear that it was not a case of ship sinking accidently simpliciter, as the attendant circumstances and documentation show that the intent of the concerned Respondents was susceptible to doubts. Their conduct in not rendering adequate help and providing requisite machines and tools is indicative of the earlier condition of the ship which, even at the time of inspection subsequent to purchase did not reflect the true position, which was that the ship was not in a seaworthy condition. Further, the conduct of the Respondents no. 5, 7 and 11, when the ship was in trouble right from Singapore onwards, indicates that they were not really concerned with the ship sailing free of technical or mechanical deficiencies or defects. They only wanted the ship to continue with its voyage and stuck to that stand till it sank on 4th August, 2011. It was not Respondents no. 5, 7 and 11 that took steps for saving of the ship and its crew, but it was admitted on the part of the Master of the ship that VTMS at Mumbai came to their rescue in a big way and saved the life of the entire crew, however, the ship could not be saved. These facts do cast a shadow of doubt on the intent of these Respondents. Resultantly, a heavier onus lies upon these Respondents to prove their pleaded stand, with respect to the Principle of Strict Liability. The Principle of No Fault Liability by its very virtue places the onus upon the Respondents to prove that they had adhered to the Doctrine of Due Diligence, and had carried out the essence of the Precautionary Principle and that the accident occurred

despite all reasonable care and caution and efforts on their part. This is quite conspicuous by its very absence in the documents and affidavits filed by these Respondents. The present case has another feature that is, it is not a case of a particular claimant bringing his action before the Tribunal for compensation of the loss or injury that he has suffered. It is a case where the Applicant had approached the Tribunal in larger public interest and complaining of large scale pollution caused by oil spill and further pollution caused by sinking of the ship and its cargo. This is a continuing cause of action. The pollution persists.

We have referred to various reports right from the Accident Investigation Report prepared by the Mercantile Marine Department on the orders of DG Shipping, the NEERI report and Annamalai University report and international studies, which show that there was definite pollution caused by the oil spill which adversely impacted the sea water, shore, aquatic life, mangroves and tourism on five different beaches of Mumbai. These reports have also shown that the persistent lying of the ship in the sea along with its cargo, the coal would, besides having immediate adverse impact on the marine environment, will with the passage of time negatively impact the marine environment as well, in different ways. The coal may contain hazardous substances like arsenic, mercury, thallium and asbestos, which will eventually enter the food chain. The higher concentration could have short term effects and the milder concentration could have their own adverse impacts in the long run.

134. Thus, the pollution is not limited to an individual or a singular item. It is a problem of multiple sources of pollution, resulting from oil spill, sinking of the ship and its cargo. It will affect the marine environment that includes sea water, aquatic life, shore, seabed, mangroves, tourism and public life of the people living at the shore. The adverse impacts were not seen only at a singular point but at multiple beaches as afore-stated.

135. The adverse impacts on the environment due to oil spill and sinking of ship with cargo as already noticed, may manifest themselves in the form of physical smothering of organisms, chemical toxicity, ecological changes and other indirect effects. The purpose of no fault or strict liability is not only to place the onus upon the Respondents in the application, but also to ensure that what is proved by the Applicant in relation to damage and degradation of marine environment is restored and restituted or in any case is prevented from further damage and re-occurring pollution. After receiving the distress call from the master of the ship, VTMS had initiated action immediately without losing any time. They involved the Indian Navy, their helicopters, other ships and a large number of workers, firstly, to prevent and control the damage by oil spill which they were not able to remove in its entirety despite their efforts and secondly, to save the crew and the ship. They could save the crew but the ship could not be saved because of its massive technical faults, to the extent that the pumps for restricting the water ingress were non-functional and no help had been provided by Respondents no. 5, 7 and 11 to the ship for 16 days before 4th August, 2011 when it sank in the Contiguous Zone

of Indian waters. It is clear from the document placed on record that six ships have been deployed by the Coast Guard besides employing various helicopters, etc. A sum of Rs. 3,11,86,954.43/- (Rupees Three Crore Eleven Lakh Eighty Six Thousand Nine Hundred Fifty Four and Forty Three Paisa only) had been spent by the Coast Guard as capitation charges and towards the pollution response efforts undertaken by them. This amount does not include the cost of the effort made by all the deployed forces on different accounts for prevention and control of pollution and in trying to prevent the ship from causing damage to the marine environment.

136. The damage caused by pollution, cannot be computed in terms of money with exactitude and precision. This has to be on the basis of some hypothesizing or guess work as is necessary to be applied in such cases. For instance, the damage caused to the aquatic life, mangroves, sea shore and tourism are incapable of being computed exactly in terms of money. The mangroves were destroyed as a consequence of the oil spill. The quantum of leakage of oil during the first few days, was at the rate of 1–2 tonnes per hour and on August 12, 2011 according to the Applicant, the rate of oil spill was 7 to 8 tonnes per day as per the information of the Coast Guard. It shows the massive oil spill from the ship. Thereafter the ship has been lying at the present location (20 Nautical Miles from the baseline of the Mumbai shore). The ship itself has deadweight 63695 with a cargo of 60054 MT and with all other metallic and non-metallic substance such as asbestos, machines, oil, grease and other elements including the coal as cargo of the sunken ship. All this is bound to cause, in

fact, has caused pollution of marine environment. The environment as already noticed under the Indian jurisprudence has been given a very wide meaning and practically covers whatever one can think the term may include.

The claims worth Rs. 3,79,97,450.57/- (Rupees Three Crore Seventy Nine Lakh Ninety Seven Thousand Four Hundred Fifty and Fifty Seven Paisa only) have also been filed by the Shipping Corporation of India, Oil and Natural Gas Corporation Limited and Directorate General of Lighthouse in relation to what they had spent during these operations to save the ship, the crew and to prevent further damage. Thus, making a total of Rs. 6,91,84,405/- (Rupees Six Crore Ninety One Lakh Eighty Four Thousand Four Hundred and Five only). These were also placed on record by the DG Shipping. Thus, these claims are also part of the damage and pollution caused and control and prevention measures taken by different authorities on and after 3rd and 4th August, 2011. The Supreme Court of India in the case of *M/s. Sterlite Industries (India) Ltd. v. Union of India,* 2013(4) SCC 575, had evoked the Principle of Strict Liability and imposed a penalty of Rs. 100 crores for operating without obtaining consent of the Board under the provisions of the Water (Prevention & Control of Pollution) Act, 1974, on an approximate basis and the court further said that in relation to pollution caused it was not possible to determine the same with exactitude. The Supreme Court of India in the case of *M.C. Mehta vs. Kamal Nath and Ors. AIR 2002 SC 1515* by invoking the Polluter Pays Principle after issuance of show cause notice, imposed the pollution fine in addition to payment for

restoration of environment and ecology. A sum of Rs. 10 lakh was directed to be paid on account of environmental fine and the Supreme Court did not compute the same on some calculations as it was a general charge payable for polluting the environment.

Evoking the 'Precautionary Principle' in light of the facts of the present case, it is evident that Respondent no. 5, 6, 7 and 11 have completely ignored this principle and did not take due precautions at the appropriate time. Even after the accident, none of them have taken any steps to remedy the wrong since they are content with the dumping of the ship along with its cargo in Indian waters as they have not suffered any liability in that regard. This is a patent and flagrant violation of the Precautionary Principle. Serious pollution has been caused by the oil spill and by the sinking of the ship and the cargo.

137. The pollution is diverse and has serious impact on marine environment. This pollution is a continuing one and does not come to an end with the pronouncement of this judgment. They have a liability to remove the ship wreck and the cargo from the present location. Thus, in our considered view, besides Rs. 6,91,84,405/- (Rupees Six Crore Ninety One Lakh Eighty Four Thousand Four Hundred and Five only), they should be held liable to pay Rs. 93,08,15,595 crores as environmental compensation (inclusive of Rs. 6,91,84,405/- spent on mitigation measures) for default, negligence in the upkeep of the ship and cargo and the persistent pollution caused by them to the marine environment, particularly on the shore, to tourism and public health at large in terms of Sections 15 and 17 read with Section 20 of the Act

of 2010. Thus, it will be a total of 100 crores. They have a liability to pay for their default, negligence and the pollution that they have already caused on the basis of the Polluter Pays Principle. Accordingly, we answer this issue against the Respondents holding that Respondents no. 5, 7 and 11 shall be liable to pay a total sum of Rs. 100 crores as environmental compensation. Respondent no. 6 is liable for environmental compensation for chartering a ship of this kind, dumping of 60054 MT of coal in the Contiguous zone of Indian waters. We have already discussed in detail that coal contains hazardous substance and is likely to cause pollution and is causing pollution of the marine environment. Thus, he would be liable to pay environmental compensation of Rs. 5 crores. The amount paid shall be utilised for restitution and restoration of the damage done as well as to ensure that no further pollution results from the sunken ship and the cargo. These amounts would also be utilised for restoring the mangroves to their original position or plantation of accepted species in that area. The Committee appointed under this judgment would recommend a complete plan in that behalf. Respondent No. 5, 7, 11 would be liable to pay Rs. 100 crores and Respondent no. 6 would be liable to pay Rs. 5 crores and all of them jointly and severally would be responsible for removing the ship wreck and cargo from its present location.

Issue No. 8: Whether the insurance company incurs no liability whatsoever in the facts and circumstances of the case?

Issue No. 9: What is the effect of the winding up proceedings pending before the Romanian Court in relation to

the insurance company on the proceedings pending before this Tribunal?

138. We would prefer to take up issues no. 8 and 9 for discussion together as they relate to a common entity that is, the insurance company, its liability and the consequences of winding up proceedings pending in a Romanian Court in relation to the insurance company. According to the Applicant, Respondents no. 6, 7 and 11, Respondent No. 9–M/s Astra Asigurari Insurance are liable for all the consequences arising in relation to the voyage or sinking of the ship in question. Respondent no. 5 as originally impleaded had filed a very short affidavit and later on after amendment, Respondent no. 5 was ordered to be proceeded against *ex parte*. Thus, there is no stand of Respondent no. 5 in relation to these issues. However, Respondents no. 7 and 11 have common interest with Respondent no. 5 in relation to the ship in question as already held. Respondent no. 9 had filed a detailed reply and its submission in relation to these issues. It claims that it is not liable under the contract of insurance. It is stated that insurance is a contract of good faith. A breach of the party's obligation under the contract must absolutely render such contract void. Respondent no. 5 has voided the insurance contract by breaching the warranty undertaken. As a result of the loss of seaworthiness of the ship over the course of voyage, Respondent no. 9 has disclaimed its liability. It is then averred that under the pay to be paid clause, for instance, when a claim is raised, the ship owner has to make such payment, and only subsequently can such owner recover from the insurer. Lastly, it is submitted that the Respondent no. 9 - M/s Astra

Asigurari Insurance is being liquidated and the liquidation proceedings are ongoing in a Romanian Court and as a consequence the proceedings before this Tribunal, with respect to Respondent no. 9, should not be proceeded with any further.

It has been pleaded and we have already held that Respondents no. 5, 7 and 11 are responsible for the ship, its activities including the sinking of the ship. Respondent no. 6, besides these Respondents, is liable and responsible in relation to the cargo of the ship. There is no dispute to the fact that on 27th April, 2011, which is a date subsequent to the purchase of the ship, its inspection, etc. that the ship was insured by policy no. 024CT/27.04.2011. Under this policy, the Ship – Rak Carrier had been insured. The policy was taken in the name of Delta Shipping Marine Services S.A.-Respondent no. 5 as it is the assured and owner of the Ship. The managers in the policy were described to be Saqer Logistics FZE and it was reinsured by Syndicate of LLOYD'S plus other reinsurers, through RFIB Group Limited, London, UK. It was a P&I policy subject to the terms and conditions of the policy. It covers pollution risks and pollution fines as well. Maximum limit under the policy was US$10,000,000 a.o.a.o.o. in respect of claims under Section 2.10 US$ 100, 000a a.o.a.o.o. in respect of claims for pollution fines under Section 2.20. The insurance specifically provided for deductable warranties. It was a contract of indemnity insurance between the two. Clause-16 of the policy which was the "Pay to be Paid" clause states that, unless and to the extent that the insurance company otherwise decides, all claims against the insurer are paid in the first instance and then reimbursed by the

company. This insurance was subject to valid class, statutory and ISM certificate throughout the insurance contract. The 'exclusion' clause excludes any and all claims in respect of oil pollution arising out of any incident to which the United States Oil Pollution Act, 1990 and CERCLA are applicable and excluding claims for liabilities towards crew to the extent that they are recoverable under the relevant State's Social security insurance or equivalent. The insurance policy was to remain valid for 90 days, even if the insurance company cancel the policy it has to give three months written notice. In other words, the policy would remain valid for three months despite notice of termination. The policy specifically deals with any claim of wreck removal within 30 days extension period which should be attributable to deficiencies put forward in the post entry condition survey which will not be reimbursed which obviously means that prior to 30 days period, the wreck claim would lie. It is also on record that vide its letter dated 14th February, 2012, the insured had submitted its claim which was replied to vide mail dated 17th February, 2012 stating that the insurance company had no liability in light of the incident report issued by the Master, Chief Engineer and Chief Officer to Yellow Gate Police Station showing that the owners are in breach of clause-14 of the policy. Clause-14 provides for warranty and states that at the commencement of each insured voyage the insured shall be bound to effect due diligence to make matter insured seaworthy in all respects for the purpose of the particular adventure.

139. According to the Respondents including Respondent no. 11, the liability of Respondent no. 9 is absolute and there is no breach as

alleged. On the contrary, it is submitted that, the policy is in force and even the Bunker Blue Card was valid for the period from 28th April, 2011 to 27th April, 2012 and ship capsized on 28th August, 2011. On the date of the ship casualty, there was valid insurance for pollution damage and in absence of registered owner, the Respondent is liable to pay for pollution damage.

140. In view of the above facts, it is clear that there was valid insurance policy and a Bunker Blue Card as on the date of the accident when the ship sank. There is no document placed on record before us by Respondent no. 9 to show the policy to be terminated or cancelled for breach of warranty clause or otherwise three months prior to the date of the accident. The reliance placed on record in the mail dated 27th February, 2012 is without any basis. This document was created subsequent to the accident and it cannot in any way retrospectively affect the terms and conditions of the policy. There is no doubt to the fact that there is some suspicion as to the genuineness and correctness of the certificates and documents issued for voyage of the ship from Indonesia to Dahej in Gujarat. However, the ship was insured prior to the date of inspection and the Charter Party Agreement was entered into on 28th May, 2011. The insurance company in any case ought to have inspected all the requisite documents. It was for the insurance company to carry on its inspections to satisfy itself whether the ship was seaworthy and could be insured or not. At this belated stage, the stand of the insurance company would not stand the test of legal scrutiny and would be only considered as an afterthought. Respondent no. 5 had lodged his

claims and informed the insurance company of the accident. However, in terms of Clause-16, the 'Pay to be Paid' clause, liability of the insurance would be that of reimbursement of that claim, that is, the insured has to pay the damages first and thereafter claim the reimbursement from the insurance company. This submission of the insurance company has substance. Once the party has entered into a contract, it is bound by the terms and conditions of the contract. The discretion solely lies with the insurance company to decide whether it would entertain the claim otherwise than as a claim of reimbursement or not. None of the parties can turn around and challenge the content of the insurance policy. These contents would bind the parties for the entire transaction. While we reject the plea of the insurance company that it had terminated the policy, we accept the claim that in terms of Clause-16 of the policy they have a liability only of paying claims by way of reimbursement.

Protection and Indemnity Insurance certificate issued by Respondent no. 9 in favour of Respondent no. 5 is for insuring the registered owner against all third party un-quantified risks such as pollution damages. It is compulsory for a sea going vessel to have such insurance. In fact, this is also mandatory under the Act of 1958. It is also the contention that in absence of the registered owners, the liability to compensate towards pollution damage rests on Respondent no. 9, as there was a P&I insurance policy in force on the date of the accident. Limits of insurance have been fixed, to which we have already referred above. The Bunker Blue Card is a proof that the policy was current and insurance was in place. The liability of

damages on account of pollution and other events has to be the responsibility of Respondent no. 5 and/or the respondent no. 9. We have already held that the responsibility for different damages and environmental compensation lies upon Respondent no. 5, 7, 11 and 6, respectively. The liability of the insurance company to reimburse these claims cannot be disputed. However, how these claims are to be settled and paid would be a matter which possibly cannot be determined by this Tribunal as the policy is subject to Romanian law. The liability and payment with respect to Respondent no. 5, 7 & 11 will be determined under this judgment on one hand and Respondent no. 9 on the other, cannot be enforced before this Tribunal.

141. Now, dealing with the question that there are liquidation proceedings against the insurance company pending in a court in Romania under the provisions of Romanian law. The decision of the bankruptcy procedure has the effect of suspending the right of all judicial or extrajudicial actions and enforcement measures directed against the insurance/reinsurance receivables. We are afraid that the proceedings before this Tribunal would not be liable to be stayed because of winding up petition before the Romanian Court. First and foremost, the Romanian law and the orders of the Romanian Courts would not have any extra territorial jurisdiction and would not bind the Courts, Tribunals in India and/or the legal system of India. No treaty or law has been brought to our notice by any of the parties before us that the position in law is any different. Reference was also made to Section 446 of the Indian Companies Act, 1956 which is in pari materia to Section 279 of the Act of 2013. These provisions

would come into play only when the winding up proceedings are pending before the Indian Courts under the Indian Legal System. It is undisputed that no proceedings are pending before any Company, Court or Forum in India, as far as Respondent no. 9 is concerned. It is also undisputable that Respondent no. 9 is not a company registered in India. At this stage, it also needs to be noticed that Respondent no. 9 had filed its main reply to the application on 8th January, 2013. Thereafter, it argued the matter on various occasions without any demur or protest. They conceded to the jurisdiction of the Tribunal and it was only, now, at the final stage that this objection was raised in the written submission filed on 23rd May, 2016. The objection firstly does not lie before this Tribunal as discussed above and secondly, even if it has any significance, by their conduct and specifically arguing the matter on different occasions without reservations they would be deemed to have waived any such objection, in fact and in law. Thus, in view of the above discussions, we partially answer the issue against Respondent no. 9 and partially in its favour. The liability of the insurance company, Respondent no. 9 to pay the damages is upheld while actual payment of the claim and its settlement will be on account of reimbursement and would be on the contracted term of "Pay to be paid". The present application is not liable to be stayed before this Tribunal due to pendency of winding up proceedings before the Romanian Court. In any case, no order of setting aside these proceedings by Court of any competent jurisdiction has been placed on record. The location of the ship falls within the

ambit of the Contiguous Zone of India. Sovereign rights can be exercised in that zone though for a limited purpose.

The conclusions, directions and the relief–the parties to the present *lis* are entitled to:

Issue No. 10: The directions that are required to be issued in the present case?

Issue No. 11: Relief?

142. Having answered the issues in favour of the Applicant and against the respective Respondents, now we will deal with the final aspect of this judgment in relation to the above issues. From the analysis of the above findings, it is a clear case where negligence is attributable to Respondents no. 5, 6, 7 and 11. It is not a case of sinking of a ship by accident simpliciter, but it is a case where element of *mens rea* can be traced from the unfolding of the events that finally led to the sinking of the ship on 4th August, 2011. Non-rendering of requisite help/assistance by Respondent no.5 and other persons interested and responsible, to the Master of the Ship, despite the fact that they had complete knowledge about the status of the ship prior to the occurrence of the incident on 4th August, 2011. Furthermore, these Respondents did not adhere to the Principle of Due Diligence pre-voyage, for which they had sufficient means and time. The ship had developed mechanical and technical snags at Colombo and Singapore and the Master of the ship had asked for help there during its onward journey. There is nothing on record to show that Respondent no.5 and other Respondents provided timely assistance to the Master of the ship. It is also on record that there

were repeated requests for help and for stoppage of the voyage in the meanwhile. During the entire duration, the owners and the other Respondents directed the ship to continue with its voyage, even though one of the pumps and a generator of the Ship had been rendered non-functional. This is really a case where the doctrine of r*es ipsa loquitor* comes completely into play and the events speak for themselves to the extent that it hardly requires any further evidence to establish the element of negligence, carelessness and ill-design for sinking of the ship with the cargo itself. The reports on record exhibit the callous attitude of the persons interested in the ship towards its seaworthiness and safe voyage to Dahej in Gujarat. We have discussed in great detail all concepts of this case and have held that Respondents no. 5, 7 and 11 are liable for all the degradation, damage and pollution of marine environment and the consequences of the defaults in not complying with the Conventions and the law in force in the Indian Waters (Contiguous Zone). While Respondent no.6, who had chartered the ship is responsible and liable for damage and pollution resulting from the cargo, for which, despite the fact that years have gone by, it has made no effort either to remove the cargo or even take the minutest preventive or pre-cautionary measures for controlling and preventing pollution of marine environment.

143. *International Convention on Civil Liability for Bunker Oil Pollution Damage* extends its application even to the Exclusive Economic Zone that runs upto 200 Nautical Miles. This Convention imposes liability upon the present ship owner, registered owner to pay damages for an

incident, which has resulted in pollution as a result of leakage of bunker oil.

International Convention for Prevention of Pollution from Ships (MARPOL) 1973, as modified upto 1978 desires to achieve complete elimination of international pollution of marine environment by oil and other harmful substances and minimisation of accidental discharge of such substances. Under this Convention, the Respondents were required to take all measures to ensure that there was no pollution caused by oil spill.

Nairobi International Convention on the Removal of Wrecks, 2007 made it obligatory upon the State party and individuals to remove the wrecks and cargoes from the Exclusive Economic Zone. 'Wreck' included a sunken or stranded ship. 'Hazardous' was anything which may reasonably be expected to result in major harmful consequences to marine environment. 'Coal', as already indicated, contains hazardous substances, which upon chemical reaction are capable of polluting the marine environment. Annexures to *BASEL Convention* clearly state that Antimony, Arsenic, Beryllium, Cadmium, Lead, Mercury, Selenium, Tellurium and Thallium are hazardous substances. This Convention clearly directs that the marine environment should be protected against such hazardous substances even in matters of transportation.

144. The Respondents in different capacities, i.e. owner, charterer, manager, a party interested and responsible, were under specific obligation to take appropriate measures and protect the marine

environment. They have miserably failed to do so. On the one hand, these Conventions lay specific obligations upon these Respondents to take precautionary and preventive measures, while on the other the *United Nations Convention on the Law of the Sea* vests in a State, the right to exercise its sovereign rights to protect and preserve the marine environment in its Exclusive Economic Zone. In other words, the State has to take all possible steps in consonance with the law for protecting and preserving the marine environment in its Contiguous and/or even the Exclusive Economic Zone. This very Convention requires the States to take appropriate steps and adopt laws and regulations for implementation of prescribed rights and control the pollution of marine environment caused by dumping.

The synthesis and the essence of the International Conventions on the subject require that dumping should be discouraged in all events lest it becomes a regular feature for economic interests and an 'easy option' for disposing of ships which are not seaworthy. Thus, an approach which would help to suppress the mischief should be adopted.

145. On the true and purposive construction of all the International Treaties afore-referred and the laws in force in India relating to its Territorial Waters, Contiguous Zone and Exclusive Economic Zone, no country enjoys the privilege of sailing an unseaworthy ship to another country and dumping the same in the territorial waters, contiguous or economic exclusive zone of that country. Every country has a right to protect its marine environment. Dumping of a ship with its cargo

would result in two distinct pollutions besides serious pollution arising out of oil spill. They are pollution by ship itself where it will affect the sea water and aquatic life resulting in pollution becoming part of the food chain and affecting public health, and repetitive possible damage to other ships enroute. The other is the pollution by cargo, as in the present case by coal, as chemical reactions will lead to release of toxic substances like Arsenic, Mercury, Tellurium, and Beryllium which are contained in it. The affected country has a right to ask for removal of the ship wreck in accordance with international conventions. Even the cargo needs to be removed. It is only in extraordinary circumstances that an alternative to removal can be considered. Amongst others but primarily on the ground that removal of wreck and cargo is likely to cause greater harm to ecology and marine environment. The attendant circumstances could be impracticability and absence of technical know-how etc. The determinative consideration would be the extent of impact on the environment.

Reverting to the statutory principles of law contained in the Act of 2010, it has to be noticed that in terms of Section 17 of the Act, it is the Principle of 'No Fault Liability' that has to be applied. Furthermore, Section 20 mandates that the Tribunal while passing the order and deciding the matters has to statutorily apply the Principle of Sustainable Development, Precautionary Principle and Polluter Pays Principle. Once these two provisions are read in conjunction, the obvious result is that the Principle of Strict Liability will have to be applied against the Respondents and they will become

liable to pay the damages/environmental compensation and comply with other directions, on the basis of the Precautionary Principle and Polluter Pays Principle. The contentions raised by the respective Respondents have been found to be unworthy of acceptance by the Tribunal. In fact, the Respondents, particularly Respondents no.5, 7 and 11 have decimated every rule relating to inspections, seaworthiness and certification. They essentially must suffer the consequences of their defaults and for causing marine environmental pollution. It may not be possible to state environmental compensation with exactitude, however, keeping in view that we have to apply the Principle of Strict Liability and the fact that the Respondents have failed to discharge their onus satisfactorily, the Tribunal has to adopt an approach to determine the compensation on the basis of what is just and fair, in addition to the specific costs incurred by the different agencies. The liability of the interested Respondents co-exists as joint and several. Wherever there is default in compliance with the law, it *per se* invites the liability for making good, the loss of and damage to the ecology and marine environment. The damage stands established not only to the aquatic life but also to sea water and the shore. There has been degradation and damage to the Mangroves, adverse impact on human and aquatic life on shore, tourism and activities of the fishermen. The oil spill caused substantial damage, it spread over the water surface and also formed tar balls affecting the aquatic community. Even the dispersants used for controlling the oil spill had been shown to be harmful for the organisms living in the area. It was because of the negligence and callous attitude of the Respondents that

the specialized pollution control ship of the Indian Coast Guard, '*Samudra Prahari*' was diverted from routine patrol and emergency towing ship *Smit Lumba* was directed to proceed to render assistance to the ship. Indian Navy had to deploy its ship and helicopter to save the ship and the crew, large forces of workmen were also employed. Having caused such tremendous damage and loss to the aquatic life and marine environment the Respondents are liable to pay Environmental Compensation. The reports on record clearly show that the documents in favour of the ship were issued in a biased manner and the ship was not seaworthy, right from the inception of its voyage. The accident investigation report, the report by NEERI and the report by Annamalai University show that there was serious marine pollution caused by the oil spill. They, inter-alia, also sufficiently indicate that continuous pollution will result from the ship and its cargo. The NEERI report had even stated that Sepias got killed due to the oil spill. It is a matter of common knowledge that other elements of the marine environment also got polluted as a result of the oil spill.

146. The Supreme Court of India, in the case of *Sterlite Industries India Ltd. v. Union of India 2013 (4) SCC 575* had held that where the industry had violated the provisions of the Water (Prevention and Control of Pollution) Act, 1974 and had operated without obtaining consent, it was liable to pay damages of Rs. 100 crores for the default period. The Court applied the Rule of Strict Liability but did not strictly compute the damages with exactitude. It only enforced the liability on general principle for awarding of damages for non-

compliance to the law in force. In fact, any other approach would run contra to the Principle of Strict Liability. This judgment has been followed by the Tribunal in a large number of cases. Reference can be made to the cases of *S.P. Muthuraman* 2015 ALL (I) NGT Reporter (2) (Delhi) 170; *Krishan Kant Singh v. National Ganga River Basin Authority* (2014) ALL (I) NGT Reporter 3 (Delhi) 1 and *M.C. Mehta v. Kamal Nath & Ors.* AIR 2002 SC 1515. Thus, we are of the considered view that the determined damages of Rs. 100 crores should be paid by and recovered from Respondents no.5, 7 and 11, jointly and severally while Respondent no. 6 is held liable to pay Rs. 5 crores as environmental compensation for dumping of the cargo in the sea and then failing to take any precautionary or preventive measures. The consignment of 60054 MT of coal has caused marine pollution and continues to be a cause and concern for environmental pollution. The Respondents are defaulting entities which have not complied with law and have adopted a most careless and reckless attitude in relation to protecting the marine environment.

147. This case is a fit case where we must spell out clearly the directions that should be issued by the Tribunal and the relief that should be granted to the parties. Therefore, we pass the following Order/Directions:-

1. On the true and purposive construction of the International Conventions and the statutory provisions afore-referred, no party from any country in the world has the right/privilege to sail an unseaworthy ship to the Contiguous and Exclusive Economic Zone of India and in any event to dump

the same in such waters, causing marine pollution, damage or degradation thereof.

2. The Ship (M.V. RAK Carrier) and its cargo should be removed by Respondents no. 5, 6, 7 and 11 or they should cause it to be removed within a period of six months from the date of submission of the Report of the Committee before the Tribunal.

3. Respondents no. 5, 7 and 11 are held liable to pay environmental compensation of Rs. 100 Crores to the Ministry of Shipping, Government of India in terms of Sections 15 and 17 read with Sections 14 and 20 of the Act of 2010, for causing marine environmental pollution by sinking of the ship in the Contiguous Zone of Indian waters (Arabian Sea) at 20 Nautical Miles offshore Mumbai coast.

4. The above Rs. 100 Crores shall include the expenses incurred by the Coast Guard and other forces for the prevention and control of pollution in different ways, as stated above, caused by the oil spill and saving the crew etc. Out of this amount, a sum of Rs. 6,91,84,405 shall be adjusted and paid to the respective agencies.

5. Respondent no. 6 is held liable to pay a sum of Rs. 5 crores as environmental compensation in terms of Sections 15 and 17 read with Sections 14 and 20 of the Act of 2010 for dumping 60054 MT Coal in the seabed and causing pollution of marine environment, in different ways as stated above.

6. The liabilities to pay environmental compensation as afore-directed are on account of and subject to adjustments, after the submission of the final report by the Committee.

7. We constitute the following Committee: -

1. Additional Secretary, Ministry of Shipping.
2. DG, Ministry of Shipping.
3. Member Secretary, Central Pollution Control Board.
4. Senior Officer not below the rank of Inspector General from the Indian Coast Guard.
5. Professor from Annamalai University.
6. Independent Expert to be nominated by the Ministry of Shipping, who is expert in removal and dismantling of ships.
7. Senior Scientist from the National Institute of Oceanography, Dona Paula, Goa.
8. A nominee from the National Physical Laboratory, Navrangpura, Ahmedabad, Gujarat who is well conversant with Geo-Chemistry.

8. The above Committee shall carry out the study and report to the Tribunal within one month from today, whether the removal of the ship wreck and cargo from the present location should be directed as per Conventions afore-referred and in the interest of marine environment and/or in the alternative, whether it is necessary to leave the wreck of the ship and its cargo to remain at the present location, again in the interest of the environment and/or it is not practically possible to remove the wreck of the ship and the cargo.

This Committee shall also recommend that if the wreck of the ship and cargo has to be permitted to lie at the present location in future, then the measures that are necessary to be taken in the interest of marine environment. Further, it shall state what compensation should be paid by the

Respondents at regular intervals for preventing and controlling the pollution arising therefrom. This exercise should be completed within one month and a report positively submitted to the Tribunal.

This Committee appointed under this judgment would recommend a complete plan in that behalf.

9. We hold Respondent no. 9 liable for claims awarded in this judgment, however, on the Principle of 'Pay to be Paid'.

148. With the above directions and relief, as afore-ordered, this application stands disposed of with no orders as to costs in the peculiar facts and circumstances.

Swatanter Kumar
Chairperson

U.D. Salvi
Judicial Member

A. R. Yousuf
Expert Member

Ranjan Chatterjee
Expert Member

New Delhi
23rd August, 2016