

**Delhi Pollution Control Committee**

v.

**Lodhi Property Co. Ltd. Etc.**

(Civil Appeal No(s). 757-760 of 2013)

04 August 2025

**[Pamidighantam Sri Narasimha and Manoj Misra, JJ.]**

**Issue for Consideration**

Whether the regulatory boards can, in exercise of powers u/s.33A of the Water Act and s.31A of the Air Act, impose and collect as restitutionary and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage.

**Headnotes<sup>†</sup>**

**Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A –** The Division Bench of the High Court held that DPCC (regulatory body/Board) is not empowered to levy compensatory damages in exercise of powers u/s.33A of the Water (Prevention and Control of Pollution) Act, 1974 and s.31A of the Air (Prevention and Control of Pollution) Act, 1981 on the ground that such an action amounts to imposition of penalty provided for in Chapters VII and VI of the respective Acts, and as such, procedure contemplated thereunder will be the only method for imposing and collecting compensatory damage – Correctness:

**Held:** 1. Having considered the principles that governing environmental laws and on interpretation of ss.33A and 31A of the Water and Air Acts, this Court is of the opinion that the Division Bench of the High Court was not correct in restrictively reading powers of the Boards – The environmental regulators, the Pollution Control Boards exercising powers under the Water and Air Acts, can impose and collect restitutionary or compensatory damages in the form of fixed sum of monies or require furnishing of bank guarantees as an *ex-ante* measure to prevent potential environmental damage – These powers are incidental and ancillary to the empowerment u/ss.33A and 31A of the Water and Air Acts – The powers must be exercised as per procedure laid down by

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subordinate legislation incorporating necessary principles of natural justice, transparency and certainty. [Paras 2, 28]

2. The Board's powers u/s.33A of the Water Act and s.31A of the Air Act have to be read in light of the legal position on the application of Polluter Pays principle as formulated and explained – This means that State Board cannot impose environmental damages in case of every contravention or offence under the Water Act and Air Act – It is only when the State Board has made a determination that some form of environmental damage or harm has been caused by the erring entity, or the same is so imminent, that the State Board must initiate action u/s.33A of the Water Act and s.31A of the Air Act. [Para 30]

**Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Board's responsibility to choose appropriate course of action:**

**Held:** Given their broad statutory mandate and the significant duty towards public health and environmental protection the Boards must have the power and distinction to decide the appropriate action against a polluting entity – It is essential that the Boards function effectively and efficiently by adopting such measures as is necessary in a given situation – The Boards can decide whether a polluting entity needs to be punished by imposition of penalty or if the situation demands immediate restoration of the environmental damage by the polluter or both. [Para 32]

**Water (Prevention and Control of Pollution) Act, 1974 – Air (Prevention and Control of Pollution) Act, 1981 – 2024 amendments – Decriminalisation and Adjudicatory Officer:**

**Held:** There is no conflict between the powers of the State Boards to direct payment of environmental damages u/ss.33A and 31A of the Water and Air Acts and the powers of the Adjudicating Officer to impose penalties under Chapter VII of the Water Act and Chapter VI of the Air Act – The decriminalization of offences under these Chapters has not removed the punitive nature of actions that can be taken under them – There remains a clear distinction between the nature of directions that the State Boards can issue u/ss.33A and 31A of the Water and Air Acts for payment of environmental damage and the determination by Adjudicating Officers – The former is compensatory in nature and will be resorted to when remedial measures are being undertaken to restore the

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degraded environment or pollution caused – The latter is a penalty for an offence under the law and is imposed with the objective of punishing the offender. [Para 31]

**Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Power of Boards to direct the payment of environmental damages – Powers must be guided by transparency and non-arbitrariness:**

**Held:** The Boards have the power to direct the payment of environmental damages, this Court makes it clear that this power must always be guided by two overarching principles – First, that the power cannot be exercised in an arbitrary manner; and second, the process of exercising this power must be infused with transparency. [Para 33]

**Water (Prevention and Control of Pollution) Act, 1974 – s.17 – Air (Prevention and Control of Pollution) Act, 1981 – s.17 – Existing Legal Regime for Pollution Control in India – discussed. [Paras 9 and 10]**

**Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Insertion of ss.33A & 31A in Water and Air Acts – Discussed. [Paras 11 to 15 ]**

**Constitution of India – Part IV A and Arts. 48A, 51A – Interpretation of and for Environmental Institutions – Discussed. [Paras 16-17]**

**Environment – Pollution control – Duty to Restitute v. Power to Punish and Penalise – Discussed. [Paras 18 to 26]**

**Water (Prevention and Control of Pollution) Act, 1974 – Chapters VII – Air (Prevention and Control of Pollution) Act, 1981 – Chapters VI – Environmental damage – Distinction between restitution and punitive action:**

**Held:** There is a distinction between a direction for payment of restitutive and compensatory damages as a remedial measure for environmental damage or as an *ex-ante* measure towards potential environmental damage on the one hand; and a punitive action of fine or imprisonment for violations under Chapters VII of the Water Act and VI of the Air Act on the other hand – If directions

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in furtherance of restitutive and compensatory measures are issued, these are not to be considered as punitive in nature – Punitive action can only be taken through the procedure prescribed in the statute for example under chapters VII and VI of the Water and Air Acts respectively. [Paras 27(I)(II)]

**Environmental Law – Indian environmental law assimilation of Principle of Polluter Pays:**

**Held:** Indian environmental law has assimilated the principle of Polluter Pays and there is also a statutory incorporation of this principle in our laws – The invocation of this principle is triggered in the situations – i) when an established threshold or prescribed requirement is exceeded or breached, and it does result in environmental damage, ii) when an established threshold or prescribed requirement is not exceeded or breached, nevertheless the act in question results in environmental damage and also iii) when a potential risk or a likely adverse impact to the environment is anticipated, irrespective of whether or not prescribed thresholds or requirements are exceeded or breached. [Para 27(III)]

**Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Duty of Environmental regulators:**

**Held:** Environmental regulators have a compelling duty to adopt and apply preventive measures irrespective of actual environmental damage – *Ex-ante* action shall be taken by these regulators and for this purpose a certain measure in exercise of powers u/s.33A and 31A of the Water and Air Acts is necessary. [Para 27(IV)]

**Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Environment Protection Act – s.5 – Powers of Board under Environment Protection Act and Water and Air Acts:**

**Held:** The powers of the Boards u/s.33A and 31A of the Water and Air Acts are identical to that of s.5 of the Environment Protection Act – Under Section 5, the Central Government or its delegate has the power to issue directions to the polluting industry to pay certain amounts and utilise the said fund for carrying out remedial measures – The Boards are empowered to take similar actions u/s.33A and 31A of the Acts. [Para 27(V)]

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### Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Directions issued by the Supreme Court:

**Held:** (a) The judgement and order dated 23.01.2012, passed by the Division Bench of the High Court of Delhi is set aside to the extent of declaration of law but direct that the show cause notices that have been set aside by the High Court shall not be revived; (b) This Court directs that the Pollution Control Boards can impose and collect as restitutive and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage in exercise of powers u/s. 33A and 31A of the Water and Air Acts; (c) It is further directed that the power to impose or collect restitutive or compensatory damages or the requirement to furnish bank guarantees as an *ex-ante* measure u/s. 33A and 31A of the Water and Air Acts shall be enforced only after detailing the principle and procedure incorporating basic principles of natural justice in the subordinate legislation. [Para 39]

#### Case Law Cited

*MC Mehta v. Kamal Nath* [2000] Supp. 1 SCR 389 : (2000) 6 SCC 213; *Vellore Citizens' Welfare Forum v. Union of India* [1996] Supp. 5 SCR 241 : (1996) 5 SCC 647; *Research Foundation for Science (18) v. Union of India* [2005] 1 SCR 115 : (2005) 13 SCC 186; *Deepak Nitrite Ltd. v. State of Gujarat* [2004] Supp. 2 SCR 49 : (2004) 6 SCC 402; *T.N. Godavarman Thirumulpad, In Re v. Union of India* [2024] 3 SCR 187 : (2025) 2 SCC 641; *Bengaluru Development Authority v. Sudhakar Hegde* [2020] 5 SCR 755 : (2020) 15 SCC 63 – relied on.

*State of MP v. Centre for Environment Protection Research & Development* [2020] 12 SCR 1139 : (2020) 9 SCC 781; *Chandra Kishore Jha v. Mahavir Prasad & Ors.* [1999] Supp. 2 SCR 754 : (1999) 8 SCC 266; *Indian Council for Enviro-Legal Action v. Union of India* [1996] 2 SCR 503 : (1996) 3 SCC 212; *Bengaluru Development Authority v. Sudhakar Hegde* [2020] 5 SCR 755 : (2020) 15 SCC 63 – referred to.

*Splendor Landbase Ltd. v. DPCC*, 2012 (195) DLT 177; *State Pollution Control Board, Odisha v. M/s Swastik Ispat Pvt Ltd and Others*, 2014 SCC OnLine NGT 13 – referred to.

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Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981; Constitution of India; Environment (Protection) Act 1986.

**List of Keywords**

Restitutionary and compensatory damages; Bank guarantees as an *ex-ante* measure; Potential environmental damage; Violation of the environmental norms; Power of Boards; Principle of Natural Justice in the subordinate legislation; Polluter Pays principle; Broad statutory mandate; Appropriate action against a polluting entity; Payment of environmental damages; Pollution control; Section 33A of Water (Prevention and Control of Pollution) Act, 1974; Section 31A of Air (Prevention and Control of Pollution) Act, 1981; Environmental regulators; Punitive action; Remedial measure; Power to issue directions to the polluting industry; Decriminalization of offences; Powers of the Adjudicating Officer to impose penalties; Remedial jurisprudence; Injunctive, mandatory and compensatory remedies; Restitutionary directives; Fundamental rights of citizens; Environmental wrongs; Institutional foresight; Institutional memory; Institutional integrity; Institutional transparency and accountability; Independent and objective decisions.

**Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 757-760 of 2013

From the Judgment and Order dated 23.01.2012 of the HIGH COURT OF DELHI AT NEW DELHI in LPA No(s). 709, 710, 866 and 867 of 2011

With

Civil Appeal No(s). 1977-2011 of 2013

**Appearances for Parties**

*Advs. for the Appellant:*

Ninad Laud, Saurabh Kulkarni, Ms. Rashika Narain, Ms. Ishani Shekhar, Dcosta Ivo Manuel Simon, Pradeep Misra, Daleep Dhyani, Suraj Singh.

**Supreme Court Reports***Advs. for the Respondents:*

S. D. Sanjay, Satya Darshi Sanjay, A.S.Gs., Pinaki Mishra, B.b.gupta, Ms. Swarupma Chaturvedi, Kailash Vashudev, Pravin Bahadur, Kishan Rawat, Ms. Rubi Singh Ahuja, Ms. Kanika Gomber, Rajan Narain, Umesh Kumar Khaitan, Ajit Warrier, Angad Kochhar, S. S. Shroff, Gurmeet Singh Makker, Ms. Ruchi Kohli, Chinmayee Chandra, Chitvan Singhal, Mohit D. Ram, Ms. Nayan Gupta, Mrs. Priya Puri, Navin Prakash, Ms. Srishti Prakash, Ms. Swarupama Chaturvedi, Ms. Ruchi Kohli, Ms. Chinmayee Chandra, Chitvan Singhal, Amit Sharma V, Dr. N. Visakamurthy, Avijit Roy.

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\* Ed. Note: Pagination as per the original Judgment.

**Delhi Pollution Control Committee v. Lodhi Property Co. Ltd. Etc.****1. *Introduction.***

1. The Delhi Pollution Control Committee (DPCC)<sup>1</sup> is in appeal against the judgment of the Division Bench of the High Court holding that it is not empowered to levy compensatory damages in exercise of powers under Section 33A of the Water (Prevention and Control of Pollution) Act, 1974 and Section 31A of the Air (Prevention and Control of Pollution) Act, 1981<sup>2</sup> on the ground that such an action amounts to imposition of penalty provided for in Chapters VII and VI of the respective Acts, and as such, procedure contemplated thereunder will be the only method for imposing and collecting compensatory damage.
2. Having considered the principles that govern Indian environmental laws, we have held that the environmental regulators, the Pollution Control Boards exercising powers under the Water and Air Acts, can impose and collect restitutionary or compensatory damages in the form of fixed sum of monies or require furnishing of bank guarantees as an *ex-ante* measure to prevent potential environmental damage. These powers are incidental and ancillary to the empowerment under Sections 33A and 31A of the Water and Air Acts. At the same time, we have directed that the powers must be exercised as per procedure laid down by subordinate legislation incorporating necessary principles of natural justice, transparency and certainty.

**2. *Facts.***

3. It is the case of the Delhi Pollution Control Committee that pursuant to the directions of the Ministry of Environment, Forest and Climate Change (MoEFCC) to take appropriate action against certain entities operating in violation of the environmental norms, show cause notices were issued for violation of Section 25 of the Water Act and Sections 21 and 22 of the Air Act. These entities were either residential complexes, commercial complexes or shopping malls. The show cause notices were issued on the ground that they proceeded with construction and in fact, were operating without obtaining the mandatory “consent to

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1 DPCC is a regulatory body in the National Capital Territory of Delhi, established as a ‘State Board’. These Boards are constituted under section 4 of the Water Act and under section 4 or section 5 of the Air Act, and exercise powers granted under section 33A of the Water Act and section 31A of the Air Act. Our interpretation of section 33A and 31A herein will apply to any such body established under said Acts.

2 Hereinafter referred to as the Water Act and Air Act respectively.

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establish" and "consent to operate" under Section 25 of the Water Act and Section 21 of the Air Act. The show cause notices were challenged by way of 38 writ petitions before the Delhi High Court. The challenge culminated in the judgement of a single judge dated 30.09.2010 in the case of *Splendor Landbase Ltd. v. DPCC*<sup>3</sup>. The learned single judge considered the question as to whether a State Board can levy environmental damages in the form of fixed sums of money or require an entity to furnish a bank guarantee as a condition for grant of consent under Section 33A of Water Act and/or Section 31A of Air Act. Similar writ petitions were considered and decided by another single judge bench in *Bharti Realty Ltd. v. DPCC* and *Anush Finlease and Construction v. DPCC* on 20.07.2011 and 15.09.2011 and were disposed of in terms of the decision in *Splendor Landbase Ltd. v. DPCC*. The reasoning adopted in the judgement and orders passed by the Single Judges are as follows.

**3. Single Judge's Judgement and Orders.**

4. In *Splendor Landbase Ltd. v. DPCC*<sup>4</sup>, the Id. single judge by his judgement dated 30.09.2010 dealt with two major issues – firstly, whether proprietors of properties over 20,000 square meters are required to obtain *consent to establish* and *consent to operate* under Water Act and Air Act independently, despite obtaining EIA Clearance from the Ministry; and secondly, whether Boards can levy penalties, fines, environmental damages in form of fixed sums of monies or call for bank guaranties as a condition to grant consent under Water and Air Acts? While the first question was answered in the affirmative, the second was answered in the negative.
  - 4.1 It was held that the power to levy penalty is in the nature of a penal power and as such a penalty cannot be imposed without there being an enabling statutory power. For this reason, the single judge held that Board has no power to levy penalty or damage, even on the basis of the general powers under Sections 31A or 33A of the Acts. The learned Judge criticized the monetary demand as a pre-condition for grant of consent under the Acts on the ground that it has no statutory backing.

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3 2012 (195) DLT 177.

4 Hereinafter referred to as *Splendor*.

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4.2 In the other batch of cases i.e. in *Bharti Realty Ltd. v. DPCC* and *Anush Finlease and Construction Ltd. v. DPCC*, decided on 12.07.2011 and 15.09.2011, the learned Single Judge was constrained to enquire into the matter in detail as writ appeals against the judgement in *Splendor* were already pending before a Division Bench. Therefore, the Single Judge allowed the writ petitions following the decision in *Splendor* and holding that the Board has no power to impose and collect compensatory damages. In these cases, the learned Judge also directed refund of the amounts collected. However, no interest was granted to the respondents as they chose to comply with the demand instead of challenging the same at the relevant point in time.

**4. *Impugned Order of the Division Bench.***

5. The decisions of the single judges were challenged by the appellant before the Division Bench of the High Court. By the judgement impugned before us, the Division Bench upheld the findings of the Single Judge in *Splendor* that the power to issue directions under Sections 33A and 31A under the two Acts does not confer the power to levy 'penalty'. The High Court further observed that under Chapter VII and Chapter VI of the Water and Air Acts penalties can be levied only by courts and that too after taking cognizance of offences specified under the two Acts. Provided that the procedure so prescribed under the statute has to be followed mandatorily, the Division Bench held that the appellant would not be entitled to impose compensation or direct deposit of bank guarantees. The relevant portion of the Division Bench of the High Court is as follows –

*"37. We concur with the reasoning of the learned Single Judge in paras 58 to 64 of the impugned decision and thus do not elaborate any further, but would additionally highlight that, the power to issue directions under Section 33A of the Water Act and the power to issue directions under Section 31A of the Air Act, on their plain language, does not confer the power to levy any penalty. We would further highlight that under Chapter VII of the Water Act and under Chapter VI of the Air Act penalties and procedure to levy the same have been set out. A perusal of the provisions under the Water Act would reveal that penalties can be levied as per procedure prescribed and only Courts can take*

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*cognizance of offences under the Act and levy penalties, whether by way of imprisonment or fine. Similar is the position under the Air Act. The legislature having enacted specific provisions for levy of penalties and procedures to be followed has specifically made the offences cognizable by Courts and the power to levy penalties under both Acts has been vested in the Courts. The role of the Pollution Control Boards is to initiate proceedings before the Court of Competent jurisdiction and no more.*

40. *The language of Sub-Section 5 of Section 25 of the Water Act makes it plain clear that the only solution to a situation of a building being constructed to establish an industry, operation or process without obtaining prior consent of the State Pollution Control Board is the power of the Board to serve upon the person concerned a notice imposing such conditions as might have been imposed on an application, seeking prior consent and we find that the learned Single Judge has correctly so opined and has rightly issued the direction that the only way out, pertaining to the Water Act is to permit DPCC to inspect the shopping malls and the shopping commercial complexes and if it is found that pertaining to discharge of sewage from these buildings any steps are required to prevent water pollution DPCC would be authorized to issue notices requiring the owner of the building to take steps in terms of the notice issued. Pertaining to the Air Act notwithstanding there being no similar provision, but the concept of a post decisional hearing may be made applicable with the modification that no hearing would be required inasmuch as there is no decision, but DPCC should be empowered to inspect the shopping malls and the shopping, commercial complexes and pertaining to air pollution, if the owners of the buildings do not take corrective action, DPCC would always have the power to file criminal complaints before the Courts of Competent Jurisdiction, which Courts would alone have the power to impose fine and additionally impose sentence of imprisonment upon the offending persons.*

42. *In a few cases, we find that since DPCC was not permitting the buildings to be occupied, under protest, the*

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*owners paid the penalty to DPCC and have immediately approached the Court seeking refund and the same has been ordered for the reason neither under the Water Act nor under the Air Act there exists any power in DPCC to levy penalty or impose conditions of furnishing bank guarantee. The decision of the learned Single Judge is correct in directing the bank guarantees to be discharged and penalties levied to be refunded for the reason the said act of DPCC is ultra-vires its power under the two statutes and the levy of penalty is without any authority of law. In the decision reported as 1997 [5] SCC 535 Mafatlal Industries Ltd. & Ors. Vs UOI & Ors., under writ jurisdiction refund can be directed where the levy is without jurisdiction and the same would include a penalty levied without any jurisdiction. In the instant case the penalty levied is unconstitutional being not sanctioned by any power vested in DPCC either under the Water Act or the Air Act. The impugned decisions where penalty levied has been directed to be refunded are upheld."*

**5. Submissions.**

6. Mr. Pradeep Mishra appearing on behalf of the appellant DPCC submitted that the High Court erred in holding that the State Boards are not empowered to impose environmental damages under Sections 33A and 31A of Water and Air Acts. He has argued that the application of the principle of *Polluter Pays* is distinct from the requirement of authority of law to impose tax or penalty.
7. We have requested Mr. Ninad Laud, learned counsel to assist us in the matter. He has gracefully accepted and has eminently assisted the Court. He has submitted<sup>#</sup> that as per broad scheme of the Acts and also the statement of objects and reasons, State Boards are empowered to act on their own while enforcing Sections 25 and 26 and also while issuing directions under Sections 33A and 31A. However, when faced with non-compliances, recourse to judicial process is contemplated under Sections 49 and 43 of Water and Air Acts respectively. Further, neither Rule 34 of Water (Prevention

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# Ed. Note: "We have requested Mr. Ninad Laud, learned counsel to assist us in the matter. He has gracefully accepted and has eminently assisted the Court. He has submitted" instead of "On behalf of the respondents, Mr. Ninad Laud has submitted" in terms of subsequent corrigendum.

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& Control of Pollution) Rules 1975 nor Rule 20A of Air (Prevention & Control of Pollution) Rules 1983, while providing a mechanism to administer Section 33A and Section 31A, contemplate monetary penalties. Countering the submission of Mr. Pradeep Misra on the principle of *Polluter Pays* to encourage reading the power to impose and collect environmental damages under Sections 33A and 31A of the respective Acts, he would submit such an approach is impermissible as the said power is specifically and separately provided under Chapters VII and VI therein. Relying on the decision of this Court in *MC Mehta v. Kamal Nath*<sup>5</sup>, he would submit, after considering the scheme of penal provisions under Water Act, Air Act and Environment (Protection) Act 1986, the Supreme Court held that penalties under the Acts befall a person only after finding of guilt upon trial by a court of law. Referring to the legitimacy of State Board's action demanding bank guarantees to secure compliance with conditions, he would submit that no penalty, other than that contemplated in the statute or statutory scheme can be imposed.<sup>6</sup> We have also heard Mr. Pinaki Misra, Senior Advocate and other learned counsel and they have strongly supported the decision of the Division Bench.

- 7.1 Counsel for M/s Laxmi Buildtech Pvt Ltd<sup>7</sup> has submitted that they have neither violated nor acted in breach of any provision of environmental laws and therefore they cannot be subjected to any penalty or criminal prosecution. Counsel for other respondents further submitted that they have deemed consent as well as EIA clearance from the Ministry. They have also submitted that imposition and collection of damages by the State Boards is outside the powers vested in them under the Water and Air Acts.
- 7.2 Counsel for M/s Bharti Realty Ltd has submitted that it is a settled principle of law that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and no other.<sup>8</sup> This principle, according to the learned counsel, squarely applies to the present case as Chapter VII and Chapter VI of the Water and Air Acts have a prescribed

5 (2000) 6 SCC 213, para 13-17.

6 *State of MP v. Centre for Environment Protection Research & Development*, (2020) 9 SCC 781.

7 Civil Appeal No. 2001 of 2013.

8 *Chandra Kishore Jha v. Mahavir Prasad & Ors*, (1999) 8 SCC 266.

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procedure to be followed before imposing penalties. It is further argued that the role of any State Board is in the nature of a complainant and not that of an adjudicatory authority. In this vein, it is submitted that any other interpretation would render the chapter on 'Penalties and Procedures' nugatory and otiose. It is also submitted that the power to give directions under Sections 33A and 31A of the Water and Air Acts is "subject to provisions of this Act". Written submissions also refer to the recent amendments to the Water and Air Acts, empowering an Adjudicating Officer, not below the rank of Joint Secretary of Government of India or Secretary to State Government, for imposing penalties for contravention of provisions of the Acts.

**6. Issue.**

8. The core question in these appeals is - whether the regulatory boards can, in exercise of powers under Section 33A of the Water Act and Section 31A of the Air Act, impose and collect as restitutionary and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage?

**7. Existing Legal Regime for Pollution Control in India.**

9. Under the Water Act and the Air Act, the State Boards have a broad statutory mandate to prevent, control and abate water pollution and air pollution. Under Section 17 of the Water Act, the State Boards are to shoulder enormous responsibilities and their functions are reproduced herein for ready reference -

**"Section 17. Functions of State Board – (1) Subject to the provisions of this Act, the functions of a State Board shall be— (a) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof;**

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

**(c) to collect and disseminate information relating to water pollution and the prevention, control or abatement thereof;**

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- (d) to encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution;
- (e) to collaborate with the Central Board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of water pollution and to organise mass education programmes relating thereto;
- (f) to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents and to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required by this Act;
- (g) to lay down, modify or annul effluent standards for the sewage and trade effluents and for the quality of receiving waters (not being water in an inter-State stream) resulting from the discharge of effluents and to classify waters of the State;
- (h) to evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of soils, climate and water resources of different regions and more especially the prevailing flow characteristics of water in streams and wells which render it impossible to attain even the minimum degree of dilution;
- (i) to evolve methods of utilisation of sewage and suitable trade effluents in agriculture;
- (j) to evolve efficient methods of disposal of sewage and trade effluents on land, as are necessary on account of the predominant conditions of scant stream flows that do not provide for major part of the year the minimum degree of dilution;
- (k) to lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair weather dilution

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*available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents;*

*(l) to make, vary or revoke any order—*

*(i) for the prevention, control or abatement of discharges of waste into streams or wells;*

*(ii) requiring any person concerned to construct new systems for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or adopt such remedial measures as are necessary to prevent, control or abate water pollution;*

*(m) to lay down effluent standards to be complied with by persons while causing discharge of sewage or sullage or both and to lay down, modify or annul effluent standards for the sewage and trade effluents;*

*(n) to advise the State Government with respect to the location of any industry the carrying on of which is likely to pollute a stream or well;*

*(o) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Board or the State Government.*

*(2) The Board may establish or recognize a laboratory or laboratories to enable the Board to perform its functions under this section efficiently, including the analysis of samples of water from any stream or well or of samples of any sewage or trade effluents.”*

10. Section 17 of the Air Act<sup>9</sup>, substantially similar to its equivalent

9 Section 17 of Air Act states –

**17. Functions of State Boards.**— (1) Subject to the provisions of this Act, and without prejudice to the performance of its functions, if any, under the Water (Prevention and Control of Pollution) Act, 1974, the functions of a State Board shall be—

- (a) to plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof;
- (b) to advise the State Government on any matter concerning the prevention, control or abatement relating to air pollution;
- (c) to collect and disseminate information relating to air pollution;
- (d) to collaborate with the Central Board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of air pollution and to organise a mass-education programme relating thereto;

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under the Water Act, also indicates the crucial responsibilities of the State Boards in discharge of their mandate. Chapter V of the Water Act and Chapter IV of the Air Act include provisions that prescribe the regulatory powers of the State Boards. These powers include the power to issue, modify or withdraw consent<sup>10</sup>, power to obtain information<sup>11</sup>, power of entry and inspection<sup>12</sup> and power to take samples<sup>13</sup>.

### **8. Insertion of Sections 33A & 31A in Water and Air Acts.**

11. In 1988, both Acts were amended. Notably, through amendments the State Boards were further empowered to give directions under Section 33A of the Water Act and Section 31A<sup>14</sup> of the Air Act. These

- (e) to inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process and to give, by order, such directions to such persons as it may consider necessary to take steps for the prevention, control or abatement of air pollution;
- (f) to inspect air pollution control areas at such intervals as it may think necessary, assess the quality of air therein and take steps for the prevention, control or abatement of air pollution in such areas;
- (g) to lay down, in consultation with the Central Board and having regard to the standards for the quality of air laid down by the Central Board, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft: Provided that different standards for emission may be laid down under this clause for different industrial plants having regard to the quantity and composition of emission of air pollutants into the atmosphere from such industrial plants;
- (h) to advise the State Government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution;
- (i) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Board or the State Government;
- (j) to do such other things and to perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purposes of this Act.

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

- 10 Sections 25, 27 of Water Act and Section 21 of Air Act  
 11 Section 20 of Water Act and Section 25 of Air Act  
 12 Section 23 of Water Act and Section 24 of Air Act  
 13 Section 21 of Water Act and Section 26 of Air Act  
 14 Section 31A of the Air Act states –

**31A. Power to give directions.**—Notwithstanding anything contained in any other law, but subject to the provisions of this Act, and to any directions that the Central Government may give in this behalf, a Board may, in the exercise of its powers and performance of its functions under this Act, issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.

**Explanation.**—For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct—

- (a) the closure, prohibition or regulation of any industry, operation or process; or
- (b) the stoppage or regulation of supply of electricity, water or any other service.

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two provisions are identically worded. Section 33A of the Water Act is as under;

**“Section 33A. Power to give directions.—Notwithstanding anything contained in any other law, but subject to the provisions of this Act, and to any directions that the Central Government may give in this behalf, a Board may, in the exercise of its powers and performance of its functions under this Act, issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.**

*Explanation.—For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct—*

(a) *the closure, prohibition or regulation of any industry, operation or process; or*

(b) *the stoppage or regulation of supply of electricity, water or any other service.”*

12. The directions contemplated under Sections 33A and 31A of the Water and Air Acts must be in furtherance of the powers and functions of the Boards and they must be in writing. These provisions, declares that the power to issue directions will include the power to direct closure, prohibition or regulation of any industry, operation or process. Further, this power extends to directing the stoppage or regulation of supply of electricity, water or any other service. The power to give directions has been worded broadly, and it allows the Boards significant flexibility in deciding the nature of directions. The legislative intention of granting these powers through the 1988 amendment can be inferred from the Statement of Objects and Reasons of the Water Act, which reads as follows –

*“2. The Water Act is implemented by the Central and State Governments and the Central and State Pollution Control Boards. Over the past few years, the implementing agencies have experienced some more administrative and practical difficulties in effectively implementing the provisions of the Act. The ways and means to remove these difficulties have been thoroughly examined in consultation*

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*with the implementing agencies. Taking into account the views expressed, it is proposed to amend certain provisions of the Act in order to remove such difficulties....*

*3. The Bill, inter alia, seeks to make the following amendments in the Act, namely:—*

....

*(iv) in order to effectively prevent water pollution, the penal provisions of the Act are proposed to be made stricter and bring them at par with the punishments prescribed in the Air (Prevention and Control of Pollution) Act, 1981 as amended by Act 47 of 1987;*

....

*(vi) it is proposed to empower the Boards to give directions to any person, officer or authority including the power to direct closure or regulation of offending industry, operation or process or stoppage or regulation of supply of services such as water and electricity,”*

13. Similar objective is expressed for the amendment introduced in the Air Act.<sup>15</sup>
14. An appeal against directions issued under Section 33A of the Water Act by the State Board can be filed before the National Green Tribunal under Section 33B, introduced in 2010<sup>16</sup>. Unlike the

15 Statement of Objects and Reasons for Air Act states, “2. The Air Act is implemented by the Central and State Governments and the Central and State Boards. Over the past few years, the implementing agencies have experienced some administrative and practical difficulties in effectively implementing the provisions of this Act and have brought these to the notice of Government. The ways and means to remove these difficulties have been thoroughly examined in consultation with the concerned Central Government departments, the State Governments and the Central and State Boards. Taking into account the views expressed, the Government have decided to make certain amendments to the Act in order to remove such difficulties. 3. The Bill, inter alia, seeks to make the following amendments in the Act, namely—

....  
iv) In order to prevent effectively air pollution, the punishments provided in the Act are proposed to be made stricter.

....  
(vii) It is proposed to empower the Boards to give directions to any person, officer or authority including the power to direct closure or regulation of offending establishments or stoppage or regulation of supply of services such as, water and electricity. (viii) It is proposed to empower the Boards to approach courts to obtain orders restraining any person from causing air pollution.”

16 Act 19 of 2010.

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Water Act there is no specific Appeal provision against directions issued under Section 31A of the Air Act. This asymmetry must be addressed legislatively.

15. Offences and penalties under the two Acts, and the related procedures, are covered in Chapter VII of the Water Act and Chapter VI of the Air Act. These chapters have undergone significant and substantial amendments. Prior to the amendments, the two Acts stipulated penalties in the form of imprisonment, monetary fine or both for offences under the statute. Courts could only take cognizance of an offence if a complaint was filed by a Board or any officer authorized by it, or by any person who had given notice of the alleged offence and of his intention to make a complaint. No court inferior to that of a Metropolitan Magistrate or a Judicial magistrate of the first class can try an offence punishable under the two Acts. Be that as it may, for the present purpose we have to examine and interpret Sections 33A and 31A of the Water and Air Acts.

**9. Interpretation of and for Environmental Institutions.**

16. Our constitutionalism bears the hallmark of an expansive interpretation of fundamental rights. But such creative expansion is only a job half done if the depth of the remedies, consequent upon infringement, remain shallow. In other words, remedial jurisprudence must keep pace with expanding rights and regulatory challenges. It is not sufficient that courts adopt injunctive, mandatory and compensatory remedies, but our regulators also must be empowered in that regard. However, the legislative grammar must be elastic for us to infuse the regulators with power to fashion different remedies. This infusion must also be **tempered**<sup>‡</sup> with the necessary guidelines and parameters of exercise of remedial powers, failing which such infusion would aid arbitrary use. Our firm view is that remedial powers or restitutionary directives are a necessary concomitant of both the fundamental rights of citizens who suffer environmental wrongs and an equal concomitant of the duties of a statutory regulator, which are informed by Part IV A of the constitution. To that extent, the functions and powers of a regulator must be inspired by the obligation in Part IV A and Article 48 A. The State's '*endeavour to protect and improve the environment*' will be partial, if it does not encompass a duty to restitute.

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<sup>‡</sup> Ed. Note: "tempered" instead of "tampered" in terms of subsequent corrigendum.

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17. Of all the duties imposed under Article 51A, the obligation to conserve and protect water and air, is perhaps the most significant, amidst our climate change crisis. The Water Act and the Air Act institutionalised all efforts and actions that need to be taken to protect air that we breathe and water that we consume by creating the Pollution Control Boards. These Boards functioning as our environment regulators are expected to act with *institutional foresight* by evolving necessary policy perspectives and action plans. Working with perpetual seal and succession, they are to develop and retain *institutional memory* so that they can act on the basis of the experience, data and information that they would have gathered and processed. *Institutional expertise* is critical, and these bodies are to employ human resource which have domain expertise and talent. These bodies are intended to maintain *institutional integrity* by taking independent and objective decisions without governmental or industrial control. These values flow naturally if there is *institutional transparency and accountability*. It is in this perspective that we need to interpret Section 33A of the Water Act and 31A of the Air Act.

**10. Duty to Restitute v. Power to Punish and Penalise.**

18. There is a distinction between an action for environmental damages for restitution or remediation and imposition of penalties or fines levied at the culmination of a punitive action. This Court in *M.C. Mehta* (supra), while referring to the provisions of the Water Act, Air Act and the Environment Protection Act observed –

*“17. All the three Acts, referred to above, also contemplate the taking of the cognizance of the offences by the court. Thus, a person guilty of contravention of provisions of any of the three Acts which constitutes an offence has to be prosecuted for such offence and in case the offence is found proved then alone can he be punished with imprisonment and fine or both. The sine qua non for punishment of imprisonment and fine is a fair trial in a competent court. The punishment of imprisonment or fine can be imposed only after the person is found guilty.”*

*“24. Pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment*

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*and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender....”*

19. Therefore, Indian law distinguishes between the imposition of a monetary penalty or fine, which constitutes punitive action following a determination of guilt after adherence to the statutorily prescribed procedure, and the payment of damages for restitution or remediation as compensatory relief.
20. In this context, it is important to turn to one of the key principles of Indian environmental law – the *Polluter Pays* principle. This principle has been a part of Indian jurisprudence since 1996. In *Indian Council for Enviro-Legal Action v. Union of India*<sup>17</sup>, this Court held that according to the *Polluter Pays* principle the responsibility for repairing the damage is that of the offending industry. The Court further held that the powers of the Central Government to issue directions under Section 5 read with Section 3 of the Environment Protection Act include the power to impose costs for remedial measures -

*“60. ... Section 3 of the Environment (Protection) Act, 1986 expressly empowers the Central Government (or its delegate, as the case may be) to “take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment...”. Section 5 clothes the Central Government (or its delegate) with the power to issue directions for achieving the objects of the Act. Read with the wide definition of ‘environment’ in Section 2(a), Sections 3 and 5 clothe the Central Government with all such powers as are “necessary or expedient for the purpose of protecting and improving the quality of the environment”. The Central Government is empowered to take all measures and issue all such directions as are called for for the above purpose. In the present case, the said powers will include giving directions for the removal of sludge, for undertaking remedial measures and also the power to impose the cost of remedial measures on the offending industry and utilise the amount so recovered for carrying out remedial measures. This Court can certainly give directions to the*

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*Central Government/its delegate to take all such measures, if in a given case this Court finds that such directions are warranted. ...*

*67. The question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now come to be accepted universally as a sound principle, viz., the “Polluter Pays” principle. ...Thus, according to this principle, the responsibility for repairing the damage is that of the offending industry. Sections 3 and 5 empower the Central Government to give directions and take measures for giving effect to this principle. In all the circumstances of the case, we think it appropriate that the task of determining the amount required for carrying out the remedial measures, its recovery/realisation and the task of undertaking the remedial measures is placed upon the Central Government in the light of the provisions of the Environment (Protection) Act, 1986. It is, of course, open to the Central Government to take the help and assistance of State Government, RPCB or such other agency or authority, as they think fit.”*

(emphasis added)

21. Subsequently, the Court in *Vellore Citizens' Welfare Forum v. Union of India*<sup>18</sup>, has held that the liability for environmental damage includes both a compensatory aspect and a restorative or remedial aspect-

*“12. ... The “Polluter Pays Principle” as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of “Sustainable Development” and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.”*

(emphasis added)

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22. Application of the *Polluter Pays* principle not only includes payment for restoring the damaged environment, taking remedial action to deal with the damage and compensating for the direct harm caused, but also for avoiding pollution. In *Research Foundation for Science (18) v. Union of India*<sup>19</sup>, this Court held -

*"29. The polluter-pays principle basically means that the producer of goods or other items should be responsible for the cost of preventing or dealing with any pollution that the process causes. This includes environmental cost as well as direct cost to the people or property, it also covers cost incurred in avoiding pollution and not just those related to remediying any damage. It will include full environmental cost and not just those which are immediately tangible. The principle also does not mean that the polluter can pollute and pay for it. The nature and extent of cost and the circumstances in which the principle will apply may differ from case to case."*

(emphasis added)

23. The Court further held that the observations of the Court in *Deepak Nitrite Ltd. v. State of Gujarat*<sup>20</sup> that "mere violation of the law in not observing the norms would result in degradation of environment would not be correct" were confined to the facts of that case. The Court clarified that the actual degradation of the environment is not a necessary condition for the application of polluter pays principle, as long as the offending activities have the potential of degrading the environment -

*"30...The decision also cannot be said to have laid down a proposition that in the absence of actual degradation of environment by the offending activities, the payment for repair on application of the polluter-pays principle cannot be ordered. The said case is not relevant for considering cases like the present one where offending activities have the potential of degrading the environment. In any case, in the present case, the point simply is about the payments to be*

19 (2005) 13 SCC 186.

20 (2004) 6 SCC 402

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*made for the expenditure to be incurred for the destruction of imported hazardous waste and amount spent for conducting tests for determining whether it is such a waste or not..."*

(emphasis added)

24. The distinction between a punitive action and a direction to pay environmental damages was made by the National Green Tribunal in *State Pollution Control Board, Odisha v M/s Swastik Ispat Pvt Ltd and Others*<sup>21</sup>. The Tribunal in this case was considering the legality of forfeiture of bank guarantees in case a defaulting industry did not comply with the regulatory conditions within the stipulated timeframe. The Tribunal expressly considered the opinion of the High Court in the impugned judgment before us today and held -

*"45. It is evident from the above facts and the reasoning that there was actual levy of penalty or damages by the DPCC and it was in consequence of such imposition of penalty/damages that the Units were called upon to furnish bank guarantees for granting of consent. In other words, bank guarantee was required to be furnished in furtherance to the imposition of a penalty or damages in that case. It was not an act de hors the imposition of penalty and had the element of punitive action. In the present case, it is not a consequence of a punitive or penal action but is in exercise of the powers vested in the Board in relation to recalling the conditions of consent and ensuring their implementation while also making compensatory provision for remedying the apprehended wrong to the environment. In the cases in hand, the Board has not imposed any penalty upon the units but has granted consent to them on certain conditions, none of which is punitive. They squarely fall within the power of the Board to prevent and control pollution in consonance with the scheme of the Acts concerned. Thus, on facts, the judgments of the High Court in Splendor (supra) do not have any application to the present case. In any case, we are of the considered view that asking for a bank*

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*guarantee as an interim measure for due performance of the conditions of the consent order being compensatory in nature, is not punitive.*

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

(emphasis added)

25. In *Swastik Ispat*, the Green Tribunal correctly interpreted Sections 33A and 31A of the Water and Air Acts. The judgment of the High Court in *Splendor* had not yet been taken up or considered by this Court at that time, the Tribunal had to distinguish the facts of *Splendor* to arrive at its own conclusion. In view of our reasoning and interpretation of Sections 33A and 31A of the Water and Air Acts, we have no hesitation to hold that the Green Tribunal is correct in its approach.
26. More recently, in *T.N. Godavarman Thirumulpad, In Re v. Union of India*<sup>22</sup>, this Court while considering the issue of illegal construction in the Corbett Tiger Reserve drew the distinction between action against persons violating the law and measures for restoration of the environmental damage. The Court held -

*“173. ... However, the principle of restoration of damaged ecosystem would require the States to promote the recovery of threatened species. We are of the considered view that the States would be required to take steps for the identification and effective implementation of active restoration measures that are localised to the particular ecosystem that was damaged. The focus has to be on*

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*restoration of the ecosystem as close and similar as possible to the specific one that was damaged.*

175. We find that, bringing the culprits to face the proceedings is a different matter and restoration of the damage already done is a different matter. We are of the considered view that the State cannot run away from its responsibilities to restore the damage done to the forest. The State, apart from preventing such acts in the future, should take immediate steps for restoration of the damage already done; undertake an exercise for determining the valuation of the damage done and recover it from the persons found responsible for causing such a damage.”

(emphasis added)

**11. Principles.**

27. Based on a review of precedents on this issue, the following legal position emerges –
  - I. There is a distinction between a direction for payment of restitutive and compensatory damages as a remedial measure for environmental damage or as an *ex-ante* measure towards potential environmental damage on the one hand; and a punitive action of fine or imprisonment for violations under Chapters VII of the Water Act and VI of the Air Act on the other hand.
  - II. If directions in furtherance of restitutive and compensatory measures are issued, these are not to be considered as punitive in nature. Punitive action can only be taken through the procedure prescribed in the statute for example under chapters VII and VI of the Water and Air Acts respectively.
  - III. Indian environmental law has assimilated<sup>23</sup> the principle of *Polluter Pays* and there is also a statutory incorporation of this principle in our laws.<sup>24</sup> The invocation of this principle is

23 Indian Council for Enviro-Legal Action (supra n.12); Vellore (supra n 13).

24 **Section 20. Tribunal to apply certain principles-** The Tribunal shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle.

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- triggered in the situations<sup>25</sup>; i) when an established threshold or prescribed requirement is exceeded or breached, and it does result in environmental damage, ii) when an established threshold or prescribed requirement is not exceeded or breached, nevertheless the act in question results in environmental damage and also iii) when a potential risk or a likely adverse impact to the environment is anticipated, irrespective of whether or not prescribed thresholds or requirements are exceeded or breached.
- IV. Environmental regulators have a compelling duty to adopt and apply preventive measures irrespective of actual environmental damage. *Ex-ante* action shall be taken by these regulators and for this purpose a certain measure in exercise of powers under Sections 33A and 31A of the Water and Air Acts is necessary.
- V. The powers of the Boards under Sections 33A and 31A of the Water and Air Acts are identical to that of Section 5 of the Environment Protection Act. Under Section 5, the Central Government or its delegate has the power to issue directions to the polluting industry to pay certain amounts and utilise the said fund for carrying out remedial measures. The Boards are empowered to take similar actions under Sections 33A and 31A of the Acts.
28. Having considered the principles that govern our environmental laws and on interpretation of Sections 33A and 31A of the Water and Air Acts, we are of the opinion that that the Division Bench of the High Court was not correct in restrictively reading powers of the Boards. We are of the opinion that these regulators in exercise of these powers can impose and collect, as restitutionary or compensatory damages fixed sum of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential or actual environmental damage.
29. There is no doubt that Section 33A of the Water Act and Section 31A of the Air Act give the State Boards powers to issue necessary directions for environmental restoration, remediation and compensation and for the payment of costs for the same. The National Green Tribunal's judgment in *Swastik Ispat* correctly identified the Boards powers to issue directions for payment of environmental damages under Section

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25 Loveleen Bhullar, 'The Polluter Pays Principle: Scope and Limits of Judicial Decisions'; in Shibani Ghosh (ed.), *Indian Environmental Law* (Orient BlackSwan 2019).

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33A of the Water Act and the Section 31A of the Air Act. A restrictive interpretation which fails to differentiate between environmental damages and punitive action significantly encumbers the Boards ability to discharge its duties.

30. The Board's powers under Section 33A of the Water Act and Section 31A of the Air Act have to be read in light of the legal position on the application of *Polluter Pays* principle as formulated and explained. This means that State Board cannot impose environmental damages in case of every contravention or offence under the Water Act and Air Act. It is only when the State Board has made a determination that some form of environmental damage or harm has been caused by the erring entity, or the same is so imminent, that the State Board must initiate action under Section 33A of the Water Act and Section 31A of the Air Act.
31. At this stage, we must also take note of the recent 2024 amendments<sup>26</sup> to the Water and Air Acts. Two major changes relevant for our consideration are that of decriminalisation<sup>27</sup> and introduction of the office of "Adjudicatory Officer"<sup>28</sup>. Even after the amendments, in our opinion, there is no conflict between the powers of the State Boards to direct payment of environmental damages under Sections 33A and 31A of the Water and Air Acts and the powers of the Adjudicating Officer to impose penalties under Chapter VII of the Water Act and Chapter VI of the Air Act. The decriminalization of offences under these Chapters has not removed the punitive

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26 The Water (Prevention and Control of Pollution) Amendment Act, 2024, Jan Vishwas (Amendment of Provisions) Act, 2023.

27 Section 41 in the erstwhile Water Act has been substituted by sections 41 and 41A, whereby contravention of directions issued under section 20 (for obtaining information), 32 (for imposing emergency measures in case of pollution), 33 (for restraining apprehended pollution) or 33A would now be punishable by penalty alone; thereby replacing the earlier penal framework comprising of imprisonment *and* fine. Similar amendments done for section 42 (penalty for certain acts), section 43 for contravention of directions under section 24 (prohibiting use of stream or well), section 44 (prohibiting alteration of meter, etc.), and section 45A (residuary). Correspondingly, under the Air Act criminal liability under section 37 for contravention of directions under section 22 (restricting emission beyond standards) or section 31A has been restricted to fine alone. Similar amendments have been brought in section 38 and 39 (residuary). Punishment for imprisonment has been retained only for violation of section 21 and failure to pay penalty or additional penalty under section 39D.

28 In the Water Act, section 45B puts in place a new office by the title of 'Adjudicating Officer', who would be an officer not below the rank of Joint Secretary to the Centre or Secretary to the State, appointed by the Central Government. Adjudicating Officer is empowered to inquire and impose penalties under sections 41, 41A, 42, 43, 44, 45A and 48. Appeal against such imposition lies before the National Green Tribunal as per section 45C. The Adjudicating Officer is further empowered to file a complaint for cognizance under section 49. Corresponding additions have been made under the Air Act as well under sections 39A (Adjudicating Officer), 39B (Appeal to NGT) and 43 (Cognizance of offences).

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nature of actions that can be taken under them. There remains a clear distinction between the nature of directions that the State Boards can issue under Sections 33A and 31A of the Water and Air Acts for payment of environmental damage and the determination by Adjudicating Officers. The former is compensatory in nature and will be resorted to when remedial measures are being undertaken to restore the degraded environment or pollution caused. The latter is a penalty for an offence under the law and is imposed with the objective of punishing the offender. This penalty collected here will not be specifically directed towards the restoration of the degraded environment (for instance, to decontaminate a pond that has been polluted due to discharge of untreated sewage). It will be deposited in the Environmental Protection Fund that is to be set up under Section 16 of the Environment (Protection) Act. According to Section 16(3) of the EP Act, the Fund shall be used for, (a) the promotion of awareness, education and research for the protection of environment; (b) the expenses for achieving the objects and for purposes of the Air (Prevention and Control of Pollution) Act, 1981(14 of 1981) and under this Act; and (c) such other purposes, as may be prescribed.

**A. Board's Responsibility to Choose Appropriate Course of Action.**

32. Given their broad statutory mandate and the significant duty towards public health and environmental protection the Boards must have the power and distinction to decide the appropriate action against a polluting entity. It is essential that the Boards function effectively and efficiently by adopting such measures as is necessary in a given situation. The Boards can decide whether a polluting entity needs to be punished by imposition of penalty or if the situation demands immediate restoration of the environmental damage by the polluter or both.

**B. Powers Must Be Guided by Transparency and Non-Arbitrariness.**

33. While we hold that the Boards have the power to direct the payment of environmental damages, we make it clear that this power must always be guided by two overarching principles. First, that the power cannot be exercised in an arbitrary manner; and second, the process of exercising this power must be infused with transparency.

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34. This Court has underscored the importance of strong institutional frameworks in environmental governance that are effective, accountable and transparent. In *Bengaluru Development Authority v. Sudhakar Hegde*<sup>29</sup>, this Court held -

*"95. The protection of the environment is premised not only on the active role of courts, but also on robust institutional frameworks within which every stakeholder complies with its duty to ensure sustainable development. A framework of environmental governance committed to the rule of law requires a regime which has effective, accountable and transparent institutions. Equally important is responsive, inclusive, participatory and representative decision-making. Environmental governance is founded on the rule of law and emerges from the values of our Constitution. Where the health of the environment is key to preserving the right to life as a constitutionally recognised value under Article 21 of the Constitution, proper structures for environmental decision-making find expression in the guarantee against arbitrary action and the affirmative duty of fair treatment under Article 14 of the Constitution. Sustainable development is premised not merely on the redressal of the failure of democratic institutions in the protection of the environment, but ensuring that such failures do not take place."*

(emphasis added)

35. To ensure that the Boards impose restitutionary and the compensatory environmental damages in a fair transparent, non-arbitrary manner, with procedural certainty, necessary subordinate legislation in the form of rules and regulations must be notified. This shall include methods by which environmental damage is determined, and the consequent quantum of damages are assessed. They may also incorporate certain basic principles of natural justice for fairness in action. At present environmental damages are being levied by the Boards on the basis of certain guidelines issued by the Central

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Pollution Control Board in its document “*General framework for imposing environmental damage compensation*” issue in December, 2022. These guidelines seem to have been issued pursuant to the directions of the NGT.<sup>30</sup> It is important that these guidelines are reviewed thoroughly and issued in the form of Rules and Regulations. This will enable declaration of a law that applies and ensures its recognition and easy implementation.

36. These Rules must also create enabling framework for citizens to file complaints about environmental damage. Public participation in environmental protection has assumed great importance with climate change threatening to drastically disrupt our way of living. Boards, being the first line of defence against polluting activities, must provide easy accessibility and encourage public participation in their function and decision making.
37. While we have reversed the decision of the High Court on the principle of law and hold that the environmental regulators, the Pollution Control Boards, can impose and collect as restitutive and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage in exercise of powers under Sections 33A and 31A of the Water and Air Acts, we issue the following consequential directions.
38. In view of the fact that the show cause notices in these cases relate to the year 2006 and those show cause notices were set-aside by the Single as well as by the Division Benches of the High Court, we are of the opinion that no purpose will be served in reviving the said show cause notices at this point of time. In the facts and circumstances of the case while we allow the appeal on the principle of law there shall not be any consequential direction for reviving the show cause notices which have been set-aside concurrently by the Single as well as by the Division Bench of the High Court. If certain amounts have been collected on the basis of the said show cause notices they shall be returned by DPCC within a period of six weeks from the date of this order, and if amounts are not deposited or collected the appellant, DPCC shall not take any further action.

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30 Pursuant to the NGT in its order in O.A. No. 606/2018 dated 24.04.2019.

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39. For the reasons stated above:

- (a) we allow these appeals and set aside the judgement and order dated 23.01.2012, passed by the Division Bench of the High Court of Delhi to the extent of declaration of law but direct that the show cause notices that have been set aside by the High Court shall not be revived.
- (b) we direct that the Pollution Control Boards can impose and collect as restitutive and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage in exercise of powers under Sections 33A and 31A of the Water and Air Acts.
- (c) it is further directed that the power to impose or collect restitutive or compensatory damages or the requirement to furnish bank guarantees as an *ex-ante* measure under Sections 33A and 31A of the Water and Air Acts shall be enforced only after detailing the principle and procedure incorporating basic principles of natural justice in the subordinate legislation.

*Result of the case:* Appeals allowed.

<sup>†</sup>*Headnotes prepared by:* Ankit Gyan